Attorney-Client—Disciplinary Proceedings—Mental Competency

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University of Washington, but that the University itself is not exempt from the APA. In summary, the Nostrand case (1) creates confusion on the injury a plaintiff must suffer before having standing to challenge a state statute, (2) sanctions the discharge of state employees for refusal to swear a loyalty oath without an opportunity for a statutory hearing to explain the refusal, and (3) seems to exempt the University of Washington from the state Administrative Procedure Act. Nostrand, however, does put Washington in accord with a majority of states which allow creation of employment qualifications in the form of loyalty oaths.

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ATTORNEY-CLIENT

Disciplinary Proceedings—Mental Competency. May mental irresponsibility be an effective defense in disciplinary proceedings brought against an attorney? The Washington court answered in the affirmative in the recent case of In re Sherman, setting forth the requirements for such a defense.

In 1960 the Board of Governors of the Washington State Bar Association recommended “the disbarment of Arthur Eber Sherman, Jr., for making false answers in his application for admission [by examination] to practice law in the state of Washington.” The board also recommended a reprimand for insulting and contemptuous petitions for

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46 Subsequent to Nostrand, the Washington Supreme Court determined that the state APA repealed, by implication, a long standing statute which required appeals involving the Public Service Commission to be filed within twenty days of judgment rather than thirty. See Herrett Trucking Co. v. Washington Pub. Serv. Comm’n, 58 Wn.2d 542, 364 P.2d 505 (1961). Query, if the court could find legislative intent to repeal such a long standing statute, why could it not find a similar intent to repeal statutes relating to the operation of the University of Washington?

47 After this note was written, the plaintiffs’ appeal to the Supreme Court was denied in a per curiam decision on the ground that there was no substantial federal question. 368 U.S. 436 (1962).


2 RCW 2.48.060. “Admission and disbarment. The said board of governors shall likewise have power . . . to investigate, prosecute and hear all causes involving discipline, disbarment, suspension or reinstatement, and make recommendations thereon to the supreme court . . . .”

3 In re Sherman, 156 Wash. Dec. 531, 354 P.2d 888 (1960). In December, 1956, Sherman applied for permission to take the Washington bar examination. After falsely stating that he had never before taken another bar examination, he ignored the question, “If so, were you successful?” In fact, Sherman had twice taken, and failed, the California bar examination. He had twice taken, and failed once, the Oregon bar examination.
rehearing which Sherman had filed with the Oregon Supreme court while a party to litigation there.

In the first *Sherman* decision, the court was satisfied that a case had been made against Sherman, but it expressed concern as to whether he was mentally responsible for what he had done. Because of this concern, the court remanded to the Board of Governors of the Washington State Bar Association for further investigation into Sherman’s mental condition, both at the time of the alleged misconduct and at present. The court made it clear that the burden of proof was upon Sherman.

On rehearing of *In re Sherman*, the court, adopting the suggestion of *amicici curiae,* indicated its present acceptance of these rules:

A. Mental irresponsibility is a complete defense to conduct of an attorney which would otherwise warrant disciplinary action: (1) if such conduct was the result or the consequence of mental incompetency; and (2) if the mental condition which was responsible for such conduct has been cured so completely that there is little or no likelihood of a recurrence of the condition. The burden of proof of this defense, in all of its aspects, is upon the respondent attorney.

B. If the respondent attorney is able to carry the burden of proof as to his mental irresponsibility at the time of the conduct of which com-

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4 Sherman’s record of mental problems began in 1946, when he was discharged from the United States Army Air Corps with honors and decorations, but also with a diagnosis of “combat fatigue.” He was admitted to the University of Michigan hospital in 1946 and his case summary included the following: “During his hospitalization the patient demonstrated very asocial behavior. He was very antagonistic and lacking in desire to be friendly or cooperative.

‘‘...If the patient will accept psychotherapy it is felt that psychiatric aid would be very desirable.’’

He again entered the university hospital in February, 1953. His case summary included the following: “He demonstrated marked hostility of a diffuse nature which did not suggest any paranoid tendency. The patient had no insight into his difficulty and also had difficulty distinguishing fact from fantasy, although he appeared to be in good contact and was oriented...[H]owever, his judgment was quite good...The consultant felt that he was a schizophrenic of the simple type, but felt that nothing could be done about this immediately...”

‘‘...Recommendations: The patient should be observed for further change in his psychiatric condition and if he becomes paranoid, it would seem highly advisable to carry out commitment at that time.’’ *In re Sherman*, 156 Wash. Dec. 531, 532-33, 354 P.2d 888-89 (1960).


6 The Honorable John J. O’Connell, Attorney General of the State of Washington, and George Neff Stevens, Dean of the University of Washington School of Law, Dean Stevens’ recommendations are discussed in his article, *The Lawyer’s Mental Health and Discipline*, 48 A.B.A.J. 140 (1962).

plaint is made, but is unable to prove recovery to the extent indi-
cated in 'A' and the court has reason to believe that such recovery is
possible, he will be suspended until such time as he can prove such
recovery—otherwise, he shall be disbarred.8

In the first Sherman case, the court indicated a willingness to follow
such a procedure when, as a prelude to deciding what action to take, it
remanded for an investigation of Sherman's mental condition. How-
ever, the court did not indicate specifically the consequence of a finding
of mental irresponsibility, either when the misconduct occurred or at
present. Nor did it state what disposition should be made of the case if
Sherman established his past incompetency, but successfully carried the
burden of proving his present competence and capability to practice
law. The second Sherman case answers these questions and becomes
the first Washington case to clearly recognize mental irresponsibility as
a possible defense to conduct which would otherwise warrant discipli-
nary action.

The only prior Washington case dealing with the problem is In re
Durham.9 The disciplinary proceeding was commenced following Nel-
son Durham's trial in July, 1951, for accepting the earnings of a pro-
stitute. In the criminal action the jury found that he had committed the
acts charged, but held him not guilty by reason of insanity. He was
committed on January 25, 1952. Two weeks later he was released on a
court order finding that he was sane, safe to be at large, and that there
was little or no likelihood of a recurrence of his condition.

In subsequent disciplinary proceedings, the supreme court rejected
the Board of Governors' recommendation that Durham be suspended
for two years and until he submitted satisfactory evidence of his com-
petence to practice law. The court disbarred him because it felt his
continued membership in the bar would be detrimental to the public,
since it could not "certify to the public that he is now worthy of trust
and confidence or that he will be in the future..."10 Because of
Durham's present incompetency to practice law, the court was not
forced to determine the consequences of mental incompetency when the
misconduct occurred.

8 In re Sherman, 158 Wash. Dec. 399, 402, 363 P.2d at 392-93. The court cited these
cases in support of the rule: In re Chmelik, 203 Minn. 156, 280 N.W. 283 (1938); In
re Breeding, supra note 7; In re Freedman, supra note 7; In re Dubinsky, 256 App.
Div. 102, 7 N.Y.S.2d 387 (1938); In re Creamer, supra note 7; In re Durham, supra
note 7.
9 41 Wn.2d 609, 251 P.2d 169 (1952).
10 Id. at 613, 251 P.2d at 171. Durham's petition for reinstatement was denied in
As the second Sherman case indicates, the position adopted finds support in other jurisdictions. The standard presented by the Washington court has the advantage of being more precise than the other verbal standards pronounced from the bench. However, some jurisdictions, particularly Illinois and Louisiana, have adopted a contrary position, holding that mental irresponsibility is not a defense in disciplinary proceedings, even if the attorney can prove a complete recovery.

The position taken by the Washington court appears to be more in accord with the purposes of a disciplinary proceeding. The court has consistently held that the purpose of such proceedings is not punishment, but rather the protection of the public and the maintenance of high professional and ethical standards on the part of attorneys. Disbarment of an attorney whose misconduct was the result or consequence of mental irresponsibility, and who has since been completely cured, cannot be soundly rationalized on the ground of public benefit.

The probability of any future harm to the public is so slight that, when weighed against the harm to the attorney, disbarment would only be for punishment. When the attorney is unable to prove present recovery, but the likelihood of such recovery is strongly indicated, suspension pending proof of such future recovery also accomplishes the purposes of disciplinary proceedings. Suspension safeguards the public pending recovery and spares the attorney the stigma of disbarment, a needless punishment under the circumstances.

It is worthwhile to note the disparity relative to the defense of insanity which now exists in Washington. In criminal cases, the court adheres to the old "McNaghten" test of right and wrong. In fact, the court goes even further and requires not only that the accused not be able to distinguish right from wrong, but also that he not have the mental capacity to know the nature and quality of his act. The "Mc-
Naghten Case expresses these requirements in the disjunctive, not the conjunctive. Washington has also rejected both the defense of "irresistible impulse", a supplement to the McNaghten rule, and the Durham rule, a replacement of the McNaghten rule. This, added to the Washington requirement that the criminal defendant must prove his insanity by a preponderance of the evidence, makes the defense extremely difficult to establish.

In disciplinary proceedings, the Sherman cases give Washington a far more liberal approach when dealing with insanity. In fact, it is worthwhile to compare the Sherman rules with both the Durham rule and the rule proposed by the American Law Institute in its Model Penal Code. Rule A says: "If such conduct was the result or the consequence of mental incompetency . . . ." (Emphasis added.) The Durham rule, in its essence, is: "An accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." (Emphasis added.) The rule proposed by the American Law Institute is: "A person is not responsible if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law." (Emphasis added.) Because of the flexibility and special considerations present in disciplinary proceedings, it is arguable that the liberal approach of the two rules will not be extended into the more restricted and precedent-bound criminal area. As stated in the second Sherman case, "decisions in disciplinary matters are not precedents for any other class of cases."

Another significant aspect of the second Sherman case results from this statement: "We do, however, think it timely to state specifically

18 See note 15 supra.
19 Smith v. United States, 36 F.2d 548 (D.C. Cir. 1929).
23 State v. Clark, 34 Wash. 485, 76 Pac. 98 (1904). This case indicates that the following jurisdictions give the prosecutor the burden of disproving insanity, once the defendant has raised the issue: The Supreme Court of the United States, Florida, Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New York, Tennessee, Vermont and Wisconsin. In Commonwealth v. Clark, 292 Mass. 409, 198 N.E. 641 (1935), Massachusetts adopted a similar position.
26 MODEL PENAL CODE § 4.01 (Proposed final draft No. 1 1961). A rule very similar to that in the MODEL PENAL CODE was adopted by the Third Circuit Court of Appeals in United States v. Currens, 290 F.2d 751 (3rd Cir. 1961). The court rejected the phrase "to appreciate the criminality of his conduct" and substituted the phrase "to conform his conduct to the requirements of the law which he is alleged to have violated." Id. at 774. See also 23 U. Pitt. L. Rev. 239 (1961).
what we have heretofore implied but not clearly articulated, i.e., that a
disciplinary proceeding is a special proceeding, neither civil nor crim-
nal, incident to the inherent power of the court to control its officers and
is *sui generis*.

The court's definition of the nature of a disciplinary proceeding is welcome due to the confusion its past definitions have created. In *State v. Willis*, the court said: "It is true, we have held that a disbarment proceeding 'is in the nature of a civil action'... but we are of the opinion it is not a civil action in the strict sense...." *In re Jett* stated: "The answer to this is that the proceeding is a civil, and not criminal, one." *In re Little* recognized the difficulty of drawing an analogy from other legal proceedings and modified the *Jett* case by stating that a disciplinary proceeding is "quasi-criminal, in that it is for the protection of the public and is brought for the misconduct of the lawyer involved."

Because, as the court stated in *Sherman*, it has inherent power to control its officers, and because of the nature of the proceeding, the court indicated that it has a duty to insist upon a complete investigation of every facet of the case which is "relevant and material." Therefore, when the mental competency of an attorney is "relevant and material" to the ultimate decision, the court, as in the *Sherman* cases, will remand for a further investigation, even though the attorney has not previously raised the defense of mental incompetency.

The *Sherman* cases clearly indicate the Washington court's awareness of the dual purpose of a disciplinary proceeding. The promulgation of the two rules relative to the defense of mental incompetency, and the court's willingness to remand for additional investigation, illustrate the lengths to which the court is willing to go in order to fully and completely safeguard the attorney's interest, while simultaneously balancing and safeguarding the public interest. Whether the liberality of the new rules is indicative of the court's attitude toward the whole area of insanity and criminal responsibility remains to be seen.

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28 *Id.* at 400, 363 P.2d at 391.
29 95 Wash. 251, 252, 163 Pac. 737 (1917).
30 6 Wn.2d 724, 729, 108 P.2d 635, 637 (1940).
31 40 Wn.2d 421, 244 P.2d 255 (1952).
32 *Id.* at 430, 244 P.2d at 259.