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Article 8

Attorney-Client: Attorney Disciplined for Extra-Professional Conduct

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RECENT DECISIONS

Attorney-Client: Attorney Disciplined For Extra-professional Conduct—After defendant failed to file state income tax returns for two consecutive years, he was tried and convicted under section 71.11(42) of the Wisconsin Statutes. The Board of State Bar Commissioners then brought the instant action seeking disciplinary action by the Wisconsin Supreme Court. A court appointed referee found no actual criminal intent, fraud or moral turpitude and recommended dismissal of the action. Disregarding this recommendation the court affirmed the referee's findings but held that the attorney's conduct warranted a reprimand and ordered defendant to pay costs and expenses of the proceeding not exceeding $750.[1]

In its per curiam opinion the court specifically overruled the previous Wisconsin law in this area as contained in *State v. McKinnon.*[2]

> Defendant's conduct may show an inexcusable lack of moral sense regarding the discharge of his obligations as a private citizen to his government, but it is not within the scope of this court's authority to impose a discipline for conduct which has no relation to his duties and obligations as a lawyer, where the request for disciplinary action is based upon acts involving no moral turpitude.[3]

The Wisconsin court has defined moral turpitude as follows:

> Moral turpitude is an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.[4]

There appears to be a general trend toward the expansion of the attorney's standard of conduct, violation of which is punishable.[5] The general rule is stated in *Corpus Juris Secundum:*

> Attorneys, in performance of the obligations and duties assumed, must conform to certain standards in relation to their clients, to the court, to the profession and to the public, and an attorney can be deprived of his rights as an attorney by the judgement of the court for moral or professional delinquency. While a license to engage in the practice of law will not be revoked for trivial causes, impropriety, or breaches of good taste, discipline for misconduct is not limited to cases where the attorney's acts are infamous or of a gross or serious nature, and the

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[1] State v. Roggensack, 19 Wis.2d 38, 119 N.W.2d 412 (1963).

[2] 263 Wis. 413, 57 N.W.2d 404 (1953).

[3] *Id.* at 416-417, 57 N.W.2d at 406.

[4] State v. McCarthy, 255 Wis. 234, 249, 38 N.W.2d 679, 687 (1949).

[5] Helm, *Disciplining the Attorney for Extra-Professional Conduct,* 12 SYRACUSE L. REV. 487 (1961).

courts will ordinarily discipline for offenses involving moral turpitude.[6]

Expansion of the general rule has taken the form of enlargement of the definition of "moral turpitude" or substitution of a different test for evaluation of the lawyer's alleged misconduct.[7] The Wisconsin court has commendably refused to tamper with the definition of "moral turpitude" but in deciding this case has not laid down any firm test that may be applied to questionable conduct. In holding defendant subject to censure and discipline the court quoted from Canon 32 of the Canons of Professional Ethics of the American Bar Association,[8] "He (the lawyer) must also observe and advise his client to observe the statute law, . . ." and stated:

> The intentional violation of the tax laws is also a violation of Canon 32. . . . Governments cannot operate effectively unless their revenue laws are obeyed. Such a violation of the tax laws by an attorney is a matter of serious concern because he necessarily must advise his clients with respect to their obeyance of such laws. . . . The intentional failure to file income tax returns evinces an attitude on the part of the attorney of placing himself above the law. Such *an attitude does not befit a lawyer.* . . .
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> We do not wish to imply that every violation of law by an attorney will subject him to discipline. As a general rule, before such violation will be a ground for discipline it must entail moral turpitude. . . . Nevertheless, we deem intentional violation of the tax laws, even though without intent to defraud the government, an exception to this general rule *because in our opinion such intentional violation constitutes unprofessional conduct."*[9] (Italics supplied.)

Thus, apparently those violations of statute law which are intentional and, in the opinion of the supreme court, unprofessional conduct subject the attorney to discipline. Such unprofessional conduct is that attitude which does not befit a lawyer. This type of test would require a court decision for each new fact situation for it appears impossible to establish generally what attitudes do not befit a lawyer.

With the increased control being placed on the attorney by the supreme court and the existence of the integrated bar, this case and its rule places the attorney in the very precarious position of having to

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[6] 7 C.J.S. *Attorney & Client* §19 (1937).

[7] Helm, *supra* note 5.

[8] Rule 9 of the Rules of the State Bar of Wisconsin states: "The rules of professional conduct set forth from time to time in the Canons of Professional Ethics of the American Bar Association, as supplemented or modified by pronouncements of the court, shall be the standards governing the practice of law in this state."

[9] State v. Roggensack, *supra* note 1, at 45-46, 119 N.W.2d at 416-417. In a case handed down at the same time, the Wisconsin court suspended an attorney's license for two years after defendant was found guilty of filing false and fraudulent returns. State v. Cain, 19 Wis.2d 50, 119 N.W.2d 391 (1963).

guess when a statutory violation might result in censure, In other jurisdictions putting slugs in a parking meter,[10] writing checks without funds,[11] and being negligent in providing for safety of patrons in a night club[12] were found grounds for disbarment. Perhaps in Wisconsin a traffic violation or poker playing in the basement might have the same effect.

The majority of the court did not mention Wisconsin Statute, section 256.28, which has been interpreted as follows:

> . . . Under sec. 256.28 a lawyer found guilty of unprofessional conduct or an act involving moral turpitude may be suspended or disbarred from practice but no other penalty is provided.[13]

It would seem relatively easy for the court to construe this statute as permissive and not restrictive, therefore allowing the discipline to be other than suspension or revocation of defendant's bar license. Such an interpretation would avoid the questioning of the court's authority to discipline outside the statute, such authority being described in Justice Hallows' dissent as "a dangerous doctrine of inherent power."[14] The oft reiterated test of whether there is a likelihood, if discipline is imposed short of suspension or disbarment, of the attorney engaging in future unprofessional conduct could then be applied to ascertain the form of discipline.

Defendant, besides pleading illness, overwork and a failure of his accounting system, alleges:

> Defendant was never aware that his delay constitutes criminal conduct; indeed, at the time he failed to timely file, no individual in the State of Wisconsin had ever been subjected to criminal prosecution, although the statute had been in existence almost fifty years.[15]

Being an attorney, defendant had all the more reason to know the law and now use of the statute in question does not reflect on its use in this case. The court seems to have the correct object in mind but its approach is tedious. Such problems will always cause difficulty in reasoning to a result which seems unanimously desirable. As another writer has pointed out:

> Courts have not always concerned themselves with making a characterization as to moral turpitude with regard to the conduct of an attorney convicted of evasion of federal income taxes. [Evasion of federal income taxes is not considered as a criminal

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[10] Fellner J. Bar Association, 213 Md. 243, 131 A.2d 729 (1957).
[11] State v. Mannix, 133 Ore. 329, 288 Pac. 507, 290 Pac. 745 (1930).
[12] *In re* Welansky, 319 Mass. 205, 65 N.E.2d 202 (1946).
[13] State v. McCarthy, *supra* note 4, at 246, 38 N.W.2d at 685.
[14] State v. Roggensack, *supra* note 1, at 49, 119 N.W.2d at 418-419.
[15] Brief for Defendant, p. 6, State v. Roggensack, *supra* note 1.

charge involving moral turpitude because the majority of the courts do not consider fraud an element of the charge.][16] They have sometimes approached the problem as being one of whether there had been conduct below the level of behavior of attorneys and, if so, to what extent, for the purpose of determining the gravity of the punishment.[17] (Material in parentheses has been added.)

STEPHEN F. SCHREITER

Attorney-Client: Compensation of an Attorney Appointed to Defend an Indigent—Appellant, an attorney, was assigned by the circuit court to defend one of three indigents charged with the murder of a Wisconsin law enforcement officer. The jury trial of these three Illinois residents, after a change of venue, consumed thirty-nine and one-half days and resulted in the conviction of all three and sentences of life imprisonment. After the trial, appellant applied to the court for allowance of attorney fees and disbursements in the amount of $18,486.55. This amount included $10,556.30 for services rendered prior to the trial, $6,810.00 for services rendered during the trial and $1,120.25 for disbursements. It was computed at $100 per day in trial and $15 per hour in preparation. The circuit court refused to pay the full amount requested on the grounds that the trial was unnecessarily protracted and the amount of time spent in preparation was not reasonably necessary. The trial court allowed appellant a total of $6,500 without specifying how the amount was computed according to the various services rendered and the disbursements. On the attorney's appeal from the order, the supreme court awarded $1,120.25 for expenses in addition to the $6,500 awarded by the trial court.[1]

This case presented the supreme court with the problem of interpreting section 957.26 of the Wisconsin Statutes as it was amended by Chapter 500 of the Laws of 1961. This statute provides for compensation for an attorney assigned to represent an indigent charged with any felony. The amendment to the statute eliminated provisions for fixed fees[2] and directed that compensation be made "pursuant to §256.49," which provides that when any attorney has been appointed by a court, the court shall

. . . fix the amount of his compensation for the services and provide for the repayment of disbursements in such sum as the

[16] 47 KY.L.J. 256 (1959).
[17] Annot., 59 A.L.R.2d 1398 (1958).
[1] Conway v. Sauk County, 19 Wis. 2d 599, 120 N.W. 2d 671 (1963).
[2] "The county shall pay the attorney so appointed such sum as the court shall order as compensation and expenses, not exceeding $25 for each half day in court, $15 for each half day of preparation not exceeding 5 days, $15 for each half day attending at the taking of depositions . . ." WIS. STAT. §957.26 (1959).