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tory package licensing is illegal because it violates the antitrust prohibitions against unlawful tying arrangements.

Since mandatory package licensing creates the possibility that a patentee may force licensees to take licenses under patents which the licensee would not otherwise take, and since mandatory package licensing may be used by a patentee to protect possibly invalid patents, it is submitted that the blocking-competing patent distinction is a weak ground for judging the legality of such an arrangement. The factors of coercion,⁴⁸ market dominance,⁴⁹ price control,⁵⁰ and effect upon competition⁵¹ seem to provide sounder bases for determining whether mandatory package licensing constitutes patent misuse.

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DISCIPLINING ATTORNEY FOR NONPROFESSIONAL CONDUCT

Membership in the bar is a privilege only for those who maintain good conduct in their professional and private lives.¹ When an attorney's nonprofessional conduct² evidences unfitness or a lack of personal honesty, a basis for discipline³ has been established.⁴

The recent case of *In re Morris*⁵ involved disciplining an attorney for misconduct in his private life. A New Mexico statute⁶ provides, "The commission of any act contrary to honesty, justice or good morals," is reason for discipline. Morris had been convicted of involuntary manslaughter, involving the death of five people, committed while driving under the influence of intoxicating liquor. An original

⁴⁸E.g., *Automatic Radio Mfg. Co. v. Hazeltine Research Corp.*, supra note 21.

⁴⁹E. g., *International Salt Co. v. United States*, supra note 26.

⁵⁰E.g., *United States v. Line Material Co.*, supra note 30.

⁵¹E.g., *International Salt Co. v. United States*, supra note 26.

¹In re Rouss, 221 N.Y. 81, 116 N.E. 782 (1917).

²Disciplinary proceedings may be invoked whenever it becomes necessary for the protection of the profession, the courts, and the public. In re Moon, 310 S.W.2d 935 (Mo. 1958).

³The sanctions imposed by disciplinary proceedings may be disbarment, suspension, or reprimand. There is generally no prescribed discipline for any particular type of conduct. Past good character and an attorney's record as a member of the bar, however, are considered in determining the extent of the sanctions to be imposed. In re Pinckney, 276 App. Div. 700, 96 N.Y.S.2d 865 (1950).

⁴In re Williams, 221 Minn. 554, 23 N.W.2d 4 (1946); *State ex rel. Neb. State Bar Ass'n v. Fitzgerald*, 165 Neb. 212, 85 N.W.2d 323 (1957); In re Brown, 64 S.D. 87, 264 N.W. 521 (1936).

⁵397 P.2d 475 (N.M. 1964).

⁶N.M. Stat. Ann. § 21-2-1(3) (2.04) (Supp. 1963).

proceeding was brought before the New Mexico Board of Bar Examiners to suspend Morris' right to practice law. Morris argued that driving under the influence of intoxicating liquor is only a misdemeanor, and the fact that the result was unintended does not alter the nature of the act. Thus, Morris was contending that his act was not such that could be considered "contrary to honesty, justice or good morals."

The New Mexico Supreme Court rejected Morris' argument and held that the offense of involuntary manslaughter, although arising out of a misdemeanor, was clearly a felony and of such character as to be considered "contrary to honesty, justice or good morals." The court indicated that it was difficult to imagine a felony that is not "contrary to honesty, justice or good morals," although it was not prepared to declare that disciplinary action is either justified or required in every case where a felony had been committed. The court stated that moral turpitude was not a consideration.

Justice Noble, in a dissenting opinion, stated that an act "contrary to honesty, justice or good morals," meant the same thing as moral turpitude.

The courts in all states have authority to discipline attorneys for nonprofessional misconduct.⁷ Almost every state has some statutory authority covering the conduct of attorneys.⁸ These statutes fall into two categories: those which detail the specific grounds for disciplinary action,⁹ and those which make general statements of policy for the courts to interpret and enforce.¹⁰ Where there is no statutory authority the court will rely on its inherent power to regulate the administration and discipline of its attorney officers.¹¹

⁷Virtually every state gives some statutory authority. *Infra* note 8. In many of the statutes professional and nonprofessional misconduct is covered. E.g., Cal. Bus. & Prof. Code § 6106; Md. Ann. Code art. 10, § 16 (1957); N.Y. Judiciary Law § 90. New Jersey gives its courts authority by constitutional provision. N.J. Const. art. VI, § 2(3).

⁸For a compilation of the statutes and rules concerning discipline of attorneys, see Brand, *Bar Associations, Attorneys and Judges* 914-1036 (1956), 289-312 (Supp. 1959).

⁹E.g., Ariz. Rev. Stat. Ann. § 32-267 (1956); Iowa Code Ann. § 610.24 (1950); N.C. Gen. Stat. § 84-28 (1965).

¹⁰E.g., Md. Ann. Code art. 10, § 16 (1957); N.Y. Judiciary Law § 90; Va. Code Ann. §§ 54-73 (1950).

¹¹In *re Cox*, 164 Kan. 160, 188 P.2d 652 (1948); In *re Tracy*, 197 Minn. 35, 266 N.W. 88 (1936); *Barnard's Case*, 131 A.2d 630 (N.H. 1957).

The Canons of Professional Ethics of the American Bar Association are not binding upon the courts, but rather are a guide to the attorney's professional conduct. In *re Mitgang*, 385 Ill. 311, 52 N.E.2d 807 (1944).

In most nonprofessional misconduct cases the ground for discipline is the commission of a crime,¹² the most common ground being a felony conviction.¹³ Under some statutes, discipline is required only where the felony involves moral turpitude.¹⁴ In other statutes moral turpitude is not an express requirement.¹⁵ Where an attorney has been convicted of a misdemeanor many jurisdictions specifically require disciplinary action only if the misdemeanor involves moral turpitude.¹⁶ A misdemeanor not involving moral turpitude ordinarily is not thought to reflect upon the attorney's fitness to practice law.¹⁷

The usual requirement of moral turpitude was not a factor in the majority's holding in *Morris*¹⁸ that involuntary manslaughter was an act "contrary to honesty, justice or good morals." In the only other

¹²Disciplinary Comm'n v. Worrell, 201 N.E.2d 330 (Ind. 1964) (passing counterfeit United States obligations); In re Welansky, 319 Mass. 205, 65 N.E.2d 202 (1946) (involuntary manslaughter); In re Meyerson, 190 Md. 671, 59 A.2d 489 (1948) (procuring abortion); In re Williams, 221 Minn. 554, 23 N.W.2d 4 (1946) (tax evasion); In re Wright, 248 P.2d 1080 (Nev. 1952) (conspiracy); In re Belluscio, 38 N.J. 355, 184 A.2d 864 (1962) (no funds check); In re Devine, 18 N.J. 67, 112 A.2d 726 (1955) (obtaining money and property by false pretenses); In re Steinberg, 12 App. Div. 2d 331, 211 N.Y.2d 527 (1961) (forgery); In re Patrick, 136 App. Div. 450, 120 N.Y. Supp. 1006 (1910) (murder); Butler County Bar Ass'n v. Schaeffer, 172 Ohio St. 165, 174 N.E.2d 103 (1961) (attorney obtained narcotic drugs by using a forged prescription); In re Bengtson, 230 Ore. 369, 370 P.2d 239 (1962) (embezzlement); In re Wolfe's Disbarment, 288 Pa. 331, 135 Atl. 732 (1927) (receiving stolen goods); In re Dalton, 375 P.2d 258 (Wash. 1962) (grand larceny).

The misconduct sufficient to warrant discipline may occur while the attorney is acting in a non-legal occupational capacity. The same standard of conduct is applicable. State ex rel. The Fla. Bar v. Clements, 131 So. 2d 198 (Fla. 1961) (insurance agent); In re Lynch, 238 S.W.2d 118 (Ky. 1951); State ex rel. Neb. State Bar Ass'n v. Butterfield, 169 Neb. 119, 98 N.W.2d 714 (1959) (notary); In re Chartoff, 16 App. Div. 2d 277, 227 N.Y.S.2d 578 (1962) (businessman). In only a few instances has an attorney who was convicted of a crime not been disciplined. In re Rothrock, 16 Cal. 2d 449, 106 P.2d 907 (1940); Branch v. State, 99 Fla. 444, 128 So. 487 (1930); State v. Metcalfe, 204 Iowa 123, 214 N.W. 874 (1927); In re Burch, 73 Ohio App. 97, 54 N.E. 803 (1943). It has been noted, however, that discipline will not be warranted in every case where an attorney has violated the law. In re Means, 207 Ore. 638, 298 P.2d 983 (1956).

¹³Statutory authority generally explicitly provides for disbarment or disciplinary action where there is a felony conviction. E.g., Ala. Code tit. 46, § 49 (1958); Cal. Bus. & Prof. Code §§ 6101-02; Minn. Stat. Ann. § 481.15(1) (1958).

¹⁴E.g., Cal. Bus. & Prof. Code § 6101; Md. Ann. Code art. 10, § 16 (1957).

¹⁵Ala. Code tit. 46, § 49(1) (1958); N.C. Gen. Stat. § 84-28(2) (1965); N.Y. Judiciary Law § 90(4).

¹⁶Ala. Code tit. 46, § 49(1) (1958); Alaska Stat. § 08.08.240 (1962); Cal. Bus. & Prof. Code. § 6101; Ga. Code Ann. § 9-501(1) (1936); Minn. Stat. Ann. § 481.15(1) (1958).

¹⁷In re Rothrock, 16 Cal. 2d 449, 106 P.2d 907 (1940) (assault with a deadly weapon).

¹⁸Supra note 5.

reported case, *In re Welansky*,¹⁹ where an attorney was disciplined after having been convicted of involuntary manslaughter, moral turpitude was not discussed. In *Welansky*, the attorney-owner of Boston's Coconut Grove night club, where over 400 people died in a fire,²⁰ was disbarred for his reckless disregard for the safety and welfare of his patrons. The court stated that although the crime had no relation to any act of Welansky as a member of the bar, disbarment was not precluded. The court further stated that discredit might be cast upon the bar by extra-professional conduct which reveals unfitness to remain in the profession. Since Welansky failed to offer any evidence to show the crime was not one disclosing unfitness to remain at the bar the court decided the question purely on the involuntary manslaughter conviction.

Since *Welansky* it has been argued that involuntary manslaughter should not be a ground for discipline as a felony.²¹ The argument is that an attorney who has been convicted of involuntary manslaughter, a crime of negligence and not of intent, is not necessarily unfit to practice law. While the crime evidences disrespect for the law, it is not clear that it reflects the attorney's unfitness or incompetence so as to warrant disciplinary action.²²

Whether a particular criminal act involves moral turpitude causes special difficulty, although moral turpitude is easily defined: "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 men."²³ Two prohibition cases, *Young v. Edmundson*²⁴ and *Bartos v. United States Dist. Court*,²⁵ illustrate the difficulty in applying the phrase as a practical test. In *Edmundson*, the court held the possession and sale of intoxicating liquors to involve moral turpitude. *Bartos* held that the act of an attorney manufacturing beer in his home for personal use did not involve moral turpitude. With such an inherently vague criterion the courts have frequently interpreted moral turpitude statutes as giving wide discretion in disciplinary proceedings.

¹⁹319 Mass. 205, 65 N.E.2d 202 (1946).

²⁰The facts are set forth in *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944).

²¹See Note, 52 Colum. L. Rev. 1039, 1049 (1952).

²²Manslaughter is specifically excluded in several state attorney discipline statutes. E.g., Ala. Code tit. 46, § 49(1) (1958); Miss. Code Ann. § 8667 (1956).

²³Black, Law Dictionary (4th ed. 1951).

²⁴103 Ore. 243, 204 Pac. 619 (1922).

²⁵19 F.2d 722 (8th Cir. 1927).

Presently, the courts appear to be in disagreement concerning the element of moral turpitude in one particular area, income tax evasion. While uniform in holding that some discipline is necessary,²⁶ it has not been settled whether moral turpitude is a natural consequence of a tax evasion conviction. The California case of *In re Hallinan*²⁷ considered the question of moral turpitude in this connection. Hallinan had been convicted of filing false and fraudulent income tax returns. A summary disbarment proceeding was brought against him under the California statute,²⁸ which clearly provided that an attorney can only be disbarred when the crime for which he had been convicted involved moral turpitude. The court considered moral turpitude inherent in any crime where an intent to defraud was present. The question thus raised was whether an intent to defraud is an essential element of willful tax evasion. The court held that it was not an essential element under the federal statute, and that a conviction thereunder does not necessarily involve moral turpitude. Although the court stated that the attorney's conviction did not warrant summary disbarment on the basis of conviction alone, he still might be guilty of acts involving moral turpitude, and so the case was referred to the State Bar to determine whether further proceedings were called for.²⁹

Since *Hallinan*, numerous cases have dealt with the problem of whether conviction of willful tax evasion, either failure to file or fraudulent filing, involves moral turpitude. While *Hallinan* has been followed in a number of jurisdictions,³⁰ there is still no uniformity and a number of courts hold to the contrary.³¹ The Supreme Court of Washington has held that when fraudulent filing is charged

²⁶For a general discussion of state disciplinary action where an attorney has been convicted of federal income tax evasion, see Annot., 59 A.L.R.2d 1398 (1958).

²⁷43 Cal. 2d 243, 272 P.2d 768 (1954).

²⁸Cal. Bus. & Prof. Code § 6101.

²⁹Subsequently, the state bar found the facts and circumstances surrounding the offense to involve moral turpitude. The state bar recommended that Hallinan be suspended from practice for three years, which was approved by the court. In re Hallinan, 48 Cal. 2d 52, 307 P.2d 1 (1957).

³⁰People ex rel Dunbar v. Fischer, 132 Colo. 131, 287 P.2d 973 (1955) (fraudulent filing); Baker v. Miller, 236 Ind. 20, 138 N.E.2d 145 (1956) (fraudulent filing, no showing of moral turpitude); Ford's Case, 102 N.H. 24, 149 A.2d 863 (1959) (failure to file—no moral turpitude); In re Corcoran, 215 Ore. 660, 337 P.2d 307 (1959) (failure to file—no moral turpitude).

³¹In re Teitelbaum, 13 Ill. 2d 586, 150 N.E.2d 873 (1958) (fraudulent conduct resulting in conviction causes connotation of moral turpitude); State ex rel. Neb. State Bar Ass'n v. Tibbels, 167 Neb. 247, 92 N.W.2d 546 (1958) (failure to file involves moral turpitude); In re Seijas, 52 Wash. 2d 1, 318 P.2d 961 (1957) (fraudulent filing involves moral turpitude).

in the indictment, a conviction thereunder would conclusively be a conviction of crime involving moral turpitude.³² When fraud is charged in the indictment, this view seems preferable. When fraud is not charged in the indictment, a consideration in the disciplinary proceeding of the circumstances surrounding the criminal act could permit a determination of the presence of moral turpitude.

When commission of a crime is the basis for discipline, actual conviction is not a condition precedent to the disciplinary proceeding.³³ Even though there has been an acquittal in the criminal trial,³⁴ a court is not precluded from disciplining upon a showing of dishonorable conduct.³⁵ The reason is the difference between the burden of proof in the two actions. Whereas proof beyond a reasonable doubt is required in the criminal proceeding, only a preponderance of the evidence is necessary in a disciplinary proceeding.³⁶ In some courts, a conviction has been held to be conclusive proof in the disciplinary proceeding of the commission of the offense,³⁷ whereas in others a conviction is regarded as only prima facie evidence of commission.³⁸ Where the conviction has been reversed after the disciplinary action, the reversal only gives the attorney a right to petition for reinstatement to the bar.³⁹ A pardon is not a defense in a subsequent disciplinary proceeding on the theory that it does not remove the stigma attached to the conviction.⁴⁰

The misconduct of an attorney in his private life may make some disciplinary action necessary or appropriate⁴¹ on the theory that good moral character, frequently a requirement for admittance to the bar, no longer exists. Offenses which have been held to evince such immorality, even without consideration of the criminal character of the

³²In re Seijas, 52 Wash. 2d 1, 318 P.2d 961 (1957).

³³State Bar v. Hartford, 282 Mich. 124, 275 N.W. 791 (1937).

³⁴Disciplinary proceedings are not criminal actions. In re O'Neill, 184 App. Div. 75, 171 N.Y. Supp. 514 (1918).

³⁵In re Richards, 333 Mo. 907, 63 S.W.2d 672 (1933); In re Chernoff, 344 Pa. 527, 26 A.2d 335 (1942). A similar result has been reached where there was a reversal. In re Stein, 249 App. Div. 382, 292 N.Y. Supp. 828 (1937).

³⁶Maloney v. State ex rel. Cypert, 182 Ark. 510, 32 S.W.2d 423 (1930); In re Chernoff, 344 Pa. 527, 26 A.2d 335 (1942).

³⁷In re Needham, 364 Ill. 65, 4 N.E.2d 19 (1936); In re Rudd, 310 Ky. 630, 221 S.W.2d 688 (1949).

³⁸People ex rel. Colo. Bar Ass'n v. Burton, 39 Colo. 164, 88 Pac. 1063 (1907); State v. O'Leary, 207 Wis. 297, 241 N.W. 621 (1932).

³⁹In re Stein, 249 App. Div. 382, 292 N.Y. Supp. 828 (1937).

⁴⁰State v. Snyder, 136 Fla. 875, 187 So. 381 (1939); In re Rudd, 310 Ky. 630, 221 S.W.2d 688 (1949); In re Bozarth, 178 Okla. 427, 63 P.2d 726 (1936).

⁴¹People ex rel. Chicago Bar Ass'n v. Meyerovitz, 278 Ill. 356, 116 N.E. 189 (1917); In re Mattered, 34 N.J. 259, 168 A.2d 38 (1961).