

Winter 1979

Mental Disability and Lawyer Discipline, 12 J. Marshall J. Prac. & Proc. 227 (1979)

Daniel L. Skoler

Roger M. Klein

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Legal Ethics and Professional Responsibility Commons](#)

Recommended Citation

Daniel L. Skoler, Mental Disability and Lawyer Discipline, 12 J. Marshall J. Prac. & Proc. 227 (1979)

<https://repository.law.uic.edu/lawreview/vol12/iss2/1>

This Article is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

MENTAL DISABILITY AND LAWYER DISCIPLINE

DANIEL L. SKOLER* & ROGER M. KLEIN**

INTRODUCTION

Mental disability is not just an affliction of the poor and disadvantaged; it strikes the affluent, the educated, and those with extensive professional and public responsibility as well. Its consequences among this last group can be quite devastating. Professionals are expected to police themselves and are accorded power to individually review their own qualifications for continued service. When mental illness descends, a great deal of client harm and professional misfeasance may accumulate before the pattern of emotional disturbance becomes fully apparent. Difficult and delicate maneuvers may be required to correct past errors and to move, if necessary, toward suspension or removal of the incapacitated person from professional practice.

This article is concerned with the practicing attorney who encounters severe mental or emotional disability to the detriment of his clients and his capacity for continued and competent functioning as a lawyer. Although reliable statistics are unavailable, it is not unreasonable to suppose that legally trained persons encounter the same social stresses and life trauma and much the same incidence of emotional and psychic breakdown (what psychiatrists term "patient care episodes") as the population at large. Today's best estimates suggest that one in ten Americans suffers from some form of mental illness (defined as schizophrenic, depressive, neurologic, and emotional and neurotic disorders requiring mental health treatment) and the President's Commission on Mental Health has pointed to evidence suggesting an even higher incidence.¹ Almost ten million more citizens have significant alcohol-related problems, and many others suffer from drug dependence.²

* J.D., 1952, Harvard Law School. Mr. Skoler is presently Director, American Bar Association Division of Public Service Activities.

** A.B., 1979, Harvard College. ABA Student Research Intern.

1. THE REPORT OF THE PRESIDENT'S COMMISSION ON MENTAL HEALTH 8-9 (vol. I, 1978); NATIONAL INSTITUTE OF MENTAL HEALTH, RESEARCH TASK FORCE, RESEARCH IN THE SERVICE OF MENTAL HEALTH 2 (1975).

2. PRESIDENT'S COMMISSION ON MENTAL HEALTH, REPORT OF THE TASK PANEL ON THE NATURE AND SCOPE OF PROBLEM 33-36 (vol. II, 1978); GLASSCOTE, PLAUT, HAMMERLY, O'NEILL, SHAFETZ & CUMMING, THE TREATMENT OF ALCOHOLISM: A STUDY OF PROGRAMS AND PROBLEMS, JOINT INFORMATION

Professionals are not immune from such problems. At least 100 physicians commit suicide every year, and their alcoholism rate is estimated at ten percent, compared to seven percent for the general population.³ It is highly likely that these diseases afflict lawyers in equally significant proportions as well. Indeed, as the director of the nation's largest state bar disciplinary agency has speculated, lawyers in certain forms of practice (trial work, family law, and poverty law) may be especially vulnerable to "patient care episodes" and disabling mental stress.⁴

Occasional "horror stories" draw national attention, such as the eighty-two year-old California Supreme Court Justice who, until ordered retired in 1977, read magazines on the bench, practiced calisthenics during court conferences and regularly voted on cases he had neither read nor heard.⁵ But these more dramatic cases may be only the tip of the iceberg. No accurate estimates exist of less visible and, no doubt, more commonplace instances: a paranoid lawyer begins uncontrollably to lie to clients or to bring vengeful and groundless suits; an attorney suffers a nervous breakdown and simply cannot bring himself to confront the daily tasks necessary to avoid harm to clients; or an attorney suffering from a disease of the nervous system begins to forget appointments and trial dates, leaving clients floundering in the midst of important case junctures.

Disciplinary proceedings generally commence after a lawyer has acted improperly and a client has already been harmed. Despite the growing acceptance and incorporation in court rules of provisions for suspension of mentally ill, alcoholic and hospitalized attorneys, preventive suspension or disciplinary actions against such attorneys—those brought for mental disability *per se* and before the manifestation of client harm—are almost non-existent in many of the states.

Another difficult problem in the disciplining of mentally ill attorneys arises when an attorney, in a proceeding for profes-

SERVICE OF AMERICAN PSYCHIATRIC ASS'N AND NATIONAL ASS'N FOR MENTAL HEALTH (1967).

3. Clark & Matt, *Physician, Heal Thyself*, NEWSWEEK, August 8, 1977, at 74; Hirsh, *The Medical-Legal Implications of the Problems of Errant or Sick Physicians*, CASE AND COMMENT, July-August 1977, at 23; see *New Help for Alcoholic Lawyers*, ABA BAR LEADER, July 1976, at 23-26 (10% drinking rate for lawyers, and alcoholism is a factor in more than one-half of all discipline cases in California).

4. Letter from R. W. Stovitz, Senior Attorney, California State Bar, Courts Division to authors (September 25, 1978). The multiple stresses arise from such factors as "a great deal of matters clamoring for attention, high expectations of clients which cannot often be fulfilled in our legal system and rapidly changing priorities in an attorney's caseload."

5. *McComb v. Commission on Judicial Performance*, 19 Cal. 3d Spec. Trib. Supp. 1, 564 P.2d 1, 138 Cal. Rptr. 459 (1977).

sional misconduct, pleads mental incompetence as a defense, as either a present disability or a condition at the time of the offense. Most states have accepted a prohibition of disciplinary actions against attorneys who are presently incompetent to defend themselves. The attorney is generally suspended pending rehabilitation or recovery, at which time the disciplinary proceedings must resume. But subtler legal questions arise when an attorney who is presently competent defends on the grounds that mental illness prevented conscious control of the behavior at the time of the misconduct. Critics of this defense, like critics of the insanity defense in criminal law, argue that courts lack an adequate definition of incompetence and accurate psychiatric testimony to identify it. Proponents caution against holding "irresponsible" persons, professional or otherwise, responsible for their own acts. Perhaps because of the controversy, state courts show no uniformity in their treatment of the defense.

Subsequent discussion will probe issues of this kind, describing and analyzing the authoritative sources that have established the role of mental incompetence in disciplinary proceedings. Since approaches to the topic have varied widely among jurisdictions, pertinent cases from a representative sampling of states (spanning several decades) will be examined. An attempt will be made to sort and identify among the relevant statutes, court rules, bar association ethical codes and judicial decisions the major lines of response and legal postures that have emerged, to compare and evaluate these competing responses, and to predict a trend. Although a greater number of disciplinary complaints derive from or are related to alcoholism and other drug dependency, these situations will only be dealt with collaterally.⁶ The prime focus will be on the problems of mental illness and disabling neurosis and how these are handled in lawyer disciplinary systems.

Discussion and analysis will not cover the institutional mechanisms that have arisen in the United States to deal with discipline, misconduct and mental or physical disability of judges—the so-called judicial conduct commissions. Patterned largely after the California model established in 1960, this concept calls for the creation of state judicial performance bodies to investigate complaints against judges, conduct formal hearings and impose or recommend appropriate disciplinary or remedial action by the various state supreme courts (typically, in the case of mentally impaired judges, involuntary suspension or retire-

6. See Annot., 17 A.L.R.3d 692 (1968) (misconduct involving intoxication as grounds for disciplinary action against an attorney).

ment).⁷ Today, in one of the fastest reform evolutions in the court improvement field, over ninety percent of the states have such commissions authorized and operating, and a similar body is being considered for the federal judiciary.⁸ In some cases, the authority is constitutional; in others, it derives from statute or court rule. In most, the supervising commissions include non-judicial attorneys and even non-lawyers. In some states (perhaps a quarter), there is a two-tier system with an investigative commission and a dispositional commission that actually metes out sanctions. Whatever the case, these judicial conduct commissions have replaced the cumbersome and rarely used techniques of impeachment, recall or resolution and now constitute the major vehicle for acting upon complaints of mental or physical disability of sitting judges. The movement is attracting its own body of literature and analysis, and although special sub-studies of mental disability actions have not as yet appeared, only two years ago a national clearinghouse was established to meet the growing communication and information interchange needs of these systems.

MENTAL ILLNESS AS GROUNDS FOR SUSPENSION OR INACTIVE ENROLLMENT

The ABA Code of Professional Responsibility

Federal statutory or judicial standards concerning mental unfitness as a ground for suspension or temporary removal from practice are virtually nonexistent. Until 1970, no national standards—mandatory or advisory—dealt even peripherally with the question. In that year, the American Bar Association adopted the Code of Professional Responsibility to replace its sixty-year-old Canons of Professional Ethics, which made no statement on or reference to the competency issue. Yet, even the Code speaks only generally to the subject, suggesting “diligence” in keeping disabled lawyers from practicing.⁹

7. ABA STANDARDS RELATING TO COURT ORGANIZATION No. 1.22 (1973) (discipline and removal of judges); Greenberg, *The Task of Judging the Judges*, 59 JUDICATURE 458 (1976); Overton, *Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions*, 54 CHI.-KENT L. REV. 59 (1977) (part of a symposium on judicial discipline); *The Center for Judicial Conduct Organizations*, 61 JUDICATURE 205 (1977).

8. H.R. 622, 96th Cong., 1st Sess. (1978) (“Judicial Tenure Act,” to create a federal judicial conduct commission, presently pending before the Congress). See generally, 62 JUDICATURE 147 (1978) (for earlier history of this legislation).

9. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 1-6 (1976):

An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational

The Code distinguishes two levels of obligations. "Ethical Considerations" are aspirational in character. They command less force than "Disciplinary Rules" which are mandatory. Although the Ethical Considerations "constitute a body of principles upon which the lawyer can rely for guidance in many specific situations," Disciplinary Rules "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."¹⁰

The Ethical Considerations avoid any statement about the method and extent of suspension appropriate for a showing of incompetence. Unfortunately, the only relevant Disciplinary Rule offers an even narrower statement about incompetence. Instead of advocating suspension for the mentally ill attorney, the Rule merely calls for withdrawal from representation as cases require.¹¹

The ABA Code enjoys no legal status *per se*. However, approximately forty-seven states and the District of Columbia have incorporated it in their laws (some with minor modifications) by legislation and court rules.¹² In addition, numerous courts have considered its exhortations in adjudicating questions of ethical conduct. For example, in *St. Pierre's Case*¹³ and *In re Fahey*,¹⁴ recent cases centering on the mental incompetence defense, judges in New Hampshire and California cited the relevant Code provisions in their opinions. Although in cases of this type courts tend, quite properly, to treat the Code

reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such a person is not granted a license or, if licensed, is not permitted to practice [footnote]. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

10. *Preamble and Preliminary Statement*, ABA CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT 1 (1976).

11. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-110(b) (1976):

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

. . . .

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

12. Interview with C. Russel Twist, ABA Center for Professional Discipline (August 1978). Only Colorado, Illinois and Maine have not expressly adopted the Code. However, since some states have modified parts of the Code and their methods of adoption vary, the 47-state estimate must be viewed with some caution, as it required some judgment as to what constituted "adoption."

13. 113 N.H. 198, 304 A.2d 88 (1973).

14. 8 Cal. 3d 842, 505 P.2d 1369, 106 Cal. Rptr. 313 (1973).

as a guideline rather than a command, they frequently heed and follow its dictates.¹⁵

Court Rules and Statutes Governing Preventive Disciplinary Actions

At least thirty-two states have promulgated rules setting forth criteria for the suspension of mentally ill or alcoholic attorneys,¹⁶ supplemented by statutes establishing the framework for these actions.¹⁷ Many of these regulations derive from a recommendation of the landmark 1970 Clark Committee report on the then "scandalous" state of the nation's disciplinary enforcement machinery.¹⁸ Several regulations are adaptations of a comparable formulation from Suggested Guidelines for Rules of Disciplinary Enforcement, a model set of rules developed in 1974 by a joint group from the American Bar Association's Center for Professional Discipline. The model rule mandates suspension (or, in less stigmatic terminology, "inactive enrollment" or "disability inactive status") when an attorney has been judicially declared incompetent, involuntarily committed, or is determined by a court to be incapacitated for law practice by virtue of addiction to alcohol or other drugs or by diagnosis of mental illness after medical examination.¹⁹ Assignment of a guardian or

15. *Id.* at 852-53, 505 P.2d at 1375, 106 Cal. Rptr. at 319. "Several courts have invoked in support of this ground for discipline [moral turpitude] the precepts of the former Canons of Ethics of the American Bar Association. . . . As of January 1, 1970, the Canons of Ethics were superseded by a new Code of Professional Responsibility."

16. The authors' survey of published state codes and court rules revealed 32 states whose court rules provide for preventive suspension for mental illness. Because some states fail to publish their court rules, a comprehensive study would probably reveal a substantially higher number. All otherwise undocumented findings on this subject derive from this mid-1978 survey, and must be viewed with the caution appropriate to such a partial examination.

17. See Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 HOFSTRA L. REV. 249 (1975). The United States Supreme Court and most federal appellate and district courts have traditionally disciplined attorneys based upon whether the state courts in which the attorneys were licensed have disciplined them. This multiplies the impact of the various state court rules.

18. ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT, Problem 20, at 110-15 (1970).

19. ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE AND CENTER FOR PROFESSIONAL DISCIPLINE, SUGGESTED GUIDELINES FOR RULES OF DISCIPLINARY ENFORCEMENT, Rule 22(A)(B), at 23-24 (3d ed. 1977) (hereinafter cited as SUGGESTED GUIDELINES). For cases applying this rule, see, e.g., *Florida Bar v. Minkus*, 285 So. 2d 408 (Fla. 1973) (suspension based on adjudged incompetence to stand trial in another action); *In re Edwards*, 227 So. 2d 306 (Fla. 1969) (suspension based upon adjudged incompetency in a separate matter, even though the judgment was under appeal); Anonymous

conservator for an attorney is an additional ground for automatic suspension from practice in several states.²⁰ Suspension is defined, in states adhering to these rules (or statutes based on them), as a temporary transfer to inactive status carrying a prohibition on practice and limitations on bar association activities.²¹

Other tenets of the model rule have had varying degrees of state acceptance. Medical examinations to determine competency are authorized in many states, should the supreme court find one necessary.²² To facilitate the identification of mentally ill attorneys, court clerks in several states must notify the supreme court of any licensed attorney's judicial declaration of incompetence or order of commitment to a mental hospital.²³ To safeguard the rights of lawyers incapable of defending themselves, several states require that counsel for the attorney be appointed and present at disciplinary hearings in which incompetence is an issue.²⁴

Most states have within their court rules some provision for protection of a client's legal interests after his or her attorney has been suspended. Typically, the rules require a suspended attorney (or one disciplined in another way) to send a copy of the court order requiring discipline (or other notice of such action) to all clients with matters pending.²⁵ Presumably, this requirement would present compliance difficulties to a committed or incompetent attorney. Some states recognize these difficulties and expressly address the problem posed when a mentally ill attorney loses the use of his or her license and is forced to abandon clients. Many have adopted the 1974 Suggested Guidelines rule on the subject:

If an attorney has been transferred to disability inactive status

v. New York State Bar Ass'n, 47 App. Div. 2d 83, 366 N.Y.S.2d 239 (1975) (suspension based upon an involuntary institutional commitment).

20. See, e.g., CAL. BUS. & PROF. CODE § 6007(a) (West Supp. 1978); LA. REV. STAT. ANN., tit. 37, Ch. 4, art. 15, § 9(a) (West 1974).

21. See, e.g., CAL. BUS. & PROF. CODE § 6006 (West Supp. 1978).

22. E.g., LA. REV. STAT. ANN., tit. 37, Ch. 4, art. 15, § 9(a) (West 1974); N.J. COURT RULES §§ 1:20-4(g), 1:20-11(b) (West); SUP. CT. RULES FOR THE GOVERNMENT OF THE BAR OF OHIO, rule V, 10(c); RULES AND REGULATIONS OF THE W. VA. STATE BAR, art. VI, § 26a(b). See also *In re M*, 59 N.J. 304, 282 A.2d 37 (1971).

23. E.g., ARIZ. SUP. CT. RULES, rule 42(b); CAL. BUS. & PROF. CODE § 6007(a) (West Supp. 1978); IOWA RULES GOVERNING ADMISSION TO THE BAR, rule 118.16; NEV. SUP. CT. RULES, rule 119.

24. E.g., ARIZ. SUP. CT. RULES, rule 42(c); MISS. CODE ANN. § 73-3-353 (Supp. 1978); MO. SUP. CT. RULES, rule 5.21(b); WASH. DISCIPLINARY RULES, rule XIV(c); RULES AND REGULATIONS OF THE W. VA. STATE BAR, art. VI, § 26a(b); DISCIPLINARY CODE OF THE WYO. STATE BAR, rule XI(b).

25. E.g., INTEGRATION RULE OF THE FLA. STATE BAR, rule 11.10(6).

because of incapacity or disability . . . and no partner, executor or other responsible party capable of conducting the attorney's affairs is known to exist, the presiding judge in the judicial district of the [appropriate court of general jurisdiction] in which the attorney maintained his practice upon proper proof of the fact, shall appoint an attorney or attorneys to inventory the files of the inactive . . . attorney and to take action as seems indicated to protect the interests of the attorney and his clients.²⁶

States that set forth mental disability criteria for suspension often define converse procedures and conditions for reinstatement. The 1974 Suggested Guidelines requires an affirmative showing that the disability has been removed or that the attorney fully qualifies to practice law.²⁷ Some states additionally permit automatic reinstatement of a judicially suspended attorney once those proceedings are judicially terminated.²⁸ Except when reinstatement is automatic, most states limit the frequency with which suspended attorneys can petition for return to active status. An one-year waiting period between applications is common, although the court may often establish a shorter period at its discretion.²⁹

Laws of this type have survived constitutional challenges claiming that they were overly vague. The Supreme Court of South Carolina held in *In re Chipley*³⁰ that use of "in the judgment of ordinary men" as the standard for determining mental incompetence in a South Carolina statute sufficiently warned attorneys of the degree of mental responsibility demanded of them. The court indicated that this test is used in other statutes where the mental incompetency issue arises.³¹

26. SUGGESTED GUIDELINES, *supra* note 19, at Rule 23(a); *accord*, CAL. BUS. & PROF. CODE §§ 6180-6180.14, 6190-6190.6 (West Supp. 1978); N.M. SUP. CT. RULES GOVERNING DISCIPLINE § 18-4-17; PA. RULES OF DISCIPLINARY ENFORCEMENT, rule 302; R.I. SUP. CT. RULES, rule 42-18(a); S.D. SUP. CT. DISCIPLINARY RULES § 9; RULES AND REGULATIONS OF THE W. VA. STATE BAR, art. VI, § 26(b). *See also* Anonymous v. N. Y. State Bar Ass'n, 47 App. Div. 2d 83, 366 N.Y.S.2d 239 (1975).

27. SUGGESTED GUIDELINES, *supra* note 19, at Rule 22(F).

28. *See, e.g.*, CAL. BUS. & PROF. CODE § 6007(a) (West Supp. 1978); IOWA RULES GOVERNING ADMISSION TO THE BAR, rule 118.16; ILL. REV. STAT. ch. 110A, § 759 (1977); S.D. SUP. CT. DISCIPLINARY RULES § 6(d); TENN. SUP. CT. RULES, rule 42-21.7.

29. SUGGESTED GUIDELINES, *supra* note 19, at Rule 22(F). *See also* IOWA RULES GOVERNING ADMISSION TO THE BAR, rule 118.16; KAN. SUP. CT. RULES, rule 221(d); N.M. SUP. CT. RULES GOVERNING DISCIPLINE, rule 18-4-13; PA. RULES OF DISCIPLINARY ENFORCEMENT, rule 302; S.D. SUP. CT. DISCIPLINARY RULES § 6(d); TENN. SUP. CT. RULES, rule 42-21.6.

30. 254 S.C. 588, 176 S.E.2d 412 (1970), *cert. den. sub nom.*, *Chipley v. Roberts*, 400 U.S. 905 (1970), *cert. den. sub nom.*, *In re Disbarment of Chipley*, 401 U.S. 1010 (1971), *reh. den.*, 402 U.S. 1005 (1971).

31. *In re Chipley*, 254 S.C. 588, 589, 176 S.E.2d 412, 413 (1970).

Preventive Disciplinary Actions in Court

Notwithstanding the prevalence of rules permitting suspension for mental incompetence, surprisingly few court cases have dealt with preventive suspensions in the past ten to twenty years. This may be explained, in part, by the fact that state bar boards conduct most grievance proceedings; these actions reach court and are published in reporters only when an attorney appeals.³² Also, state bar disciplinary boards may permit attorneys threatened with medical suspensions to withdraw from practice without the filing of charges. Texas, for example, offers such an alternative to attorneys who face an incompetency action. The medical suspension may occur only if the afflicted attorney "is attempting to conduct the practice of law."³³

Newly-adopted court rules and changes in the Code seem to have spawned a recent surge in preventive disciplinary actions.³⁴ Few court rules on incompetence suspension existed a decade ago,³⁵ and such suspensions were virtually impossible before the adoption of this kind of rule. In these cases, unlike other disciplinary proceedings, client complaints and ethics committee findings of careless or dishonest professional conduct or extra-practice offenses evincing "moral turpitude" are unnecessary. At most, such misconduct is treated as an indication of mental incompetence and not as grounds for discipline itself. Instead, the documentation of behavior sufficiently aberrant to convince the court of mental illness is sufficient to transfer the attorney to inactive status.

32. MICH. SUP. CT. RULES § 8, Rule 15 (suspension of attorneys in certain instances of mental illness or alcoholism resulting in "complete social disintegration"). This rule was applied in the suspension of three attorneys in 1974, one attorney in 1975 and three attorneys in 1976, but none of these cases reached the courts. Interview with Richard H. Senter, Michigan State Bar Grievance Board (August 1978).

33. TEX. CODE ANN. tit. 14, App., art. 12, § 34(a) (Vernon 1973).

34. Research in 1974 uncovered no disciplinary actions based solely upon alleged mental illness. Place & Bloom, *Mental Fitness Requirements for the Practice of Law*, 23 BUFFALO L. REV. 579, 590 (1974). There has been a rise in the volume of suspension adjudications not involving charges of misconduct since 1974. See, e.g., *Matter of Howey*, 267 S.C. 430, 229 S.E.2d 264 (1976); *Matter of Wicklund*, 75 Wis. 2d 1, 248 N.W.2d 490 (1977).

35. See, e.g., OKLA. STAT. ANN. tit. 5, ch. 1, App. 1, art. 11, §§ 1-11 (Supp. 1978) (conformed to rule of SUGGESTED GUIDELINES in 1971); WASH. DISCIPLINARY RULES FOR ATTORNEYS, rules IX, XIV (comprehensive incompetence suspension regulation); WIS. STAT. ANN. § 256.286 (repealed 1978) (previously paralleled the SUGGESTED GUIDELINES rule, permitting an attorney to elect voluntary suspension when faced with a medical suspension). For an early application of the Washington rule, see *In re Campbell*, 74 Wash. 2d 276, 444 P.2d 784 (1968) (inactive enrollment based not upon bizarre beliefs, but upon irrational concepts of use of court process to compel indefinite employment).

In *State v. Cadden*,³⁶ attorney Cadden began to conduct his everyday life in a bizarre and inappropriate manner. He tried, for example, to exchange sheets he had purchased at a store for a more expensive item without paying the additional cost and then billed the sales clerk for professional services rendered. He interjected himself into courtroom proceedings believing he was the defendant's attorney, although defendant's counsel was present. At his disciplinary hearing two court-appointed psychiatrists testified that Cadden was schizophrenic. The court found that Cadden was sufficiently mentally ill as to be unfit to practice law under Wisconsin's version of the Code. Noting that Cadden was receiving treatment for his illness, the court suspended him for six months and until it found him mentally able to resume practice.

In *In re Chipley*,³⁷ the attorney was diagnosed by psychiatrists as suffering from schizophrenia. As a result of his effort to obtain release from a mental hospital, a jury found Chipley mentally ill and in need of custodial care and treatment. The court conceded that Chipley had done no wrong, but felt the evidence uncontrovertably indicated that he was so mentally unstable as to be incapable of practicing law.³⁸

In *Florida Bar v. Worthington*,³⁹ a county court had found attorney Worthington incompetent. He was diagnosed as suffering from Korsakoff's syndrome, with cortical deterioration, and his symptoms were severe. He was confused, tremulous, unable to manage his affairs, and had been hospitalized twice for the illness in the year before the proceedings. The court, declaring incompetency, suspended Worthington "subject to any rights he may have to apply for reinstatement at the proper time and upon proper showing."⁴⁰

In states with regulations addressing the problem of mentally ill attorneys, substantial uniformity of approach appears to have been achieved. Some states, however, appear more vigilant than others in searching out potentially harmful lawyers. Even among states adhering to the 1974 Suggested Guidelines, wide variations in the volume of cases exist.⁴¹ At the same time,

36. 56 Wis. 2d 320, 201 N.W.2d 773 (1972).

37. 254 S.C. 588, 176 S.E.2d 412 (1970).

38. *Id.* at 592, 176 S.E.2d at 415.

39. 276 So. 2d 39 (Fla. 1973).

40. *Id.* at 40. See also *In re Davis*, 264 N.W.2d 371 (Minn. 1978) (indefinite suspension subject to petition for reinstatement when the attorney could sustain burden of demonstrating that he had overcome his psychiatric problems).

41. Kentucky and Missouri provide for suspension because of mental illness, but no cases have been brought under these provisions. On the other hand, WIS. STAT. ANN. § 256.286 (West) (repealed 1978), establishing

no cases have been found where an attorney was disbarred or permanently suspended for mental incompetence *per se*.⁴² Suspension or inactive status pending court reinstatement stands as the primary, if not the sole, protective measure applied. The homogeneity as to degree of discipline imposed in these cases suggests, therefore, a uniformity of outlook as to the nature of the problem and purpose of discipline.

In 1978, this general approach was confirmed in new Standards for Lawyer Disciplinary and Disability Proceedings, released by the American Bar Association and formally endorsed by the ABA's House of Delegates in early 1979.⁴³ These standards largely embrace the 1970 Clark Report and the 1974 Suggested Guidelines but, as standards, are more compact in format. They embrace the preferable "disability inactive status" rather than the "suspension" rubric (which can readily be confused with disciplinary suspension), and one point not directly handled by earlier formulations: the status of the disability defense not as to present capacity to stand trial but to a claim of past or temporary incapacity which is no longer present. The new standards suggest that past disability at the time of misconduct "merely constitutes a claim in mitigation" and is no bar to charges of misconduct or capacity to defend against them.⁴⁴

MENTAL INCOMPETENCE AS A DEFENSE TO DISBARMENT PROCEEDINGS

There is a consensus, backed by court rule and statute, which permits preventive suspension of attorneys who appear likely, because of mental instability, to default on obligations or harm client interests in the future. Yet, on the issue of mental incompetence as a defense to disbarment proceedings, the authorities are not in accord. Three distinct strands of legal thinking have developed and coexist to the present.

One strand of thinking, comprised primarily of early cases,

the mental illness suspension, had been applied in numerous disciplinary cases.

42. See generally Annot., 50 A.L.R.3d 1259, 1261 (1973) (validity and application of regulations requiring suspension for mental illness).

43. ABA STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS, Standard 12 ("Transfer to Disability Inactive Status") (hereinafter cited as ABA STANDARDS).

44. *Id.* at *Commentary* to Standard 12.6. The Standards also clarify the confidentiality of disability proceedings (Standard 12.3), the public character of court orders transferring lawyers to or from "disability inactive" status (Standard 12.4) and offer much more guidance than the earlier guidelines on the imposition and termination of probation (Standards 6.7 and 6.8). It should be noted, however, that mental disability is still considered grounds for invoking "lawyer discipline" (Standard 5.1).

tends to reject insanity and other types of mental disability as defenses to a disciplinary proceeding. An opposing school views mental incompetence as a complete defense to disbarment proceedings and permits an attorney to successfully argue that his or her rehabilitation has made disciplinary action unnecessary. The third line of argument takes a middle position: it makes no statement about mental illness as a defense to disciplinary action, but advocates leniency in discipline if the attorney's defalcations derive from severe mental strain or disability.

Cases in which an attorney raises the insanity defense in a disciplinary proceeding are rare. Rarer still are cases where a disciplinary decision hinges solely, or even largely, on proof of genuine mental illness. Rather, dispositions are frequently determined on narrow factual grounds peculiar to each case. Often, the court seems to focus on other issues: the gravity of the attorney's misconduct; financial difficulties and other extenuating circumstances; the attorney's prior disciplinary record; and whether the attorney made restitution to injured clients for losses caused or fees improperly earned.⁴⁵ This tendency makes application of prior decisions to present cases a difficult undertaking. Such factors, together with the variety of philosophic approaches to the defense, have created a confusing, often contradictory, body of case law with little light emanating from disciplinary board and committee decisions and practices prior to court involvement.⁴⁶

45. See, e.g., *Doyle v. State Bar*, 15 Cal. 3d 973, 975, 544 P.2d 937, 939, 126 Cal. Rptr. 801, 803 (1976). "Determination of the discipline to be imposed must be based on a 'balanced consideration of [all] the relevant factors,' . . . including any mitigating circumstances." *In re Gelzer*, 31 N.J. 542, 544, 158 A.2d 331, 332 (1960) ("[R]estoration and proper distribution of the funds after complaint has been made to an Ethics Committee . . ." can be a proper mitigating circumstance.)

46. The disciplinary process, of course, does not begin with the state supreme court decision on a lawyer misconduct complaint. There is an initial investigative inquiry handled by a bar disciplinary committee, a professional investigator or a disciplinary agency staff lawyer. Findings here are typically reported to an "inquiry panel" of the state disciplinary agency or bar association which determines whether formal action should be taken or charges dismissed or an informal admonition imposed. If charges are filed, formal pleadings ensue and the matter is set for trial before either a panel of the state disciplinary agency, a court referee or commissioner or, in a few states, before a jury. After trial, a recommendation is filed with the state supreme court (or with the state disciplinary board or commission which, in turn, makes a recommendation to the supreme court) suggesting dismissal of the complaint, private reprimand, public reprimand, suspension for a definite or indefinite period (sometimes with conditions of probation imposed) or disbarment (either absolutely or for a substantial period of years with reinstatement quite difficult). The state supreme court receives the recommendation, reviews the case transcript and any briefs, often hears oral argument and enters a final judgment of discipline (including removal from the roll of attorneys in cases of suspension or disbarment). United

Court Rules and Statutes on the Incompetence Defense

Research reveals no state statute or court rule directly recognizing or precluding a defense to disciplinary proceedings on grounds of mental disability. One provision of the Suggested Guidelines for Rules of Disciplinary Enforcement, however, requires courts to hold in abeyance any disciplinary proceeding during an attorney's suspension because of mental incompetence. Several states have adopted this provision with minor variations.⁴⁷ Another Suggested Guidelines rule, employed as a companion to the above rule, requires that if during a disciplinary proceeding an attorney contends he or she suffers from a mental or physical disability or is addicted to alcohol or drugs to the extent that an adequate defense cannot be made, the court must immediately transfer the attorney to inactive status. After a subsequent medical examination, the court must determine if the attorney is mentally fit to practice law. If so, it resumes the disciplinary proceedings; if not, the suspension continues.⁴⁸

Cases applying this rule are scarce. However, under it, an attorney who is incompetent at the time of hearing or trial cannot be disbarred. He or she will be suspended without prejudice to the merits of the misconduct charge and will remain so until sufficient competence has been restored to stand trial in a disciplinary proceeding.

Two state rules on capacity to stand trial deserve special note. Missouri's court rules permit resumption of disciplinary proceedings after a mental incompetence plea if the court finds that the misconduct would warrant disbarment in any event.⁴⁹ Here, the intervening stage of suspension is dropped, disciplinary proceedings resume and the attorney can be disbarred. In contrast, the Suggested Guidelines rule requires that the attorney be competent before the court may decide whether the offense, by its nature, warrants disbarment and whether the attorney in fact committed the offense.

States Supreme Court review may be sought by the charged attorney as a final step, but this rarely occurs. Reported decisions on these cases are readily available to lawyers, by and large, only with respect to state supreme court review and decisions on disciplinary recommendations from trial panels, hearing officers, or state boards and committees. See BRADNER, ABA CENTER FOR PROFESSIONAL DISCIPLINE, BACKGROUND SHEET ON LAWYER DISCIPLINARY PROCESS (1977).

47. *E.g.*, ARIZ. SUP. CT. RULES, rule 42(d); CAL. BUS. & PROF. CODE § 6007(c) (West Supp. 1978) (pending disciplinary proceedings are not abated, even though the attorney chooses "inactive enrollment"); ILL. REV. STAT. ch. 110A, § 757 (1977); KAN. STAT. ANN. § 7-124a, Rule 221(c) (Supp. 1977); NEV. SUP. CT. RULES, rule 117.

48. SUGGESTED GUIDELINES, *supra* note 19, at Rule 22(B),(C).

49. MO. SUP. CT. RULES, rule 5.21(c).

The Oklahoma Supreme Court Rules set up a different standard for the resolution of disciplinary proceedings where an attorney pleads incompetence. Although there appears to be an absence of interpretive cases, the rule stands as the only regulation specifically addressing the incompetence defense (as distinguished from regulations governing when proceedings involving the defense may take place). The Oklahoma rule provides:

Whenever a proceeding charging that a member is personally incapable to practice law is based upon conduct of neglect of duty in respect to the affairs of a client, the complaint must also allege specifically any such conduct which would justify the imposition of discipline, so that the Trial Authority may hear evidence upon, and in his report shall make findings and recommendations *as to whether he should be disciplined or found personally incapable to practice law*.⁵⁰

The rules explain further that "personal incapability" to practice law (which may result in suspension) includes judicial declaration of incompetence, involuntary commitment, successful use of the mental incompetence defense in any trial, or any other disabling mental or physical infirmity, including drug or alcohol dependence.⁵¹

Judicial Decisions on the Incompetence Defense: The Three Schools

It has been suggested that the majority of court rules dealing with the incompetence defense skirt the issue. Rather than speak to whether incompetence can exonerate an attorney who has misbehaved, they discuss when and whether disciplinary proceedings may be postponed. The ABA Code of Professional Responsibility likewise evades the question by treating only preventive suspensions for mental illness, not the mental illness defense to disciplinary proceedings. Thus, judicial decisions must be examined for legal underpinnings regarding the incompetence defense. As indicated, the cases sort themselves into three categories, and a review of the distinctions between them is instructive.

Mental Incompetence as No Defense

One line of cases, many of older vintage, takes the position that an attorney's mental state at the time he or she acted in an unprofessional manner is irrelevant to a disciplinary decision.

50. OKLA. STAT. ANN. tit. 5, ch. 1, App. 1, art. XI, § 5 (Supp. 1978) (emphasis added).

51. *Id.*

Judges here state that unlike a criminal trial, a disciplinary action's primary goal is not to punish the attorney but to protect his or her potential clients. Viewing discipline as an important deterrent to future misconduct, there is an implicit concern that the deterrent effect will be weakened by more indulgent standards.

In *In re Patlak*,⁵² the attorney received money against a promise to perform certain client services which were not performed. Later, Patlak was convicted of larceny for activities subsequent to the professional misconduct, but the criminal conviction was overturned when a jury found that he was insane at the time of the crime. The court held that whether he knew what he was doing was not of controlling influence in the disciplinary proceeding, and disbarred him. Insanity is a defense to criminal charges, the court explained, but a disciplinary proceeding is designed to protect the public.⁵³

In *Louisiana State Bar Association v. Theard*,⁵⁴ an attorney committed forgery with intent to defraud the owner of a promissory note. At the time of the misdeed, the attorney suffered from amnesia and the court found him irresponsible. Soon after, he was placed in an asylum for several years. The Louisiana Supreme Court disbarred Theard, distinguishing a disciplinary proceeding from a criminal case. The court considered irrelevant "whether the dishonest conduct stems from an incapacity to discern between right and wrong or was engendered by a specific criminal intent."⁵⁵

Subsequent developments in the *Theard* case may limit its importance. In a federal court disbarment proceeding based on the Louisiana disbarment, an order was issued striking Theard from the court rolls of the Eastern District of Louisiana. The United States Supreme Court granted *certiorari*, and in *Theard v. United States*,⁵⁶ made its only statement in recent years regarding the insanity defense to disbarment when it reversed and remanded the district court order. The significance of this reversal appears limited, however, in view of the Court's focus on the peculiar factual situation. The disbarment proceeding came eighteen years after the misconduct, during which time Theard

52. 368 Ill. 547, 15 N.E.2d 309 (1938).

53. *Id.* at 553, 15 N.E.2d at 312. New York is another state which seems to have adhered to the "no defense" school. See *Dallal v. Darrigrand*, 31 App. Div. 2d 442, 298 N.Y.S.2d 533 (1969); *In re Samuels*, 22 App. Div. 2d 564, 257 N.Y.S.2d 373 (1965); *In re Anonymous*, 21 App. Div. 2d 48, 248 N.Y.S.2d 368 (1964).

54. 222 La. 327, 62 So. 2d 501 (1952).

55. *Id.* at 335, 62 So. 2d at 503.

56. 354 U.S. 278 (1957).

had received hospital treatment, had been released from the hospital and had resumed his practice, all without a client complaint. The Supreme Court stated: "We do not think that 'the principles of right and justice' require a federal court to enforce disbarment of a man eighteen years after [the misdeed] when concededly he 'was suffering under an exceedingly abnormal mental condition, some degree of insanity.'"⁵⁷

It is significant that in the *Theard* decision, the United States Supreme Court cited no statute or court rule as authority, nor did it base its logic on previous federal decisions. It is unclear, therefore, whether the Court merely "tempered justice with mercy" about a long forgotten crime, or instead accepted the second school's view that an attorney who misbehaved only because he was insane, but has since recovered, should not be disciplined.⁵⁸

Another, and somewhat broader, articulation of the thesis rejecting the incompetence defense can be found in *In re Quimby*.⁵⁹ In *Quimby*, the court stated: "An act against a client evidencing moral turpitude, even though attributable to some aberration or stress that would warrant the prosecutor in abstaining from criminal prosecution, may nevertheless warrant severe disciplinary action concerning an officer of the court."⁶⁰

Mental Incompetence as a Complete Defense

At the opposite end of the spectrum from the "no defense" approach lies a more recent, more tolerant approach which admits incompetence as a defense to disbarment proceedings. Proponents concede that disciplinary action may be designed to protect the public, but argue that its inevitable effect is also to punish the attorney involved. If this is so, they ask, is it fair to punish attorneys for acts which they could not control? Courts of this persuasion answer in the negative.

Once a court accepts this argument, the critical issue in disciplinary proceedings against an attorney of questionable mental competence becomes: does he or she qualify as truly incompetent? In other words, the decision hinges on whether the attorney had mental responsibility for his or her acts at the time of the misdeed. Several state courts have incorporated into their rules a definition of incompetence or mental illness for use in mental infirmity suspensions. Although the definitions vary widely, almost all emphasize the ability to act effectively upon

57. *Id.* at 282.

58. *Cf. In re Sherman*, 58 Wash. 2d 1, 354 P.2d 888 (1960).

59. 359 F.2d 257 (D.C. Cir. 1966).

60. *Id.* at 258.

the external environment. The Ohio Supreme Court's definition is fairly typical, labeling mental illness as "a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life."⁶¹

Courts which admit the insanity defense have distinguished two types of mental disorders, only one of which qualifies an attorney for the defense. Psychosis and acute neurosis are instances of the disorders qualifying an attorney for the defense. These diseases often require hospitalization and, as the courts have defined them, involve major mental debilitation of an organic or inorganic cause. While afflicted by such illnesses, attorneys cannot be considered responsible for their behavior. They do not know the nature and quality of their acts and cannot distinguish right from wrong. These courts, however, often distinguish psychosis and neurosis from personality disorders and emotional strains resulting from the more trying circumstances of everyday life. Such deviations in behavior include drug addiction and extreme variations in personality, such as belligerence or compulsivity, to which many persons are periodically subject. Courts frequently choose the personality disorder designation when psychiatric testimony is contradictory, or when neither side introduces sufficient testimony and the evidence, though establishing a behavioral aberration, is insufficient to prove mental illness.⁶²

This distinction is illustrated by two Wisconsin Supreme Court cases. In *State v. Cadden*,⁶³ the attorney displayed bizarre and inappropriate behavior, and two psychiatrists testified that he suffered from schizophrenia. The court deemed this condition sufficiently severe to warrant a medical suspension under Wisconsin's incompetency suspension rule.⁶⁴

In a subsequent case, *State v. Heilprin*,⁶⁵ the defendant attorney was subjected to the same disciplinary measure as in *Cadden*—suspension pending court certification of mental fitness. However, the court did not impose a medical suspension; the suspension was based on misconduct which the court refused to excuse because of mental condition. To permit the

61. OHIO REV. CODE ANN. § 5122.01(A) (Page Supp. 1978); cf. WIS. STAT. ANN. § 51.01(12)(b) (West Supp. 1978) (excludes alcoholism from definition).

62. Place & Bloom, *Mental Fitness Requirements for the Practice of Law*, 23 BUFFALO L. REV. 579, 585 (1974). See also Annot., 96 A.L.R.2d 739, 742 (1964).

63. 56 Wis. 2d 320, 201 N.W.2d 773 (1972).

64. *Id.* at 330-31, 201 N.W.2d at 778.

65. 59 Wis. 2d 312, 207 N.W.2d 878 (1973).

attorney to continue practice, the court said, would be dangerous. Heilprin's aberrant behavior consisted of abusing and threatening court staff, exposing himself and making sexual advances to clients, threatening suits known to lack merit and repeatedly suggesting violence toward his opponents. The attorney had a history of sexual problems in his marriage, and a psychiatrist testified that he suffered from an obsessive-compulsive personality disorder. The court distinguished this disorder from *Cadden's* schizophrenic condition (which was viewed as a true mental illness), declaring "a personality disorder is not an illness, . . . but a disorder of behavior."⁶⁶ The court further explained that Heilprin's actions were not completely out of control; he could understand the difference between right and wrong and appreciate the impropriety of his conduct. Pointing out that many people exhibit the characteristics associated with Heilprin's disorder, the court expressed concern that recognizing so common a problem as a defense to disciplinary proceedings would invite abuse of disciplinary concepts.

A more recent Wisconsin case, *State v. Ledvina*,⁶⁷ further clarifies the mental illness-personality disorder distinction. Here, the attorney sent vicious letters to and otherwise harassed a resident of his town. At one point, Ledvina even encouraged the driver of a car in which he was a passenger to run over a passing pedestrian he disliked. A psychiatrist diagnosed Ledvina's problem as a "personality disorder . . . to be distinguished from a psychosis or other serious mental illness where an individual attorney is unable to perceive reality and where he exists in a world of fantasy and delusion."⁶⁸ The court declared that such a personality disorder was neither a defense to professional misconduct nor cause for a finding of incapacity to practice law warranting medical suspension under Wisconsin's disciplinary enforcement code.⁶⁹

The boundary defined by the three Wisconsin cases is one to which courts in several states have adhered. Those accepting the insanity defense, when confronted with an attorney suffering from a psychosis or other serious mental illness, merely suspend the attorney. Indeed, if a lawyer guilty of professional misconduct can demonstrate that he committed the acts while mentally irresponsible, but has since been rehabilitated, the court will not discipline him at all.

66. *Id.* at 319, 207 N.W.2d at 883.

67. 71 Wis. 2d 195, 237 N.W.2d 683 (1976).

68. *Id.* at 204, 237 N.W.2d at 688.

69. WIS. STAT. ANN. § 236.286 (West) (repealed 1978). This statute was replaced by WIS. RULES GOVERNING DISCIPLINE OF ATTORNEYS, rules 5, 9, & 10, which are substantially the same.

An early case articulating this school of thought is *In re Sherman*.⁷⁰ Attorney Sherman, recently licensed to practice in Washington, falsely stated on his application for admission to the Washington bar that he had never taken the bar examination in another state. In fact, he had failed the test twice in California, then failed once and passed it a second time in Oregon. Because of his history of hostility and a past psychiatric report diagnosing schizophrenia, the court decided that his behavior might have resulted from mental illness involving a persecution complex and, therefore, did not constitute willful perjury. The court declined to disbar Sherman, but rather remanded the case to the state referee with instructions to disbar unless Sherman could demonstrate both mental irresponsibility at the time of his perjury and his current capacity to practice law. In a frequently cited passage the court explained:

The logic of the situation would seem to dictate the conclusion that, if he [Sherman] was mentally responsible for the conduct we have outlined, he should be disbarred; and if he was not mentally responsible, he should not be permitted to practice law.

However, the flaw in this logic is that he may have been mentally irresponsible for the falsification of his application for admission to practice law in this state in December, 1956 . . . and, yet, have sufficiently improved in the [years] intervening to capably and competently represent his clients. Supporting the latter possibility is Mr. Sherman's claimed successful practice, since September, 1958, in Pacific County. We are advised of no complaint of any character made against him during that period.⁷¹

California, with its extensively funded and well-staffed disciplinary apparatus has produced, perhaps, more cases involving mental disability issues in disciplinary proceedings than any other state. In one case, *Hyland v. State Bar of California*,⁷² the incompetence defense was defined in a more limited way. Hyland willfully commingled trust funds he controlled with his own funds and misappropriated other client monies. As a defense, he pleaded that marital difficulties during the period in question rendered him mentally incompetent but that by trial time he had recovered completely. The court disbarred Hyland. However, in taking such action the court seemed to recognize the availability of the incompetence defense:

Even though mental incompetence is a defense in State Bar disciplinary proceedings, we conclude that the showing made by petitioner does not justify reopening hearings before the Board of

70. 58 Wash. 2d 1, 354 P.2d 888 (1960); accord, *In re Fahey*, 8 Cal. 3d 842, 505 P.2d 1369, 106 Cal. Rptr. 313 (1973); *State v. Ledvina*, 71 Wis. 2d 195, 237 N.W.2d 683 (1976); *State v. Heilprin*, 59 Wis. 2d 312, 207 N.W.2d 878 (1973).

71. 58 Wash. 2d at 6-7, 354 P.2d at 890 (partially quoted in ABA CODE OF PROFESSIONAL RESPONSIBILITY 4 (1976)).

72. 59 Cal. 2d 765, 382 P.2d 369, 31 Cal. Rptr. 329 (1963).

Governors. Petitioner is not excused from presenting his defenses at the local committee hearings simply because he did not know mental incompetence was a defense. Mental incompetence has been considered in previous State Bar disciplinary proceedings and petitioner is charged with knowledge of those cases.⁷³

The court went on to observe that when an attorney's mental incompetence rendered him unable to form the intent required for establishing an offense, he should not be disciplined or disbarred; rather, he should be prohibited from practicing law during the period of his disability and should be enrolled as an inactive member of the bar.

Subsequent case law in California seems not to have embraced the *Hyland* dictum to any appreciable extent; in fact, it has shown *Hyland* to be something of an aberration. In one 1973 case, expert psychiatric testimony concerning "psycho-neurotic difficulties" appears to have supported the California Supreme Court's dismissal of misconduct charges which were not viewed as involving moral turpitude or impairment of capacity for honest professional performance.⁷⁴ However, these cases seem to be isolated, and in the face of serious offenses clearly involving moral turpitude, the California Supreme Court has not hesitated to impose disbarment or other discipline even though the offending conduct may have been caused or contributed to by mental illness or psychosis.⁷⁵

Mental Disability or Stress as a Mitigating Factor, but No Defense

The third case law approach stresses the mitigating effect of conduct arising from mental disorder and, most frequently, is applied to emotional and psychological problems falling short of mental illness. Although it is conceptually, and by implication, a variant of the "no defense" school, the cases often make no statement either way about the insanity defense, but rather focus on the extent to which discipline should be applied. Conceding that mental strain or extremity in no way excuses misconduct, judges seem willing to count aberrant episodes and psychological problems (usually short of mental illness) as mitigating factors in determining the appropriate extent and nature

73. *Id.* at 774, 382 P.2d at 374, 31 Cal. Rptr. at 334.

74. *In re Fahey*, 8 Cal. 3d 842, 505 P.2d 1369, 106 Cal. Rptr. 313 (1973) (failure to file returns and pay federal income taxes for 3 successive years); *cf. In re Craig*, 12 Cal. 2d 93, 97, 82 P.2d 442, 444 (1938).

75. *See, e.g., In re Abbott*, 19 Cal. 3d 249, 561 P.2d 285, 137 Cal. Rptr. 195 (1977) (undisputed diagnostic evidence of manic depressive psychosis at time of offense); *Snyder v. State Bar*, 18 Cal. 3d 286, 555 P.2d 1104, 133 Cal. Rptr. 864 (1976) (manic depressive type of disorder held not to excuse forgery of court documents).

of disciplinary measures. Especially when misconduct is a by-product of stringent circumstances, such as financial or family crises, the presence of mental problems in these cases can lighten the disciplinary imposition.

A decision that articulates this viewpoint well is *Hoffman v. New York State Bar Association*.⁷⁶ On numerous occasions, the defendant attorney delivered certified copies of nonexistent divorce decrees. He also neglected to commence arbitration proceedings on behalf of clients. But Hoffman suffered from hypoglycemia, a pre-diabetic condition that on an episodic basis causes mental impairment characterized by confusion, forgetfulness and defects in judgment. In the opinion of medical experts, it was the hypoglycemia which accounted for Hoffman's conduct; no willful or deliberate intent to deceive his clients was found to exist. The court did not find the condition a defense to the disciplinary actions, but did treat the disorder as a "mitigating factor" in arriving at the extent of discipline to be imposed.

An earlier New Jersey case took a similar tack on charges of commingling client trust funds with personal funds. In *In re Gelzer*,⁷⁷ the court rejected the attorney's attempted mental duress defense, stating that personal financial stress and its accompanying emotional disorganization provided no excuse for professional violation. At the same time, the court found that these factors might be considered in mitigation, and presumably did so in imposing a one-year suspension.⁷⁸

Another jurisdiction in which the mitigation approach seems to be making inroads is California. Essentially a state which rejects the insanity defense, the supreme court articulated a hard public protection policy in *Grove v. State Bar of*

76. 41 App. Div. 2d 998, 343 N.Y.S.2d 994 (1973).

77. 31 N.J. 542, 158 A.2d 331 (1960).

78. See *Florida Bar v. Price*, 348 So. 2d 887 (Fla. 1977) (severe personal problems resulting in "emotional stress" accepted in mitigation and reprimand and one month suspension imposed for failure to file pleadings and entry of false satisfaction of judgment); *Louisiana State Bar Ass'n v. Stevenson*, 356 So. 2d 887 (La. 1978) ("depersonalization neurosis" accepted as mitigating factor in imposing 3-year suspension of attorney convicted of credit card fraud); *St. Pierre's Case*, 13 N.H. 149, 304 A.2d 88 (1973) (attorney, who was addicted to medication prescribed by a doctor for energy and weight problems, and who was convicted for failure to file tax returns, could not dispense with disciplinary action, but addiction was a factor considered in assessing the severity of the sanction); *In re Wasserman*, 50 App. Div. 2d 299, 377 N.Y.S.2d 487 (1975) (correction of 11 of 13 neglected matters to client's satisfaction and "chronic moderately severe depression of neurotic type" as a contributing factor in such neglect considered as mitigating factors in a two-year suspension); *In re Gardner*, 39 App. Div. 2d 84, 332 N.Y.S.2d 113 (1960) (severe mental and emotional strain occasioned by marital discord was recognized as a mitigating factor in suspension for negligent handling of an estate's stock shares).

California,⁷⁹ which has been extensively and continually cited in recent decisions imposing disbarment despite evidence of mental illness, extreme neurosis or heavy emotional strain:

We realize that in many cases psychoneurotic problems may underlie professional misconduct and moral turpitude. In this area our duty lies in the assurance that the public will be protected in the performance of the high duties of the attorney rather than in an analysis of the reasons for his delinquency. Our primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause, emotional or otherwise, for the attorney's failure to do so.⁸⁰

Two recent cases suggest a growing, albeit still sporadic, acceptance of the mitigation approach despite *Grove's* severe standard. In *Doyle v. State Bar of California*,⁸¹ the court stated:

Our guiding principle is that 'The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity for the protection of the public, the courts, and the legal profession.' [citation] Determination of the discipline to be imposed must be based on a 'balanced consideration of [all] the relevant factors' [citation], including any mitigating circumstances.⁸²

Doyle was a polio victim, and the court found that during the period in which his conduct took place, he encountered substantial domestic, business and emotional problems. Because of these mitigating factors (which went beyond emotional disability), the court imposed a suspension, stayed it, and placed Doyle on probation.

The court took the same approach in *Gassman v. State Bar of California*,⁸³ where an attorney who committed various improprieties in the course of practice had his suspension partially stayed because the court found he labored under severe emotional stress at the time of the misconduct. In so doing, the court recognized that "serious personal problems may be considered in mitigation."⁸⁴

In *Doyle* and *Gassman*, as well as in *In re Safran*,⁸⁵ the California Supreme Court employed a promising disciplinary measure—probation—as an additional protective device when staying suspension from practice.⁸⁶ This gradation in the disciplinary spectrum allows the court to take into account mitigat-

79. 66 Cal. 2d 680, 427 P.2d 164, 58 Cal. Rptr. 564 (1967).

80. *Id.* at 685, 427 P.2d at 167, 58 Cal. Rptr. at 567.

81. 15 Cal. 3d 973, 544 P.2d 937, 126 Cal. Rptr. 801 (1976).

82. *Id.* at 978, 544 P.2d at 939, 126 Cal. Rptr. at 803.

83. 18 Cal. 3d 125, 553 P.2d 1147, 132 Cal. Rptr. 675 (1976).

84. *Id.* at 133, 553 P.2d at 1151, 132 Cal. Rptr. at 679.

85. 18 Cal. 3d 134, 554 P.2d 329, 133 Cal. Rptr. 9 (1976).

86. See ABA STANDARDS, *supra* note 43, at Standards 6.7, 6.8 (suspension is considered a beneficial and preferred sanction).

ing circumstances, but still imposes a meaningful public protection sanction for an erring attorney who seems to have overcome his mental difficulties or is functioning well under active therapeutic supervision. The Oregon Supreme Court also used probation in two cases, *In re Wheelock*,⁸⁷ and *In re Ricketts*.⁸⁸ In both of these cases, probation was imposed not to punish the offenders, whose misconduct apparently resulted from psychiatric problems, but to protect the public from the risks of future professional misconduct.

Within those states advocating probation or other temporary disciplinary imposition, a common condition is that the attorney maintain a continuing program of psychiatric or other therapeutic treatment. At least one state recognizing mental disability (and alcoholism or drug dependency) as a potential mitigating circumstance will regard failure to undertake or continue in treatment as an aggravating factor.⁸⁹ No reported cases have attempted to restrict the type or volume of practice that an attorney with a history of mental difficulty might engage in as an alternate "public protection" technique. However, a recent Texas decision, based upon a court-approved "letter of intention and assurances," set aside a twelve-year-old disbarment and restored an attorney's license to practice in certain specified "narrow areas" of competence and experience: real estate, probate (non-tax), uncontested family law cases, and lower court criminal cases.⁹⁰ This type of disposition, with its implicit recognition and concern that an attorney stands as a potential public hazard if he crosses a certain line in the bounds of his practice, is something that courts have been hesitant to acknowledge. It merits close attention, and may enjoy some future application within the new flexibility being accorded to disability dispositions.

To some extent, the question of moral turpitude in attorney misconduct has determined the weight assigned to exonerating circumstances, as has been evidenced by the California court decisions. These cases have emphasized rather consistently that the public protection policy behind lawyer discipline prohibits a total defense or excuse for conduct driven by mental or emotional instability. However, such factors should, depending on the seriousness of the offense, be relevant to the choice of sanctions and extent of court supervision of future conduct.

87. 439 P.2d 872 (Ore. 1968).

88. 439 P.2d 873 (Ore. 1968).

89. Letter from R. W. Bachman, Administrative Director, Minnesota Professional Responsibility Board to authors (September 12, 1978).

90. *Rohlf v. Texas*, No. F-240, 120 (Bexar County, Texas, April 19, 1978).

CONCLUSION

The states are in substantial accord that to allow a mentally incompetent attorney to practice law would endanger the legal system and the public. The ABA Code of Professional Responsibility and at least thirty-two states' disciplinary rules call for the suspension or transfer to inactive status of incompetent attorneys prior to commission of misconduct. These rules seem so natural and essential that the law's previous lack of concern for mental illness among attorneys is surprising and, in some ways, even shocking. In the past, mentally ill attorneys unable to properly serve clients were allowed to practice until their behavior became so obviously unprofessional or resulted in such serious harm that standard disciplinary proceedings could begin. In other cases, attorneys whose mental illness was temporary were permanently disbarred and thus denied the opportunity to rehabilitate themselves, their legal careers destroyed because of one unfortunate period of incapacity.

Most jurisdictions now accept current mental disability, at least where classical psychosis or mental illness is involved, as a bar or "defense" to disciplinary proceedings, and many seem increasingly willing to seek inactive enrollment or medical suspension as the proper discipline for an attorney whose serious mental difficulties have led or contributed to actionable misconduct. This trend, however, has not involved an increase in the few jurisdictions which accept mental impairment at the time of misconduct as a full defense in disciplinary proceedings. Further progress toward acceptance of such a defense might or might not be a salutary development. Nor are the underlying concepts invulnerable to attack on philosophic grounds.

Critics of the insanity defense to criminal charges are numerous. Their criticism focuses primarily on the unreliability of psychiatric testimony and the nebulous nature of insanity and incompetence as concepts.⁹¹ These doubts apply equally in disciplinary proceedings. Additionally, these cases provide numerous examples which suggest how a lawyer whose affairs, both professional and personal, are "falling apart" and who has engaged in unethical practice and been brought to account for his misconduct, might readily generate expert psychiatric opinion or argument about severe emotional difficulty or mental disor-

91. *E.g.*, Weintraub, *Remarks Before the Annual Judicial Conference of the Second Judicial Circuit of the United States*, 37 F.R.D. 365, 369-75 (1964); *State v. Lucas*, 30 N.J. 37, 61-64, 152 A.2d 50, 74-77 (1959) (Weintraub, C.J., concurring). *See also* Szasz, *The Insanity Plea and the Insanity Verdict*, 40 TEMP. L.Q. 271, 281-82 (1967); B. WOOTEN, *CRIME AND THE CRIMINAL LAW* chs. 2 & 3 (1963); B. WOOTEN, *SOCIAL SCIENCE AND SOCIAL PATHOLOGY*, ch. 8 (1959).

der. The incapacity factor is frequently legitimately present in these complex and multifaceted "professional crisis" situations; hence, the observed close attention in many cases to differentiating between full-blown mental illness and less disabling personality, emotional and neurotic disorders.

The mental incapacity defense has its supporters too. Disability suspension or inactive status without the onus of adjudicated misconduct is readily available and accomplishes what disbarment seeks to do. But, as many courts have pointed out, while disbarment—or at least its stigma—is permanent, suspension allows for rehabilitation. Periodic judicial or bar association review of a suspended attorney's mental state seems to require modest effort, and termination or suspension can be coupled with retesting requirements or a period of probation and supervision when practice resumes.⁹² These techniques, moreover, can assist in guaranteeing to clients a measure of protection from incompetent attorneys, while ensuring that cured attorneys will be prohibited from practicing no longer than is necessary.

The legal import of mental disability in disbarment proceedings remains uncertain. The need for preventive suspension upon the finding of incompetence has been recognized, yet bar associations and courts infrequently pursue this option.⁹³ As for the incompetence defense to disbarment, many states continue to ignore it, and even "enlightened" states continue to stress the primacy of public protection over individual interest when their courts and disciplinary apparatus disbar an attorney and ignore mental illness as an exonerating factor in his serious misconduct.⁹⁴ Overall, however, a willingness to accept mental disability as at least a legitimate mitigating factor, as is proposed in the new ABA Standards for Lawyer Disciplinary and Disability Proceedings, while leaving the door open for future restoration, seems to be gaining ground.

Thirty years ago, most courts dismissed mental impairment as an unacceptable excuse for unprofessional actions. Today, even in a period of post-Watergate sensitivity to the "appear-

92. See notes 79-86 and accompanying text *supra*.

93. See Annot., 50 A.L.R.3d 1259, 1261 (1973) (comprehensive collection of relevant cases indicate few decisions recognizing the insanity defense).

94. See, e.g., *In re Abbott*, 19 Cal. 3d 249, 561 P.2d 285, 137 Cal. Rptr. 195 (1977); *Snyder v. State Bar*, 18 Cal. 3d 286, 555 P.2d 1104, 133 Cal. Rptr. 864 (1976); *Duggan v. State Bar*, 17 Cal. 3d 416, 551 P.2d 19, 130 Cal. Rptr. 715 (1976). In these cases, the courts, faced with serious misconduct and claims of mental illness in defense or exoneration, affirmed local disciplinary and state board recommendations of disbarment while conceding mental illness as a major causative factor. The theme was common, centering on the passage quoted at text accompanying note 80 *supra*.

ance" of professional misconduct, courts and the law seem to have grown increasingly sensitive to the dynamics behind and distinctions between misconduct caused by mental disability and that attributable to ethical dereliction and moral irresponsibility. They seek to keep mentally incompetent lawyers from unsuspecting clients but, at the same time, avoid impenetrable barriers against once-mentally ill lawyers who have proved themselves again healthy and ready for the stresses and demands of professional practice. In theory at least, this offers an optimal balance between the imperatives of public trust and professional responsibility on the one hand and the right of professionally trained and accredited persons to pursue their calling when clearly able to do so on the other. Let us hope that evolving legislation, rules, precedent and judicial/disciplinary practice work to maintain, safeguard and add increasing precision to that balance.