

INSANITY A DEFENSE IN DISCIPLINARY PROCEEDINGS

In re Bourgeois

25 Ill. 2d 47, 182 N.E.2d 651 (1962)

Defendant attorney commingled funds of his client with his own and converted the funds to his own use.¹ The Grievance Committee of the Chicago Bar Association recommended suspension of defendant from the practice of law for a period of five years to which defendant excepted and sought review. Defendant conceded his acts were improper, but argued that he should not be suspended because his acts were a result of severe mental and emotional strain brought on by domestic and business difficulties and that he had since recovered. Defendant introduced evidence showing that for a period of one year prior to these acts he had been taking psychiatric treatment.

The Ohio courts have never been presented with the issue of availability of insanity as a defense to disciplinary proceedings, and there is no statutory authority in any jurisdiction. Courts in other states have, however, dealt with it over the years and have developed two opposing views on the subject.²

The traditional view, and the one accepted by the Illinois courts prior to the instant decision, has been that insanity is neither a defense nor a mitigating consideration in disciplinary proceedings,³ and that insanity in and of itself, without any overt act or omission by an attorney, is sufficient reason for disbarment. This was originally due to the belief that an attorney's insanity required punishment, an idea fostered during times in which mental disorders were not understood and punishment was the only purpose in disciplinary proceedings. However, as the traditional view developed, the justification for it changed. Today the basis of this view is not punishment, but the idea that public protection from actions of attorneys suffering from mental disorders should be realized at all costs, even to the extent of sacrificing the practice of the attorney prior to the commission of any wrong by him.⁴

¹ The defendant, an attorney, was employed by a law firm which represented a life insurance company. Defendant handled the real estate closing transactions for the insurance company. On the occasion involved here he deposited \$15,500 in an escrow account with a title insurance company pending the approval of a title for a loan. The title was never approved, and the title insurance company sent a check back to defendant in repayment of the escrow deposit. Defendant deposited the check in his personal account and later wrote checks for the entire amount. Then he left the state for a period of three months, after which he returned and made full restitution. *In re Bourgeois*, 25 Ill. 2d 47, 182 N.E.2d 651 (1962).

² For a complete history of the development of the law in this area see Stevens, "The Lawyer's Mental Health and Discipline," 48 A.B.A.J. 140 (1962).

³ *In re Patlak*, 368 Ill. 547, 15 N.E.2d 309 (1938); *In re Heinze*, 233 Minn. 391, 47 N.W.2d 123 (1951); *Bruns v. State Bar of Cal.*, 18 Cal. 2d 667, 117 P.2d 327 (1941).

⁴ *In re Rothrock*, 16 Cal. 2d 449, 106 P.2d 907 (1940); The policy of prevention so as to avoid the need for cure is best illustrated by several early cases involving the related problem of alcoholism, *People ex rel. Ill. State Bar Ass'n v. Tracey*, 314 Ill.

The more modern view is that an attorney's insanity is a proper consideration in disciplinary proceedings.⁵ This approach was given lip service in dicta as early as 1896,⁶ but only within the last ten years has it been adopted by any court. The courts which take this view can be subdivided into two groups. One group, represented by *In re Sherman*,⁷ takes the approach that insanity is a complete defense to conduct which would otherwise warrant disbarment if (1) such conduct was the result of mental irresponsibility, and (2) if the mental condition responsible for such conduct has been cured so that there is little or no likelihood of a recurrence of the condition.

The second group of courts pay lip service to the idea that insanity is a complete defense, but they seem to treat it merely as a mitigating factor and not as a complete defense. These courts say that the primary consideration is the attorney's rehabilitation, but they nevertheless contradict themselves by setting a fixed period of suspension during which the attorney is not eligible for re-instatement under any circumstances.⁸ They ignore the possibility that the attorney may be rehabilitated at the trial or, if not then, at least at some time before the running of the fixed period of suspension. The present case is representative of this group of cases. Here the court has suspended the defendant for one year and thereafter until he is able to show his fitness to practice law.⁹

In this case the court further clouds the issue by speaking of the deterrent effect of the suspension on other attorneys.¹⁰ If the court were really

434, 145 N.E. 665 (1924); *In re Webb*, 37 S.D. 509, 159 N.W. 107 (1916); *Wood v. State ex rel. Boykin*, 45 Ga. App. 783, 165 S.E. 908 (1932). The view was clearly established that alcoholism itself was sufficient reason for disbarment and in the case of *Wood v. State ex rel. Boykin*, an attorney was actually disbarred for habitual drunkenness. In that case the action for disbarment was brought on the grounds of habitual drunkenness alone, no other wrong having been committed by the attorney. The court held that rehabilitation was no defense to the charge. The reason given by the court was the basic consideration of protecting the public.

⁵ *In re Creamer*, 201 Ore. 343, 270 P.2d 159 (1954); *In re Sherman*, 58 Wash. 1, 354 P.2d 888, 363 P.2d 390 (1961).

⁶ *In re Kennedy*, 178 Pa. 232, 35 Atl. 995 (1896).

⁷ *In re Sherman*, *supra* note 5; *In Matter of Fleckenstein*, 34 N.J. 1, 166 A.2d 753 (1960).

⁸ *In re Creamer*, *supra* note 5; *State of Florida ex rel. The Florida Bar v. Ruskin*, 126 So. 2d 142 (1961); *State of Florida ex rel. The Florida Bar v. Dunham*, 134 So. 2d 1 (1961).

⁹ *In re Bourgeois*, *supra* note 1, at 52, 182 N.E.2d at 654:

We feel that the fixed time of suspension is less important than that his suspension be continued until he establishes his complete rehabilitation.

But they nevertheless do set a very definite fixed time of suspension saying:

In view of all the attending circumstances we feel that a one year fixed suspension will suffice. Respondent is accordingly suspended from practice as an attorney at law for one year and thereafter until further order of the court. *Id.* at 52, 182 N.E.2d at 654.

¹⁰ *In re Bourgeois*, *supra* note 1, at 52:

The very fact that respondent will never be relieved of his suspension and

interested primarily in rehabilitation of the attorney it would not speak of the suspension in terms of deterrent effect. By speaking of deterrent effect the court implies that the purpose of suspension is partially one of punishment. This is inconsistent with the basic premise that the purpose of disciplinary proceedings is not punishment of the attorney, but the protection of the public under the traditional view, or rehabilitation of the attorney under the more recent view. Also, if we recognize that we are dealing with mental illness and that such illness was the cause of the problem at hand, it is difficult to imagine how such a suspension could ever have a deterrent effect on other attorneys with a similar illness.¹¹

The court should be commended for its switch away from the traditional view that insanity is no defense, but it should have treated insanity as a complete defense and not merely a mitigating factor. Based upon the assumption that the primary purpose of disciplinary proceedings is protection of the public and rehabilitation of the attorney, it is clear that the only reasonable approach to the problem is that taken in *In re Sherman*; that insanity is a complete defense to disciplinary proceedings, and that a showing of rehabilitation removes the need for suspension. Rehabilitation of the attorney removes the need for suspension because it eliminates the danger to the public and, in turn, the need for protection.

Consequently, a fixed period of suspension is never warranted in cases of insanity because a temporary suspension is protection enough until rehabilitation is shown, and after that no protection is needed. Fixed periods of suspension in these cases result in punishment, not protection. They are inconsistent with the protection and rehabilitation theories of disciplinary proceedings and should not be used.

never again be permitted to practice law in this state, unless he satisfactorily establishes his right thereto, should serve as a deterrent to others.

¹¹ It seems unlikely that one whose mental condition is such that he could sustain a defense of insanity would be able to give much rational thought to the possible consequences of his acts. It is therefore also unlikely that any court decision bearing on such possible consequences would have any deterrent effect on his acts.