Comments

Good Moral Character and Homosexuality

Introduction

Good moral character is a prerequisite in every state for admission to the bar.¹ The rationale for excluding those persons from the bar who are morally unfit is to protect the public.² The basis of the attorney-client relationship is the trust a client places in his attorney to adequately represent his interests. A client must be assured of the integrity of both the individual attorney and the legal profession before he can place confidence in his attorney. The interest of society in fair and efficient administration is also served by requiring that attorneys possess good moral character. Without an honest and trustworthy bar, the effectiveness of the judiciary would be severely limited.

The necessity of a qualified bar, consisting of attorneys of training and good moral character is generally unquestioned.³ But serious disagreement and difficulty arise when attempt is made to define good moral character. One commentator, however, John R. Starrs, remains undisturbed by the judiciary’s inability to precisely define the term good moral character.

We submit that the general principles of what has come to be known as Judeo-Christian morality, which embodies the natural law as recognized by all men, must be the principles by which an applicant must live if he is to be considered of good moral character. This is not a foggy notion except for who would make it a foggy notion. We understand more than we

Whether there are general principles of morality which are recognized by all, or even most men, is questionable. The response of the courts to an inability to precisely delineate the definitional bounds of good moral character has been to determine what conduct falls outside those bounds. No general rule may be given for determining what conduct evidences a lack of moral fitness. Courts have rendered a case by case determination based on the relevant facts and circumstances of each situation.

**Conduct Presenting Question of Moral Character—In General**

An examination of the case law involving questions of moral character reveals a few broad categories of conduct which may give rise to a question of an attorney’s moral fitness. Perhaps the broadest category of conduct which may render an attorney morally unfit to practice law are acts of moral turpitude. Almost universally, an act of moral turpitude is considered to be an indication of a lack of good moral character. The term is subject to as many interpretations as the term good moral character. One common definition is that acts of moral turpitude are those “contrary to honesty, justice, or good morals.” The definition sets no standard for determining what acts involve moral turpitude, but presupposes an act by act determination.

Examples of acts of moral turpitude lend guidance as to what acts exhibit poor moral character. Conviction of a felony or a misdemeanor may involve moral turpitude. An attorney manufactured beer for personal use in violation of the Prohibition Act, and was convicted of a misdemeanor. The court held the misdemeanor to be an act of moral turpitude warranting the attorney’s disbarment. An act, such as the Prohibition Act sets a standard of public morality and a deliberate violation of the act is contrary to good morals. Other courts adhering to the definition of moral turpitude as any act contrary to honesty or good morals have found that such acts as conviction of attempted income tax evasion or using the

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5. In re Bartos, 13 F.2d 138, 139 (1926).
6. Id.
7. Id.
mails to defraud are acts of moral turpitude. One court decided that the act of seducing a young girl under the promise to marry was an act of moral turpitude which justified disbarment. The basis for the court's decision is that seduction under the promise of marriage is an abuse of a confidential relationship which indicates a lack of trustworthiness. The court found that the behavior not only involved moral turpitude, but was an act of "baserness and depravity."

Conduct which indicates the attorney has a lack of veracity or integrity, or is untrustworthy, may render an attorney morally unfit whether or not the conduct involves moral turpitude. If an attorney is untrustworthy it may be inferred that he may act in breach of his fiduciary duty to his client and is therefore morally unfit to practice law. For example, in Lewis v. State Bar of California, the attorney was a partner in a real estate development corporation. The attorney obtained title to certain tracts of land from other partners of the corporation upon the understanding that the land be returned by a trust deed. The land was never returned. The disciplinary board of the California Bar found the attorney's acts of fraud and deceit to be a breach of his fiduciary responsibilities to the other partners of the corporation and demonstrated poor moral character. Another attorney who engaged in fraud by preparing documents which made a usurious transaction look like a legal transaction, was suspended from the practice of law. The behavior of the attorney was said to be "so wanting in integrity and trustworthiness that the legal business of others cannot be entrusted to him." A catalogue of conduct which indicates an attorney is so untrustworthy or lacks veracity that he cannot fulfill his professional obligations due to a lack of good moral character includes such conduct as a disclosure of confidences revealed to an attorney by his client, a failure to render services for clients

10. In re Wallace, 323 Mo. 203, 19 S.W.2d 625 (1929).
11. Id.
14. Id. at 296, 131 P.2d at 528.
because of alcoholism,\textsuperscript{16} engaging in stock market transactions without adequate funds to pay for the stock,\textsuperscript{17} or knowingly writing checks on banks in which there was not sufficient funds.\textsuperscript{18}

Another type of behavior which may give rise to questions of an attorney's moral character is behavior indicating the attorney's willingness to compromise society's interest in the fair and efficient administration of justice in favor of his or his client's interests. An attorney has a duty to obey the law and to encourage his client to do the same. As an officer of the court an attorney who refuses to obey the law lessens the effective functioning of the judicial system. To illustrate, one attorney while driving under the influence of alcohol killed another person in an automobile accident.\textsuperscript{19} The attorney plead guilty to involuntary manslaughter and was suspended from practicing law as a result.\textsuperscript{20} The attorney argued that the conviction did not indicate a lack of moral fitness since he did not intend to injure anyone. The court rejected the argument, finding the conduct to be a serious breach of the attorney's duty to obey the law and contrary to "justice and good morals." Implicit in the court's decision is the severe nature of the possible consequences of driving while intoxicated. The court seemed to impose a greater duty to obey the law when the consequences of disobedience were serious. Engaging in such behavior indicates moral irresponsibility and a disregard for society's interest in providing laws prohibiting such conduct. A court may reason that the inability of an attorney to appreciate his duty to obey certain laws indicates the inability to fully appreciate his duties to his client or to our system of administering justice. Courts have found that attorneys who urged witnesses to perjure themselves\textsuperscript{21} or who solicit personal injury claims\textsuperscript{22} are morally unable to carry out the duty of an attorney to facilitate the fair and efficient administration of justice. Likewise, attorneys who accept bribes\textsuperscript{23} or who attempt to bribe officials\textsuperscript{24} may show a lack of good moral character.

\textsuperscript{16.} In re Wooten, 260 S.C. 12, 193 S.E.2d 808 (1973).
\textsuperscript{17.} In re Alpert, 525 P.2d 1042 (Or. 1974).
\textsuperscript{18.} In re O'Brien's Petition, 79 Conn. 46, 63 A. 777 (1906).
\textsuperscript{19.} In re Morris, 74 N.M. 679, 397 P.2d 475 (1964).
\textsuperscript{20.} Id.
\textsuperscript{21.} In re Wells, 174 Cal. 467, 163 P. 657 (1911).
\textsuperscript{22.} Schoolfield v. Bean, 26 Tenn. App. 30, 167 S.W.2d 359 (1942).
\textsuperscript{23.} In re Wilson, 76 Ariz. 49, 258 P.2d 433 (1953).
\textsuperscript{24.} Florida Bar v. Riccardi, 265 So. 2d 5 (Fla. 1972).
An attorney who shows a complete disregard for the community’s standard of behavior may cast a poor reflection on the reputation of the legal profession. If the public has a poor image of the legal profession, attorneys will be hampered in adequately representing their clients. No confidential relationship with a client can be maintained if the client cannot respect his attorney. Certain conduct which greatly detracts from the reputation of the legal profession may justify ostracizing an attorney from the bar because of a lack of good moral character. Various types of sexual misconduct have been determined to be grounds for disciplining attorneys due to the damage resulting to the reputation of the legal profession.

One factor which is relevant in ascertaining whether sexual misconduct is indicative of poor moral character is the amount of public notoriety surrounding the misconduct. In *Grievance Committee of Hartford County Bar v. Broder*, the attorney was convicted of committing adultery. The attorney, Broder, was a public figure, having served as an elected official. His partner in adultery was a prominent member of the community who was married and had three children. She and Broder were arrested publicly for adultery in a local hotel. Broder asserted his sexual conduct was unrelated to his professional conduct and therefore did not render him morally unfit to practice law. The court dismissed the attorney’s argument stating that adultery is a crime of moral turpitude. The court defined moral turpitude as any conduct contrary to “justice, honesty, or good morals.” The publicity and the public manner in which the couple continued with the relationship after the arrest were central to the court’s decision. Continuing openly with the affair was said to be a disregard for the social customs of the community and the reputation of the legal profession which indicated a lack of moral fitness. The court appeared to be convinced that the notoriety of the adultery made it mandatory that the court make the standards of conduct for attorneys clear to prevent...
bringing the profession into public distrust.

Another factor in determining if sexual conduct is indicative of a lack of good moral character is the illegality of the act. At least one court has decided that the illegal nature of an attorney's sexual conduct is sufficient in and of itself to justify labeling the attorney morally unfit. In that case, the attorney engaged in an act of carnal intercourse with a girl under the age of sixteen. The girl appeared to be over the age of sixteen and had lived a less than resolute life. Although the attorney was otherwise of undisputed sound moral character, the court said the commission of an illegal act of sexual misconduct constitutes moral turpitude. Bigamy is illegal sexual behavior which may demonstrate an attorney has poor moral character. But the fact that bigamy is against the law may not be the only factor in determining whether bigamy exhibits a lack of good moral character. Engaging in bigamy may show the attorney is untrustworthy if the attorney enters into a bigamous marriage representing either himself or his spouse to be free to enter into the marriage.

Evidence that an attorney operates, manages, or participates in a house of prostitution may be an illegal act justifying disciplining an attorney for a lack of moral fitness.

The relationship of an attorney's sexual conduct to his professional behavior may be a factor in establishing whether the conduct is indicative of poor moral character. If an attorney becomes involved in sexual relations with a client, questions of whether the attorney has abused his fiduciary relationship with the client may arise. To illustrate, the attorney in the case of In re Wood solicited sexual favors and photographed female clients in the nude in exchange for his legal services. The court concluded that the attorney failed in his professional duty to protect his client's interests and demonstrated a lack of sound moral character. In order to protect the integrity of the bar and to protect the public from attorneys who use the attorney-client relationship to pursue personal

30. Id.
32. In re Okin, 272 A.D. 607, 73 N.Y.S.2d 861 (1947); In re Marsh, 42 Utah 186, 129 P. 411 (1913); In re Kosher, 61 Wash. 2d 206, 377 P.2d 988 (1963)
33. 358 N.E.2d 128 (Ind. 1976).
objectives, the court suspended the attorney.

Sexual conduct which is not illegal or related to the attorney's professional life may be so deviant from society's view of proper sexual behavior that the conduct is a violation of the good moral character requirement. To permit an attorney who engages in such conduct to remain as a member of the bar may bring the profession into public distrust and reproach. One attorney who was married and had six children became involved with a mentally deficient dwarf. The court reasoned that any attorney guilty of participating in "immoral conduct" is unfit to be entrusted with the responsibilities and duties an attorney owes to the courts and his clients. The definition of "immoral conduct" given by the court is conduct which "shows a moral indifference to the opinions of the good and respectable members of the community." Sexual activities with a mentally deficient dwarf was held to be immoral conduct which rendered the attorney morally unfit to practice law. The court's apparent rationale is that a total disregard for some of the community's standards leads to the inference that the attorney may disregard other essential moral standards such as honesty and veracity. The same reasoning seems to have led a Florida court in the case of Florida Bar v. Hefty to disbar an attorney who engaged in sexual relations with his stepdaughter. The sexual activities began when the stepdaughter was ten years old. The girl became pregnant and was placed in an unwed mother's home. The attorney was forbidden from having any further contact with his stepdaughter, but ignored the order and continued to have sexual relations with her. Eventually the attorney divorced his wife, married his stepdaughter, and the three along with the children of both wives continued to live together. The attorney argued that activities he participated in privately, which were of a personal nature, were not indicative of competence as an attorney. Rejecting this argument, the court stated that the "enormity of the depravity" brought dishonor on the legal profession and justified his disbarment. The bar has a strong interest in maintaining the highest standards of conduct in order to insure the respect and trust of the public. Although an attorney is competent at the practice of law, his personal conduct reflects on the profession as a whole. If the

34. In re Hicks, 163 Okla. 29, 20 P.2d 896 (1933).
35. Id.
36. 213 So. 2d 422 (Fla. 1968).
conduct brings reproach from the public, the effectiveness of the bar is reduced.

**Homosexual Conduct and the Good Moral Character Requirement**

Clearly, no general rule can be stated for establishing when sexual misconduct will be a violation of the good moral character requirement. Many factors may influence a court's determination of whether the conduct justifies labeling the attorney morally unfit. The illegality of the act, whether the act is related to the attorney's professional duties, the nature of the act, and the publicity surrounding the act are all factors. Courts faced with the question of whether an attorney who engages in homosexual conduct is morally sound have examined the circumstances in which the conduct occurred. The courts have found no difficulty in determining that an attorney who practices homosexual acts in public is morally unfit. The more difficult and undecided question is whether an attorney who engages in homosexual acts privately and without relation to his professional work may be adjudicated morally unsound.

Only a few cases have arisen dealing with the question of whether a homosexual act by an attorney is inconsistent with the good moral character requirement. In the earliest case, *Florida Bar v. Kimball*, the attorney was arrested and charged with violating a city ordinance prohibiting indecent and lewd behavior in public. The attorney and another adult male were seen swimming in the nude and engaging in an act of sodomy on a public beach. With little explanation, the court found the conduct to be contrary to good morals. In a similar case, the Florida Supreme Court rendered a per curiam decision affirming disciplinary measures against an attorney who was convicted of indecent exposure. The male

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38. See, e.g., Comment, *Homosexuality and the Good Moral Character Requirement*, 56 J. Urb. L. 123 (1978); Note, *The Constitutionality of Laws Forbidding Homosexual Conduct*, 72 Mich. L. Rev. 1613 (1974), in which the authors discuss whether homosexual conduct is protected by the right to privacy as developed by recent Supreme Court decisions. The constitutional limits for legislation regulating homosexual conduct or the homosexual's right to practice law is beyond the scope of this article.
39. 96 So. 2d 825 (Fla. 1957).
attorney and a consenting adult male were observed by a policeman engaging in a homosexual act in a public lavatory. The court cited no other factor for its decision other than the public nature of the act, although there was some controversy as to whether a lavatory is a public place. Chief Justice Erwin drafted a special concurrence which gives some insight into the court’s decision. Chief Justice Erwin expressed the view that public homosexual acts are an affront to society’s conventions and suggest the homosexual’s inability to conform to society’s standards of morality and decency.\(^41\) The Chief Justice went on to say that an ability to respect society’s values and mores is necessary in order for an attorney to perform his or her professional responsibilities. In order to establish a lack of good moral character, Justice Erwin argued that a connection between the circumstances and the nature of the act and the attorney’s tendency to continue the antisocial act must be shown. The Chief Justice concurred with the opinion of the majority that the public nature of the act justified the attorney’s disbarment.

The concurring opinion of Chief Justice Erwin was subsequently adopted by the Florida Supreme Court.\(^42\) The applicant to the Florida Bar whose character was in question admitted being of homosexual orientation. The applicant was fully qualified for admission to the bar in other respects. The record showed no evidence that the applicant had ever engaged in homosexual acts, or that he planned to act on his homosexual preference in the future. The court held that mere homosexual orientation does not render an attorney unfit to practice law because of a lack of good moral character. The court explicitly refused to address the issue of whether an attorney who actually engages in a homosexual act lacks sound moral character. In reaching its conclusion, the court examined the purposes served by ostracizing persons from the bar who are of poor moral character.\(^43\) The court decided that a client’s confidence that his attorney will protect his interests, and society’s interest in the fair and efficient administration of justice were not threatened by an attorney’s sexual preference for homosexuality. The court expressed the fear that absent a requirement of establishing a relationship between an act by the attorney and the attor-

\(^{41}\) Id. at 380.
\(^{42}\) In re Bd. of Florida Bar Examiners, 358 So. 2d 7 (1978).
\(^{43}\) Id. at 9.
ney’s inability to meet the fiduciary duties required of an attorney, the bar will be unfettered in regulating the details of each attorney’s private life. Since the court did not address the issue of whether an attorney who actually commits a homosexual act is of good moral character, the court did not discuss the weight to be given the illegality of a homosexual act. But the dissenting opinion recommended an inquiry into whether the applicant to the bar had engaged in homosexual acts made illegal by Florida law. The dissenter stated that no person should be admitted to the bar whose lifestyle contemplated continued violation of a criminal statute.

Conclusion

The primary focus of courts confronted with the question of whether homosexual conduct renders an attorney morally unfit is the possible damage to the reputation of the legal profession. The reputation of the profession is harmed when the act of an attorney is blatantly contrary to good morals. But the determination of what conduct is “blatantly contrary to good morals” is highly subjective. Little guidance is given by the case law on the subject. The only apparent lines which can be drawn from the cases is between a homosexual act practiced publicly, which is contrary to sound morals, and a mere unacted upon homosexual tendency, which is not contrary to good morals.

It has been suggested that no sexual conduct which does not bear on an attorney’s honesty or trustworthiness should be grounds for labeling an attorney morally unfit to practice law. But even though some conduct does not bear directly on an attorney’s veracity, the conduct may be subjectively immoral to a large segment of society. An attorney who engages in conduct which is widely felt to be indicative of poor morals may bring the legal profession into public reproach. Participating in such conduct also indicates a certain indifference to an attorney’s obligation to other attorneys and our judicial system. At least under certain circumstances, homosexual acts may illustrate to the bar that an attorney is lacking good moral character. But guidelines for determining under what cir-

44. Id. at 10.
45. See notes 26-39 supra and accompanying text.
46. 358 So. 2d at 9.
47. Id.
cumstances homosexual conduct demonstrates a lack of sound moral character are not readily ascertainable. Whether the conduct is indicative of poor morals must depend on the relationship of the behavior to the goals served by the good moral character requirement. If the behavior shows a lack of trustworthiness, or an inability to appreciate or fulfill his duties and obligations to his client or the judicial system, the bar has a right and a duty to protect the profession and the public by labeling the attorney morally unfit and preventing him from being a member of the bar.

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