Marquette Law Review

Volume 37
Issue 4 *Spring 1954*

Article 7

The Nature of Legal Disciplinary Proceedings in Wisconsin

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THE NATURE OF LEGAL DISCIPLINARY PROCEEDINGS IN WISCONSIN

The question of what body has jurisdiction over the conduct of attorneys has been definitely answered by the Wisconsin Supreme Court.[1] In *State v. Cannon,*[2] Justice Owen stated in the majority opinion: "It is not a power derived from the Constitution or statutes of this state. It is a power which is inherent in this court. It is a power that inheres because attorneys at law are officers of the court. Courts will defer to reasonable legislative regulations, but this difference is one of comity or courtesy, rather than an acknowledgment of power." Justice Crownhart concurred in the result but dissented on the question of the source of jurisdiction contending that the court derives all its power from the constitution and that it is subject to "reasonable" regulation by the legislature. In other jurisdictions it is uniformly held that attorneys are officers of the court and, as such, the court has the power to admit or to disbar them.[3]

The action by a court in disciplining an attorney is judicial in character, but the inquiry made is in the nature of an investigation by the court into the conduct of one of its own officers, and is not the trial of an action or a suit, the order entered being but an exercise of the disciplinary jurisdiction which a court has over its officers.[4]

Whether the statute of limitations is applicable in such a proceeding and whether a prior conviction can be relied upon to sustain on allegation upon a ground of *res adjudicata,* are two procedural questions which should be answered at the outset.

The Wisconsin Supreme Court has definitely answered the former in *State v. Haggerty*[5] where it held that:

> "The ordinary statutes of limitation have no application to disbarment proceedings, nor does the circumstance that the facts set up as a ground for disbarment constitute a crime, prosecution for which in a criminal proceeding is barred by limitations, affect the disbarment proceeding, except where the conviction of the crime for which the revocation of the attorney's license is asked is a necessary pre-requisite. However, proceedings instituted after a great lapse of time from the commission of the act complained of are regarded with disfavor, and the court may refuse to hear an application to disbar that has been unreasonably delayed."

On the question of the applicability of the doctrine of *res adjudicata*

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[1] State v. Richter, 187 Wis. 490, 204 N.W. 492 (1925); *In re* Stolen, 193 Wis. 602, 214 N.W. 397 (1927); *In re* Rubin, 194 Wis. 207, 216 N.W. 513 (1927).
[2] 196 Wis. 534, 221 N.W. 603 (1928).
[3] DRINKER, LEGAL ETHICS 42 (1953).
[4] AM. JUR. §287; *In re* Stolen, 193 Wis. 602, 214 N.W. 379 (1927).
[5] 241 Wis. 486, 6 N.W. 2d 203 (1942); 5 AM. JUR. §288; 2 THORTON, ATTORNEYS AT LAW, §880.

to disciplinary proceedings it has been held in the companion cases of *State v. O'Leary and Sullivan* that:[6]

> "A judgement of conviction cannot be urged to be conclusive against an attorney upon any ground of res adjudicata, even though the judgment has been rendered by a court of the same sovereignity. To hold otherwise would be virtually equivalent to making the conviction of crime involving moral turpitude an independent cause for disbarment. The legislature has not done this, and the court is of the opinion that such a rule is too stringent."

Here, "the sole inquiry is the moral character of the defendants. Neither their acquittal nor their conviction closes this inquiry."

It is noteworthy that, although the court does not specifically mention it, the obvious reason for denying the application of the doctrine of *res adjudicata* is that in a criminal prosecution and a disciplinary action neither the same parties nor their privies are involved.

If such a conviction is not conclusive, as we have seen it is not, what, then, is its effect upon the disciplinary proceedings? In the same case[7] the court held: "It is our conclusion that evidence of a conviction which stands unreversed, and which involves the solemn finding of a jury and the judgment of a court, that defendant has been guilty of acts involving such moral turpitude as to indicate his unworthiness to continue as a member of the bar, is not merely evidence of his guilt and his unfitness to practice law, but that *prima facie* it establishes both facts."

A recent and graphic example of the application of the rules stated in the *O'Leary-Sullivan Case* is to be found in *State v. McKinnon*[8] where it was held that conduct of an attorney in respect to delay in filing his income tax returns and paying his taxes for ten years was not justified and censurable, but that they were of a personal, not a professional, character and did not sustain a negative answer to the question of whether it is in the public interest to permit him to continue to practice law.

The court stated that, although the defendant's conduct showed an inexcusable lack of moral sense regarding the discharge of his obligations to the government, the conduct was not grounds for disbarment since it had no relation to his duties and obligations as a lawyer, and *since the proceeding was not based upon acts involving moral turpitude.*

The question was whether the defendant's payment of double taxes under 71.11 (6) Wisconsin Stats., where he was found to have in-

[6] 207 Wis. 297, 241 N.W. 621 (1932).
[7] *Ibid.* at 300.
[8] 263 Wis. 413, 57 N.W. 2d 404 (1953).

tended to defeat the assessment and collection of taxes[9] established a *prima facie* case of conduct involving moral turpitude.

In answering that question the court pointed out that in the tax assessment case, although no intent on the part of the defendant was proved, it had been assumed from the consequence of his failures in order that the defendant should not escape his lawful responsibility by an interpretation of the word "defeat" which "would make useless important processes of law in taxation matters. . . . In that case his 'reasons' for lack of attention to tax responsibilities had not the weight of evidence sufficient to excuse him from the application of the statute."

In the disciplinary proceeding, however, the court said that the question was whether the facts surrounding his failure to file establish actual intent and moral turpitude. In support of its negative reply to the query, the court cited the fact that, during the period of the defendant's delinquency, he frequently admitted to tax authorities that he knew that he had taxable income in all those years; that he did not destroy any of his records, checks, bills, receipts, or books, but rather had all of these available to himself and the tax authorities, and that, at no time, was it found either by the Supreme Court or the Circuit Court, that fraud or deception was involved in the defendant's failure to file.

Having considered the peculiar nature of the disciplinary proceeding in regard to the jurisdiction of the courts, and the applicability of the statutes of limitations and the docrine of *res adjudicata,* it is now necessary to realize that these proceedings are concerned with the primary question of whether the attorney's conduct has shown him to be of such a character that to allow him to continue in the practice of law would jeopardize the public's interest in the proper administration of justice.[10] The precise inquiry into the public interest grows out of the unique position of trust and confidence held by the attorney which makes him accountable in trust both to the courts and to the public which depends upon him in his professional capacity. "A license to practice law or any profession ought, by its very nature, to be an assurance of the moral fitness and professional competency of the licensee upon which those seeking his services may rely."[11]

If, then, the lawyer's position is one of trust,[12] what type of moral conduct is absolutely required of him? The Wisconsin court attempted

[9] McKinnon v. Dep't of Taxation, 261 Wis. 564, 53 N.W. 2d 169 (1952).
[10] State v. Schnorenberg, 208 Wis. 595, 243 N.W. 486 (1932).
[11] State v. Barto, 202 Wis. 345, 232 N.W. 553 (1930).
[12] "An attorney occupies a fiduciary relationship towards his client. It is one of implicit confidence and trust." *In re* Law examination of 1926, 191 Wis 359, 210 N.W. 710 (1926).

to answer this in the case of *In Re Richter*[13] where it cited with favor a dissenting opinion of Mr. Justice Field:[14]

> "It is not for every moral offense which may leave a stain upon character that courts can summon an attorney to account. Many persons, eminent at the bar, have been chargeable with moral delinquencies which were justly a cause of reproach to them; some have frequenters of the gaming table, some have been dissolute in their habits, some have been indifferent to their pecuniary obligations, some have wasted estates in riotous living, some have been engaged in broils and quarrels disturbing the public peace; but for none of these things could the court interfere and summon the attorney to answer, and, if his conduct should not be satisfactorily explained, proceed to disbar him. *It is only for that moral delinquency which consists in a want of integrity and trustworthiness, and renders him an unsafe person to manage the legal business of others, that the courts can interfere and summon him before them . . He is disbarred in such for the protection both of the court and of the public.*" (emphasis supplied)

The above quoted passage very narrowly restricts the ground for discipline to that of moral unfitness to advise and represent clients. However, the court, in that case, although holding the above quote as the general rule decided that an attorney who alleges in his answer, but offers no proof, that a woman who has brought an action against him for the value of domestic services, entered into an illegal contract to live in illicit relations with him, and rendered services incident to the relationship, was guilty of misconduct justifying the revocation of his license for advancing facts prejudicial to plaintiff's honor and reputation in violation of his oath, and was wanting in good moral character.

Thus, the court, by implication at least, added a second ground of discipline, *i.e.*, unworthiness to continue in the legal profession, which includes conduct which tends to bring the legal profession and the administration of justice into disrepute.[15]

Subsequent to the *Richter case, supra,* the Wisconsin court clarified the general rule laid down in that case that moral unfitness to advise and represent clients is a ground for discipline by saying: "But where there is lacking honesty, probity, integrity, and fidelity to trust reposed in him, *it matters not whether the lack of such virtues is revealed in transactions with clients, in the conduct of law suits, or any*

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[13] 187 Wis. 503, 204 N.W. 492 (1925).
[14] *Ex parte* Wall, 107 U.S. 265 (1882).
[15] *In re* Stolen, *supra,* n. 1; State v. Rysticken, 250 Wis. 128, 26 N.W. 2d 456 (1947); State v. Soderberg, 251 Wis. 223, 28 N.W. 2d 260 (1947). For further graphic examples of offenses which fall into this class, see DRINKER, LEGAL ETHICS at 44.

other business dealings or relations. These qualities are highly essential to the character of attorneys and judges."[16] (emphasis supplied)

More completely stated, then, the first general ground for discipline is moral unfitness to advise and represent clients as evidenced by conduct either in a strictly professional capacity or in any other capacity. In cases of this class, the most obvious illustration of the attorney's lack of moral fitness is in being proven guilty of flagrant disregard of the obligations of honesty, fidelity, candor, and fairness, which, as an attorney, he owes to his clients and to the courts.[17]

The second general ground for discipline, *i.e.,* unworthiness to continue in the legal profession, covers those cases in which the attorney, although apparently one who can be trusted to deal fairly with clients, has nevertheless done something so lacking in respect for the judicial office or for the good name of the profession that his appearance in court would be a scandal and contempt to the court or an outrage to the profession.[18] There are, of course, cases of misconduct which seem to fall within both general classes.[19]

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[16] *In re* Stolen, *supra,* n. 1 at 613; *In re* 0—, 73 Wis. 619, 42 N.W. 221 (1889), "The misconduct which will warrant suspension of an attorney is not limited to acts committed strictly in a professional character, but extends to all such misconduct as would have prevented an admission to the bar."

[17] See: Flanders et al. v. Keefe, 108 Wis. 441, 84 N.W. 878 (1901), defendant was disbarred for making and presenting to the court affidavits known to him to be false and for falsely pretending that he had served a notice of appeal on the clerk when he had actually placed the notice secretly in the clerk's files after the time had expired for such service; *In re* 0—, *supra,* n. 16, defendant was disbarred because, after acting for a claimant in a contest, he then instigated and conducted in behalf of another client a second contest against his former client, involving the same subject matter and based largely upon the same facts, and in such contest testified under oath against his former client using information acquired by means of his first employment; State v. Stetson, 203 Wis. 657, 234 N.W. 704 (1931), disbarred for petitioning the court to admit an alleged will to probate knowing it to be false and fraudulent document on the strength of his own perjured testimony; State v O'Leary, State v. Sullivan, 212 Wis. 314, 249, N.W. 519 (1933), disbarred for entering into a conspiracy to bribe and for attempting to falsify the record on their appeal from a conviction for this conduct; State v. Baer, 228 Wis. 363, 280 N.W. 325 (1938).

But see: State v. Ballentine, 231 Wis. 127, 285 N.W. 351 (1939), where defendant was suspended for one year for misappropriating a client's money and wilfully misleading a court into making an appointment of him to represent two defendant's in criminal cases without disclosing his arrangement with his clients and the fact that he had already received a part of his fee; State v. MacIntyre, 238 Wis. 406, 298 N.W. 200 (1941), where defendant was suspended for one year although guilty of subornation of perjury and conspiracy to obstruct justice in preparing a verified complaint for divorce setting forth false statements and of charging an excessive fee in settling an estate equal to twice the amount of the services rendered.

[18] See: *Ex parte* Wall, *supra,* n. 14, where defendant was disbarred for taking an active part in the staging of a lynching in front of the court house during the judge's lunch hour; *In re* Stole, *supra,* n. 1, where defendant was suspended for five years because, while acting as a judge of the superior court, he borrowed money from notorious bootleggers who were later brought before his court charged with violation of the liquor laws and because he knew the character of the persons with whom he was dealing and should

The specific duties and obligations as well as the proper professional demeanor of attorneys which come within the aforementioned general grounds have at least four sources. Statutory enactments on the subject may be found in Chapter 256, WIS. STATS., which lays down certain minimal requirements regulating the normative behavior of attorneys.[20] The Canons of Professional and Judicial Ethics of the American Bar Association are a reliable guide to the practicing lawyer. In regard to the force and effect of these Canons, although several states have enacted them or a similar code into law,[21] the Wisconsin Statutes make no mention of them. The Wisconsin court, although not officially adopting them as rules of court, has often cited the Canons in their opinions.[22]

The usages, customs, and practices of the bar and bench as handed down through the common law decisions and the commentators is undoubtedly the richest source of these duties and obligations, but are not so readily available.[23] Finally, those basic concepts of the moral law which guide the actions of all men are none the less applicable in policy considerations in the field of legal ethics.[24] It is not to be as-

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have known the reasons which prompted the loan; State v. Rysticken, *supra,* n. 15, where an attorney was retained and paid a retainer fee by defendants in an action, but did not serve an answer or notice of retainer, did not learn of a default judgment against his clients until an execution had been issued against them, neglected to get the judgment opened until too late to do so, and neglected for two years to do anything to dispose of the judgment in compliance with a promise made to his clients to save them harmless. *Held:* suspended for two years, subject to disbarment after two years upon failure to comply with certain conditions; State v. Soderberg, 251 Wis. 223, 28 N.W. 2d 260 (1947); State v. Richter, *supra,* n. 1.

[19] See: State v. Andrews, 206 Wis. 615, 240 N.W. 147 (1932), where defendant's course of misconduct covered a period of approximately nine years. Among other instances, he received and converted to his own use more than $2000 belonging to an insane woman, neither returning it nor accounting to the court for it. *Held*: disbarred; State v. Barto, *supra* n. 11, where defendant was disbarred for filing false documents, intentionally misrepresenting the facts to the court and clients, exacting extortionate fees, and showing professional incompetence to a degree that would have hindered admittance to the bar, if known; State v. Bonisz, 231 Wis. 157, 285 N.W. 386 (1939).

[20] *In re* Cannon, 206 Wis. 374, 240 N.W. 441 (1932) "The qualifications required of attorneys at law fixed by the legislature in order that the public interest may be protected constitute only a minimum standard. . . ."

[21] Drinker, *supra,* n. 3, at 23.

[22] Ellis v. Frawley, 165 Wis. 381, 161 N.W. 364 (1917); State v. Kiefer, 197 Wis. 524, 222 N.W. 795 (1929); State v. Ketchem, 263 Wis. 82, 56 N.W. 2d 531 (1953); State v. Kern, 203 Wis. 178, 233 N.W. 629 (1930); Hepp v. Petrie: Appeal of Meissner, 185 Wis. 355, 200 N.W. 857 (1925) "The American Bar Association has not attempted, nor does it attempt, to legislate for lawyers. . . ." Canons of ethics or rules governing professional conduct among attorneys derive "such authority as they have not from the fact that they are approved by the American Bar Association but because they are statements of principles and rules accepted and acknowledged by reputable attorneys wherever the common law of England obtains, and are recognized and applied by courts in proper cases."

[23] Drinker, *supra,* n. 3 at 22.

[24] SPAULDING, MORAL PHILOSOPHY 10 (1924); MCINTYRE, UNIVERSITY OF NOTRE DAME NATURAL LAW INSTITUTE PROCEEDINGS VOL. V, (Barrett's ed. 1953).

sumed, however, that these sources are mutually exclusive. Quite the contrary, each overlaps generously into the other leaving relatively few acts of conduct which have as their foundation only one particular source.[25]

Having seen the general grounds for discipline which arise from considering the principal question of whether the defendant should be permitted in the public interest to continue the practice of law,[26] we must now inquire into the importance of punishment in the view of the courts.

"Punishment of offending attorneys is neither the primary nor the ultimate purpose of disbarment proceedings, although it is an inevitable incident of a judgment of disbarment or suspension from practice," but "disciplinary measures should be at least co-extensive with an effective judicial disapproval of the confessed misconduct, so that they cannot be misunderstood or construed as an implied judicial endorsement" of the erring attorney.[27]

From this concept of the importance of punishment it can readily be seen that to say that specific acts are grounds for commencing a disciplinary proceeding is not to say that an attorney who is guilty of such acts will necessarily be disbarred. An examination of the Wisconsin Supreme Court decisions shows that there are three types of punishment which have been meted out in such proceedings: first, permanent disbarment;[28] second, temporary suspension with permission to apply for reinstatement;[29] and third, censure.[30]

The next question which presents itself is to determine what criteria the courts have considered in determining the type of punishment. From the opinions of the courts it may be seen that the justices have considered either one or more of at least six factors in determining whether the punishment should be permanent disbarment, temporary suspension from practice or censure.

First, the type and seriousness of the offending conduct. If the offense is one involving moral unfitness to advise and represent clients, this one factor alone is usually strong enough to warrant permanent disbarment.[31] However, this factor is not given so much weight in cases

[25] *Supra*, n. 21.
[26] *Ex parte* Wall, *supra*, n. 14.
[27] State v. Kern, *supra*, n. 22.
[28] *In re* Pierce, 189 Wis. 441, 207 N.W. 966 (1926); Flanders et al v. Keefe, State v. Stetson, and State v. Baer, *supra*, n. 17, State v. Soderberg *supra*, n. 18; State v. Andrews, *supra*, n. 19.
[29] State v. Ingram, 212 Wis. 142, 248 N.W. 915 (1933); State v. Rogers, 226 Wis. 39, 275 N.W. 910 (1937); State v. Maddock, 234 Wis. 441, 291 N.W. 347 (1940).
[30] State v. Clarke, 262 Wis. 594, 55 N.W. 2d 888 (1952); State v. Farmer, 253 Wis. 232, 33 N.W. 2d 135 (1948).
[31] State v. Kern, *supra*, n. 22, "Bribery and attempted bribery are indicative of deplorable moral turpitude on the part of offenders. The corruption of pub-

where the misconduct charged falls within the second general ground for discipline, *i.e.*, unworthiness to continue in the legal profession. It is rather considered more or less on a par with the other factors in the case.[32]

Second, the effect that the punishment may have upon other attorneys with a view of stamping out the evil. Third, the probability of reform of the offending attorney. Since these two factors will be discussed later in this article, they will not be elaborated upon here.

Fourth, the advanced age of the attorney. In *State v. Bradford*[33] the attorney induced a client, a guardian for minors, to loan trust funds on inadequate security for the benefit of the attorney in reliance on representations of personal responsibility of the attorney, who was in straightened financial circumstances. The attorney, who was also director of a bank, was indebted to the bank in a large amount when it closed and had participated as director in illegal extensions of large credits to himself and to other officers and directors. The court considered the age of the defendant (72 years old) and suspended him for two years.

Fifth, the circumstances surrounding the trying of the disciplinary action. Illustrations of this are the attorney's subjection to a protracted trial in the disciplinary action together with the wide publicity given to his misconduct,[34] the fact that the attorney served a jail sentence for sixty days and had virtually been out of the practice for a year and a half,[35] financial impoverishment and loss of practice as a result of the disciplinary proceeding,[36] and the fact that the offense upon which the disciplinary action was based had been committed twenty years previously and that it was publicized to the detriment of the attorney in his campaign for Circuit Judge.[37]

Sixth, the character and professional reputation of the attorney.[38] This factor is considered as evidencing the probability of reform of the offending attorney and his fitness to advise and represent clients in the future.

The rather obvious weakness in this method of determining the punishment to be exacted is the lack of certainty and uniformity which

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lic officers and employees, if not unequivocally condemned and emphatically checked, seriously imperils the safety and perpetuity of our institutions."

[32] State v. Rubin, 201 Wis. 30, 229 N.W. 36 (1930).

[33] 217 Wis. 389, 259 N.W. 101 (1935); see also State v. Ingram, *supra*, n. 29, where the court considered the fact that the attorney was sixty-five years old and in ill health as mitigating his punishment to suspension for two years.

[34] State v. Farmer, *supra*, n. 30.

[35] State v. Kuenzli, 212 Wis. 296, 249 N.W. 511 (1933).

[36] State v. Clarke, *supra*, n. 30.

[37] State v. Haggerty, 241 Wis. 486, 6 N.W. 2d 203 (1942).

[38] State v. McKinnon, *supra*, n. 8; State v. Schnorenberg, *supra*, n. 10; State v. Kern, *supra*, n. 22 .

is necessarily incident to the exercise of such broad discretion on the part of the court. An illustration of this may be noted from a comparison of two cases decided by the Wisconsin Supreme Court in 1929.

In *State v. Kiefer*[39] the attorney was charged with (1) procuring, through his brother, Frederick Kiefer, a contract from an injured party to prosecute the party's claim upon a contingent fee of fifty per cent of the amount received or recorded, (2) procuring this contract while the injured party was in the hospital suffering great bodily pain by placing it in front of the claimant and asking him to sign, without any explanation of the terms of the contract and without his reading it, (3) later settling the claim for $600, $300 of which was retained by defendant Kiefer, and (4) negotiating the settlement hurriedly, without any action having been instituted, and, apparently, with little consideration given to the seriousness of the injuries.

With reference to these charges the court agreed with the referee that the making of the contract was substantially as alleged, but that there were these further mitigating circumstances: (1) that defendant saw the claim agent twice, interviewed the claimant to get such further facts as he could, saw no opportunity to make a valid claim against the railway company, and after some negotiation agreed on a settlement for $600, which the claimant approved; and (2) that, although the claimant did not appreciate the meaning of the contract when he signed it, he realized it later and accepted $300 as his share.

The attorney was further charged with having pursued, for at least two years prior to April, 1927 (at which time the legislature enacted sec. 256.29 making solicitations of business a ground for disbarment, and fee-spliting a crime under sec. 256.45 of the Wisconsin Stats.), an organized system of soliciting personal injury cases. This organized system, in particular, follows. The defendant's brother acted as his solicitor. The brother's business card read "Claim adjuster for the injured," and contained the statement "If hurt and want damages collected, see me. No charge unless successful." In 1917 the brother copyrighted a twenty page circular, which he used in soliciting such cases, which was intended to foment and induce litigation solely for the profit of the solicitor and the attorney. He also used a form letter which went to prospects, containing his picture and on the margin pictures of different accidents. The defendant knew of the methods employed by his brother to get business and occupied adjoining offices with him with a common waiting room. The defendant paid his brother half of his fees from the cases which the brother procured as compensation for his soliciting.

With reference to these charges, the court advanced the following

[39] 197 Wis. 524, 222 N.W. 795 (1929).

facts as mitigating. (1) Prior to the statutory prohibition in 1927, such practice was the accepted custom in Milwaukee and nearly all personal injury cases were obtained by some sort of a solicitor. (2) When the circuit judges in *State ex. rel. Reynolds v. Circuit Court*[40] asked for voluntary full disclosure by attorneys engaged in such practices, the defendant was the first to respond, made a frank statement of his position, reported the cases he then had pending under such contracts, and discontinued taking cases so obtained. (3) The defendant had a very good reputation for honesty and fair dealing with his clients and others.

The court held on the first count that although the defendant had exacted an exorbitant fee, he had acted in good faith believing he was justified in so doing in light of the prevailing practice in Milwaukee County at that time. The recovery of the excess of a reasonable fee was left to Milwaukee County since the claimant was a public charge.

On the second count, the court agreed with the referee that, although solicitaton and fee-splitting are "offensively unprofessional, against public policy, in violation of good legal morals" and call for "substantial discipline," and notwithstanding the defendant's admittedly unethical conduct in this regard, in view of the mitigating circumstances mentioned above, it could not be said that "the defendant is of a character unfit to practice law" and that there was "no reason to question his future uprightness."[41]

In support of their order that the defendant be suspended for ninety days and pay the costs of the proceeding, ($391.40) the court stated: (1) that in view of the then recent and potent influences which were substantially stamping out the evils of "ambulance chasing," it was not necessary to prescribe a very severe penalty on the defendant calculated to have a deterring effect upon the profession generally; (2) that the court was satisfied that the defendant was fully convinced of the unprofessional conduct involved in his previous practices and that he was not likely to resort to them again; and (3) that although punishment is neither the primary nor ultimate purpose of disbarment proceedings, the minimum punishment that could not be construed as an implied judicial endorsement of the defendant's misconduct was the one ordered.

Approximately six months later, the case of *State v. Cannon* was decided by the Wisconsin Supreme Court.[42] There it was charged that the defendant: (1) began a personal injury action without authority from the injured man; (2) improperly displaced attorneys previously retained; (3) purposely and knowingly deceived courts; (4) collected

[40] 193 Wis. 132, 214 N.W. 396 (1927).
[41] *Supra*, n. 20, at 528.
[42] 199 Wis. 401, 226 N.W. 385 (1929).

exorbitant and unconscionable fees from his clients; and (5) commercialized his profession by the organized solicitation of business. The court ordered the defendant suspended for two years and that he pay the costs of the proceeding of more than $3,100 (compare to $391.40 in Kiefer case) with permission to seek reinstatement by the Supreme Court upon good cause shown. The majority opinion per Stevens, J. was concurred in by three other justices with Chief Justice Rosenberry and Fritz, J. taking no part and with Crownhart, J. writing a vigorous opinion dissenting in part.

In that dissent[43] it is evident that there was serious room for doubt as to whether the charges were amply supported by the evidence. In the matter of beginning an action without permission from the injured man, Crownhart, J. doubts the truth of the charge and says that, at its worst the action was commenced through a misunderstanding and was promptly dismissed upon the injured man's objection to its continuation. Of the two attorneys the defendant was accused of displacing, one testified that the defendant had not solicited the client and that he had been well treated by the defendant. As for misleading courts, the dissenter points out that the evidence was circumstantial within which there was room for varying inferences as to the fact and that "there is not a word in the record that he (the judge) was deceived."

In regard to collecting exorbitant fees only two cases were charged in both of which a legal contingent fee contract was involved, and the only claim that the fee was exorbitant is based upon a very favorable settlement. The dissent contends that "such a conclusion ignores entirely the basis of contingent-fee contracts" which is that the reasonableness of the fee must be judged by looking to see what the lawyer *averages* on such contracts and not by singling out one fortunate settlement or verdict while ignoring the many where little or no compensation was received. In regard to solicitation, Crownhart, J. pointed out that Cannon had not been proved guilty of any of the objectionable methods practiced in the *Kiefer case* and that Kiefer was acquitted of the charge of taking excessive fees although in one case he took a fifty per cent fee.

The dissent further argues that there was no substantial evidence that the defendant was dishonest or untrustworthy. In regard to punishment he adds "He has already suffered much. His character has been falsely assailed, as the referee has found. Some of the charges were grossly libelous, but by being given judicial dignity they were accorded the freedom of the press, and were published broadcast. . . . . Not only has he paid the penalty for his own mistakes, but, like Kiefer,

[43] *Id.* at 412.

he has been made a vicarious sacrifice."[44] The dissent was necessarily referred to at length in the *Cannon case* because it is only there that one is appraised of the fact that there are any mitigating circumstances in the case.

Although the facts in the two cases are not exactly similar, they are compared because of their proximity in time and because in both cases the matter of punishment was influenced by the same considerations; *i.e.* (1) the effect that it may have upon others with a view of stamping out the evil, (2) the probability of reform of the offending attorney, and (3) punishment.[45] In the *Kiefer case,* it felt that a severe punishment would have little effect upon other attorneys with a view of stamping out the evil and that a severe penalty was not necessary since there was a strong probability that the defendant would reform and not resort again to such questionable conduct; while in the *Cannon case* decided only six months later and set in the identical background of the *Kiefer case,* the court felt that a severe penalty would do much to affect the stamping out of the evil and that the defendant was not likely to reform.

In summary, then, we have seen that a disciplinary action is judicial in nature and an exercise of the disciplinary jurisdiction which a court has over its officers, that the ordinary statutes of limitations have no application in a disciplinary proceeding, and that the doctrine of *res adjudicata* is not applicable to a disciplinary proceeding even though the judgment has been rendered by a court of the same sovereignty, unless the judgment relied upon is a conviction which is, of itself, an independent ground for discipline.

The protection of the public interest is the primary purpose of a disciplinary proceeding from a consideration of which two general grounds for commencing a disciplinary action may be deduced: (1) moral unfitness to advise and represent clients as evidenced by the attorney's dishonest dealings with his clients, the courts, and his other associates in whatever capacity; and (2) unworthiness to continue in the legal profession, which includes conduct which tends to bring the legal profession and the administration of justice into disrepute.

Finally, the factors which the court considers in determining whether the punishment will be permanent disbarment, temporary suspension of license, or censure are: (1) the seriousness of the offending conduct; (2) the effect that the punishment may have upon other at-

[44] *Id.* at 418. See State v. Farmer, *supra,* n. 30, where it was held that the attorney's subjection to a protracted trial in a disbarment proceeding together with the wide publicity given to his misconduct, was sufficient punishment without the imposition of further discipline for his conduct of fraudulently procuring from opposite parties not represented by counsel written admissions although no use was made of the admissions.

[45] *Supra,* n. 39.

torneys with a view of stamping out the evil; (3) the probability of reform of the offending attorney; (4) the advanced age of the attorney; (5) the circumstances surrounding the trying of the disciplinary action; and (6) the character and professional reputation of the attorney.

O. MICHAEL BONAHOON