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Attorney-Client—Disciplinary Proceedings—Mental Competency

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University of Washington, but that the University itself is not exempt from the APA.[46]

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.[47]

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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,*[1] setting forth the requirements for such a defense.

In 1960 the Board of Governors of the Washington State Bar Association recommended[2] "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."[3] The board also recommended a reprimand for insulting and contemptuous petitions for

[46] Subsequent to *Nostrand,* the Washington Supreme Court determined that the state APA repealed, by implication, a long standing statute which required appeals involving the Public Service Commission to be filed within twenty days of judgment rather than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).

[1] 158 Wash. Dec. 399, 363 P.2d 390 (1961) (on rehearing). The first decision is reported in 156 Wash. Dec. 531, 354 P.2d 888 (1960).

[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.[4] 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*,[5] the court, adopting the suggestion of *amici curiae*,[6] 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.[7]

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 does become 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).

[5] 158 Wash. Dec. 399, 363 P.2d 390 (1961).

[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).

[7] *In re* Sherman, 158 Wash. Dec. 399, 402, 363 P.2d 390, 392 (1961). The court cited these cases in support of the rule: Threrd v. United States. 354 U.S. 278 (1957); Cane v. State Bar of California, 14 Cal. 2d 597, 95 P.2d 934 (1939); *In re* Breding, 188 Minn. 367, 247 N.W. 694 (1933); *In re* Manahan, 186 Minn. 98, 242 N.W. 548 (1932); *In re* Freedman, 7 App. Div. 2d 447, 184 N.Y.S.2d 199 (1959); *In re* Gould. 4 App. Div. 2d 174, 164 N.Y.S.2d 48 (1957); *In re* Creamer, 201 Ore. 343, 270 P.2d 159 (1954); *In re* Durham, 41 Wn.2d 609, 251 P.2d 169 (1952).

> plaint is made, but is unable to prove recovery to the extent indicated 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. However, 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 disciplinary action.

The only prior Washington case dealing with the problem is *In re Durham*.[9] The disciplinary proceeding was commenced following Nelson Durham's trial in July, 1951, for accepting the earnings of a prostitute. 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 competence 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.

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[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* Breding, *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 *In re* Durham, 159 Wash. Dec. 197, 367 P.2d 126 (1961).

As the second *Sherman* case indicates,[11] 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[12] and Louisiana,[13] 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.[14] 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"*[15] test of right and wrong.[16] 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.[17] The *Mc-*

[11] See cases cited *supra* notes 7 and 8.

[12] *In re* Patlak, 368 Ill. 547, 15 N.E.2d 309 (1938).

[13] Louisiana State Bar Ass'n v. Theard, 255 La. 98, 72 So. 2d 310 (1954), *cert. denied*, 348 U.S. 832 (1954).

[14] *E.g., In re* Purvis, 51 Wn.2d 206, 316 P.2d 1081 (1957).

[15] McNaghten's Case, 10 Cl. & Fin. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843). "To establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."

[16] *E.g.*, State v. Cogswell, 54 Wn.2d 240, 339 P.2d 465 (1959); State v. Craig, 52 Wash. 66, 100 Pac. 167 (1909).

[17] State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957). By contrast, in People v. Sherwood, 271 N.Y. 427, 3 N.E.2d 581 (1936), it was held to be reversible error to use the conjunctive "and," instead of the disjunctive "or," when instructing a jury about the *McNaghten* rule.

Naghten Case expresses these requirements in the disjunctive, not the conjunctive.[18] Washington has also rejected both the defense of "irresistible impulse",[19] a supplement to the *McNaghten* rule,[20] and the *Durham*[21] rule, a replacement of the *McNaghten* rule.[22] This, added to the Washington requirement that the criminal defendant must prove his insanity by a preponderence of the evidence,[23] 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.)[24] 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.)[25] 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.)[26] 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."[27]

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).
[20] State v. Maish, 29 Wn.2d 52, 185 P.2d 486 (1947).
[21] Durham v. United States, 214 F.2d 862 (D.C.Cir. 1954).
[22] State v. Collins, 50 Wn.2d 740, 314 P.2d 660 (1957).
[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.
[24] *In re* Sherman, 158 Wash. Dec. 399, 402, 363 P.2d 390, 392 (1961).
[25] Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954).
[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).
[27] *In re* Sherman, 158 Wash. Dec. 399, 401, 363 P.2d 390, 391 (1961).

what we have heretofore implied but not clearly articulated, *i.e.,* that a disciplinary proceeding is a special proceeding, neither civil nor criminal, incident to the inherent power of the court to control its officers and is *sui generis.*"[28] 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,*[29] 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*[30] stated: "The answer to this is that the proceeding is a civil, and not criminal, one." *In re Little*[31] 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."[32]

Because, as the court stated in *Sherman,* it has inherent power to control its officers,[33] 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."[34] 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.
[33] *In re* Sherman, 158 Wash. Dec. 399, 400, 363 P.2d 390, 391 (1961). The Washington court originally recognized its inherent power in *In re* Lambuth, 18 Wash. 478, 51 Pac. 1071 (1898). Other cases to the same effect are: *In re* Bruen, 102 Wash. 472, 172 Pac. 1152 (1918); *In re* Robinson, 48 Wash. 153, 92 Pac. 929 (1907). RCW 2.48.060 recognized the court's inherent power.
[34] *In re* Sherman, 158 Wash. Dec. 399, 401, 363 P.2d 390, 391.