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Kentucky Law Survey: Professional Responsibility

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Professional Responsibility

BY EUGENE R. GAETKE* AND REBECCA G. CASEY**

In the face of persistent criticism of the legal profession, from within¹ as well as without,² the Kentucky Supreme Court exhibits a certain degree of ambivalence toward issues of professional responsibility. This ambivalence manifests itself in two ways.

First, the Court's treatment of different categories of professional misconduct seems at times unjustifiably inconsistent. The Court reacts to certain misconduct in an almost uniformly harsh manner, evincing the attitude of a strict disciplinarian for the practicing bar.³ Occasionally, however, the Court responds to various other kinds of equally gross misconduct with apparently

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¹ For example, attorneys have been criticized for doing "too little to confront the ethical problems pushed to the front by changes in the character of a legal practice. Both bench and bar are too slow to deal with abuses." Cox, *The Lawyer's Independent Calling*, 67 Ky. L.J. 5, 6 (1978-79).

² See, e.g., *Why Lawyers Are in the Doghouse*, U.S. NEWS & WORLD REP., May 11, 1981, at 38. See also *Public 'Shyster' OK—If He's On Your Side*, 67 A.B.A. J. 695 (1981).

³ In Kentucky, the Supreme Court is required by the state constitution to "govern admission to the Bar and the discipline of members of the Bar." KY. CONST. § 116. The Court has promulgated rules governing the practice of law codified as KENTUCKY SUPREME COURT RULES 3.010-.690 [hereinafter cited as SCR]. The Court has also designated the board of governors of the Kentucky Bar Association as its agent for the purpose of administering and enforcing these rules. SCR 3.070. The Court reviews the actions taken by the board of governors in disciplinary cases. SCR 3.370(5)-(9). For a discussion of the disciplinary process in Kentucky, see Leathers, *Kentucky Law Survey—Professional Responsibility*, 65 Ky. L.J. 397, 398 n.4 (1976-77). For an historical account of the regulation of the bar in Kentucky, see *Ex parte Auditor of Public Accounts*, 609 S.W.2d 682, 683-84 (Ky. 1981). See also Huelsmann & Deener, *Legal Ethics in Kentucky: Background of the Code of Ethics*, 42 KY. BENCH & B. 10 (1978).

Kentucky relies on the American Bar Association [hereinafter referred to as ABA] disciplinary standards as published in the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969). See notes 99 & 100 *infra* and the accompanying text for a discussion of Kentucky's adherence to the 1969 Code despite subsequent amendments by the ABA. For purposes of this article, the word "Code" refers to the ABA disciplinary rules [hereinafter cited as DR].

undue leniency.⁴ In such cases the Court seems to perceive itself as a forgiving guardian of erring practitioners.

Second, even within certain categories of misconduct toward which the Court generally reacts harshly, the Court will sometimes respond with unexplained moderation.⁵ The regular failure of the Court to explain the discrepancies in punishment assessed for similar instances of misconduct engenders uncertainty regarding the Court's attitude toward that misconduct.⁶

Certainly unprofessional conduct arises in many contexts, forms, and degrees, and not every breach of professional ethics should result in the same sanction—harsh or lenient.⁷ The Court must mold its punishment to fit its view of the seriousness of the offense and the mitigating factors involved, a process which naturally leads to some variations in the treatment of different offenders. Still, the reader of the Court's professional responsibility opinions issued during this survey period⁸ might well conclude

The Code is trifurcated into DR's, which are the mandatory standards the violations of which subject the profession to discipline; Canons, which serve as the section headings of the code and which state broad axiomatic propositions of ethical standards; and Ethical Considerations [hereinafter cited as EC], which are merely aspirational guidelines and not intended to be specific grounds of discipline. See Preliminary Statement to the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

⁴ See the text accompanying notes 42-71 *infra* for a discussion of such apparently unjustifiable leniency.

⁵ See the text accompanying notes 24-34 and 42-48 *infra* for examples of the Court's moderate treatment of cases involving misconduct generally receiving harsher sanctions.

⁶ One unfortunate trend in Kentucky disciplinary cases is the extreme brevity of the opinions issued by the Court. It is not unusual to find published opinions disciplining attorneys without reference to the conduct involved. See, e.g., *Kentucky Bar Ass'n v. Watson*, 597 S.W.2d 150 (Ky. 1979) (attorney suspended for 90 days for unspecified "unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute"). Even when the conduct is mentioned, the Court frequently fails to discuss the circumstances surrounding that conduct with sufficient detail to advise the reader of the seriousness of the violation, the presence of mitigating factors, or the appropriateness of the punishment imposed. See, e.g., *Kentucky Bar Ass'n v. Albert*, 549 S.W.2d 295 (Ky. 1976) (attorney publicly reprimanded for an undisclosed violation of DR 2-103 prohibiting solicitation of clients). For further discussion of the brevity of the Court's opinions, see the text accompanying notes 25-34 and 42-48 *infra*.

⁷ There are six degrees of discipline for attorneys found guilty of unprofessional conduct in Kentucky: admonition, private reprimand, public reprimand, censure, suspension, and disbarment. SCR 3.380.

⁸ This Survey includes disciplinary opinions of the Court from July, 1979 to December, 1981.

that the Court is not as determined to eradicate some forms of egregious misconduct as it is others and might further conclude that punishment for similar offenses is not uniformly imposed.

I. MISUSE OF CLIENT'S FUNDS

The Court reacts most consistently⁹ and harshly to attorneys charged with misuse of their clients' funds.¹⁰ With rare excep-

During the survey period the Court rendered two nondisciplinary opinions. In *In re Advisory Opinion of Kentucky Bar Ass'n*, 613 S.W.2d 416 (Ky. 1981), the Court was asked to review a Board of Governors Opinion, E-230, which prohibits an attorney who represents the Fraternal Order of Police in grievances and other civil matters from practicing criminal law in the same jurisdiction. *Id.* The Court wholeheartedly upheld the opinion, perceiving a conflict of interest problem if an attorney were allowed to represent both. *Id.* Because the energetic representation of criminal defendants may often require vigorous cross-examination of police officers in an attempt to discredit their testimony, the attorney may well be confronted with the dilemma of alienating a police officer in order to produce the best defense versus maintaining cordial relations with a police officer at the expense of his client's defense. *Id.* Thus, the attorney may not be able to exercise his "independent professional judgment" as Canon 5 requires. Canon 9 also supported the Court's conclusion. *Id.* Since criminal defense is naturally subject to intense public scrutiny, the Court felt that all doubts should be resolved against representation since doing so presented the only way to meet the public demand for professional independence. *Id.*

In another advisory opinion, *Ex parte Auditor of Public Accounts*, 609 S.W.2d 682, the Court decided that the Auditor of Public Accounts was not legally entitled to a general audit of the Kentucky Bar Association's books and accounts. *Id.* at 689.

The Kentucky Supreme Court also reviewed one action of the Judicial Retirement and Removal Commission. In *Long v. Judicial Retirement & Removal Comm'n*, 610 S.W.2d 614 (Ky. 1980), the Court upheld the Commission's finding that the judge knowingly used his powers to protect the local bootlegging industry. As a result, he was found guilty of misconduct in office, persistent failure to perform his duties, and violations of the Code of Judicial Conduct, particularly Canons 1, 2, and 3. *Id.* at 615. The Judicial Retirement and Removal Commission had decided to suspend the judge from his office as district judge, without pay, for 12 months, thus bypassing the more stringent penalty of removal from office. *Id.* The Court felt, however, that since the judge's term expired within 12 months, the suspension operated as a removal from office. *Id.* It also felt that removal was not the penalty which the Commission anticipated or intended and modified the penalty by reducing the suspension to six months, thereby preserving its operation as a suspension rather than a removal from office. *Id.* In light of the misconduct involved, the imposition of a six month suspension seems unduly lenient.

⁹ See Leathers, *supra* note 3, at 398-400; Wallingford, *Kentucky Law Survey—Professional Responsibility*, 67 Ky. L.J. 757, 764-66 (1978-79).

¹⁰ Such conduct is prohibited by DR 9-102 of the Code:

Preserving Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank ac-

tions¹¹ such conduct results in disbarment.

In *Kentucky Bar Association v. Dungan*,¹² for example, the respondent attorney, acting as an appointed public defender, received from his client's mother \$1,000, which was deposited in his escrow account.¹³ Upon conclusion of the representation, the respondent paid the fine and court costs of \$159 out of the escrow account, returned \$141 to the client's mother, and kept \$700 himself.¹⁴ For failing to return the \$700 and for making a false statement to a court regarding the status of the client's money,¹⁵

counts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

- (1) Funds reasonably sufficient to pay bank charges may be deposited therein.
- (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

(B) A lawyer shall:

- (1) Promptly notify a client of the receipt of his funds, securities, or other properties.
- (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.
- (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.
- (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

DR 9-102. Unfortunately, the Court generally chooses to discipline attorneys under the catch-all language "unprofessional or unethical conduct tending to bring the bench and bar into disrepute," SCR 3.130(1), rather than under the specific provisions of the Code. For further discussion of this tendency of the Court, see notes 101-04 *infra*. See also Gaetke, *Solicitation and the Uncertain Status of the Code of Professional Responsibility in Kentucky*, 70 Ky. L.J. (in print) (1981-82).

¹¹ See the text accompanying notes 25-34 *infra* for a discussion of such an exceptional case. See also *Kentucky Bar Ass'n v. Graves*, 556 S.W.2d 890 (Ky. 1977).

¹² 586 S.W.2d 15 (Ky. 1979).

¹³ *Id.* at 16.

¹⁴ *Id.*

¹⁵ *Id.* Disciplinary cases involving the misuse of clients' funds also frequently involve false statements by the attorney, usually made to avoid detection of the financial impropriety. For the Court's reaction to disciplinary cases involving false statements and misrep-

the attorney was disbarred.¹⁶

Similarly, in *Kentucky Bar Association v. Brown*,¹⁷ the respondent attorney, Brown, was advanced substantial funds by a client to defray expenses of litigation, which Brown failed to pay.¹⁸ After failing to render a requested accounting of the funds, Brown wrote a check in partial payment—a check which was returned due to insufficient funds.¹⁹ The Court found the attorney's failure to render an accounting to his client sufficient to support an inference that the funds were misappropriated and found the returned check conclusive evidence that the funds had been converted to the attorney's own use.²⁰ The attorney was disbarred.²¹

The Court's harsh reaction to the misuse of clients' funds is entirely appropriate. The conduct indicates dishonesty and deception on the part of an attorney who engages in it.²² Moreover, the misuse of clients' funds negatively reflects on the entire legal profession and engenders mistrust between clients and their attorneys.²³ Surely if clients are to trust to their attorneys the resolution of their most serious problems, they must be able to trust their attorneys with their money and property as well.

Despite the Court's regular disbarment of attorneys misusing

resentation by attorneys in the absence of misuse of clients' funds, see the text accompanying notes 35-48 *infra*.

¹⁶ 586 S.W.2d at 16.

¹⁷ 613 S.W.2d 418 (Ky. 1981). When this action was commenced, the respondent attorney was already under suspension for neglect of his clients' affairs. *Id.* See *Kentucky Bar Ass'n v. Brown*, 599 S.W.2d 169 (Ky. 1980) (discussed in note 59 *infra*).

¹⁸ 613 S.W.2d at 418.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² The Court has stated:

When an attorney converts his client's funds to his own use, he commits an offense greater and broader than a mere injury to his client, he brings the entire bar into disrepute in the eyes of the public. Such conduct evinces the unfitness of the attorney to be a member of the legal profession and an officer of the court.

Kentucky Bar Ass'n v. Collis, 535 S.W.2d 95, 96 (Ky. 1975).

²³ Indeed, even the commingling of clients' and attorneys' funds where there is no misuse of the clients' funds by the attorney creates the appearance of professional impropriety which is prohibited by DR 9-102(A). See note 10 *supra* for the text of DR 9-102(A). See also EC 9-5.

their clients' funds,²⁴ in *Kentucky Bar Association v. Berry*²⁵ the Court imposed only a three-year suspension.²⁶ In *Berry*, the respondent attorney, acting as executor of a large estate, made fifteen unsecured loans to himself from the estate funds²⁷ at interest rates below those prevailing in the market.²⁸ Furthermore, numerous other loans of estate funds were made by Berry to business associates and relatives, including his brother, an individual who was unable to obtain loans from a bank and whose failure to pay interest was forgiven by Berry on behalf of the estate.²⁹ The Court noted, however, that the estate had increased in value

²⁴ A related case involving the misuse of funds, though not those of a client, is *Kentucky Bar Ass'n v. Ricketts*, 599 S.W.2d 454 (Ky. 1980). In *Ricketts*, the respondent attorney negotiated a worker's compensation settlement of \$22,430. *Id.* The insurer forwarded a check in that amount to Ricketts, who properly endorsed and delivered it to his client. *Id.* at 455. Subsequently, however, the insurer erroneously mailed a second check in that amount to Ricketts, who had his client endorse it and then deposited it in his own account. *Id.* Ricketts spent the entire proceeds of the second check on personal expenses. *Id.* The Court found his actions an "unacceptable course of conduct for a lawyer." *Id.* at 456. Ricketts was disbarred. *Id.*

²⁵ 626 S.W.2d 632 (Ky. 1981).

²⁶ *Id.* at 633. This is not to suggest that a three-year suspension is an insignificant sanction. An attorney suspended for disciplinary infractions must seek reinstatement by the Kentucky Supreme Court, and applicants for reinstatement are subjected to character and fitness investigation by the bar association. SCR 3.510(1). If the suspension is for more than five years, the applicant for reinstatement must pass a written examination on procedure and ethics. *Id.* The procedures for reinstatement after disbarment are similar. See SCR 3.520(1). It is clear, therefore, that suspension from the practice of law is a serious sanction indeed. Yet it is also clear that a suspension, for whatever period, is perceived by the court, the bar, and the public as less serious than disbarment.

²⁷ 626 S.W.2d at 633. Strictly speaking, the attorney's conduct in *Berry*, rather than being a misuse of clients' funds under DR 9-102, was in the nature of a conflict of interest. By loaning estate money to himself, the attorney arguably violated DR 5-104(A), which provides that

[a] lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

By failing to pay the market interest rates for his loans and forgiving the unpaid interest on other loans, the attorney also may have prejudiced his client under DR 7-101(A)(3).

The Court did not discuss the applicable Code provisions in disposing of the case. Nevertheless, Berry's personal use of the estate funds was so extensive that disposition consistent with cases involving misuse of clients' funds would have been appropriate. See note 10 *supra* for the text of DR 9-102, which prohibits misuse of clients' funds.

²⁸ 626 S.W.2d at 633.

²⁹ *Id.*

under the attorney's management³⁰ and that "other evidence of mitigation" had been considered by the Court in concluding that a three-year suspension was the appropriate punishment.³¹ Unfortunately the Court failed to disclose those mitigating factors, rendering impossible the reconciliation of the *Berry* case with the decisions in *Dungan*³² and *Brown*.³³ Without a discussion of those factors, *Berry* seems to be an example of unjustifiable leniency.³⁴

II. MISREPRESENTATION AND FALSE STATEMENTS

Another form of professional misconduct warranting severe punishment, in addition to misuse of clients' funds,³⁵ is misrepresentation by an attorney.³⁶ Such conduct reflects adversely on the honesty and character necessary for both the individual and the bar to fulfill the profession's obligations to the public and the judicial system.

It is understandable, therefore, that the Court disbarred the respondent attorney in *Kentucky Bar Association v. Hammond*.³⁷ While representing claimants in two workers' compensation actions, Hammond falsified medical reports and forged a physi-

³⁰ *Id.*

³¹ *Id.*

³² 586 S.W.2d 15. See the text accompanying notes 12-16 *supra* for a discussion of *Dungan*.

³³ 613 S.W.2d 418. See the text accompanying notes 17-21 *supra* for a discussion of *Brown*.

³⁴ For a discussion of the difficulties created by the Court's tendency to render overly brief opinions in disciplinary cases, see the text accompanying notes 6 *supra*.

³⁵ See the text accompanying notes 9-34 *supra* for a discussion of the Court's treatment of misuse of clients' funds.

³⁶ Such conduct is, of course, prohibited under the Code. DR 1-102(A)(4) prohibits an attorney from engaging "in conduct involving dishonesty, fraud, deceit, or misrepresentation." Similarly, DR 7-102(A)(5) provides that an attorney shall not "[k]nowingly make a false statement of law or fact" in the representation of a client.

³⁷ 619 S.W.2d 696 (Ky. 1981). The Court also disbarred the respondent attorney in *Kentucky Bar Ass'n v. White*, 613 S.W.2d 132 (Ky. 1981), for conduct involving fraud and misrepresentation. In *White*, the respondent attorney had pleaded guilty to two counts of wire fraud, a felony, and to one count of failure to file a federal income tax return, a misdemeanor. *Id.* Even though Kentucky attorneys convicted only of failure to file income tax returns are generally suspended for six months, *see, e.g.*, *Kentucky Bar Ass'n v. Kramer*, 555 S.W.2d 245 (Ky. 1977); *Kentucky Bar Ass'n v. Trimble*, 540 S.W.2d 599 (Ky. 1976); *Kentucky State Bar Ass'n v. Vincent*, 537 S.W.2d 171 (Ky. 1976), *White* was disbarred. This compels the conclusion that the additional conviction on wire fraud charges was the reason for the stricter penalty of disbarment in *White*.

cian's signature on them.³⁸ These medical reports were provided to opposing counsel.³⁹ Despite the respondent's assertion that such conduct is customary among attorneys in workers' compensation cases,⁴⁰ the Court concluded that "there is no justification for an attorney to alter medical reports so as to report a nonexisting condition."⁴¹

Given the justifiably harsh reaction of the Court to the falsification of medical reports in *Hammond*, it is difficult to understand the outcome of *Kentucky Bar Association v. Cohen*.⁴² The respondent attorney in *Cohen* had altered the dates of depositions and affidavits and had also made false statements regarding attorney's fees in bankruptcy petitions.⁴³ The Court nevertheless chose to impose only a two-year suspension on Cohen rather than disbar him.⁴⁴

The seriousness of the misconduct in *Cohen* appears indistinguishable from that in *Hammond*.⁴⁵ The falsification of documents in adjudicatory proceedings is so detrimental to the administration of justice and so reflective of a lack of that degree of honesty essential for the practice of law that, absent any extraordinary circumstances,⁴⁶ the practice warrants disbarment.⁴⁷ The

³⁸ 619 S.W.2d at 697.

³⁹ *Id.*

⁴⁰ *Id.* at 699.

⁴¹ *Id.*

⁴² 625 S.W.2d 573 (Ky. 1981).

⁴³ *Id.* at 574.

⁴⁴ *Id.*

⁴⁵ See the text accompanying notes 37-41 *supra* for a discussion of *Hammond*.

⁴⁶ If such circumstances were present in *Cohen*, the Court did not so state.

⁴⁷ Yet another case during the survey period also involved misrepresentation. In *Kentucky Bar Ass'n v. Gangwish*, 618 S.W.2d 176 (Ky. 1981), the respondent attorney devised and advertised a genealogy tracing service under the corporate name of ReUnited, Inc. *Id.* at 176. In response to inquiries, Gangwish mailed letters on his law office stationery, referring to himself as attorney for that corporation. *Id.* No such corporation existed, a fact known to Gangwish. *Id.* The Court found such conduct to be false and misleading and, in one of its rare references to the Code during this survey period, the Court held the conduct a violation of DR 1-102(A)(4), which prohibits attorneys from engaging in "dishonesty, fraud, deceit, or misrepresentation." *Id.* The Court publicly reprimanded the respondent attorney. *Id.* at 177.

Unlike *Hammond* and *Cohen*, *Gangwish* did not involve the falsification of documents in adjudicatory proceedings. Furthermore, the respondent attorney's major error in *Gangwish* appears to have been his failure to file the corporation's articles of incorporation, which he had drawn. *Id.* at 176. Thus the misrepresentation in *Gangwish* appears to

more lenient treatment of the respondent attorney in *Cohen*, however, remains unexplained,⁴⁸ and it stands as a stark contradiction of the Court's position in *Hammond*.

III. NEGLIGENCE

While the Court usually reacts with harshness to the misuse of clients' funds⁴⁹ and misrepresentation⁵⁰ by Kentucky attorneys, it is more lenient in its treatment of attorneys who have neglected the legal matters entrusted to them.⁵¹ In the worst cases of neglect, such leniency constitutes an unfortunate message to the bar and to the public regarding the significance of the problem of neglect.⁵²

In *Kentucky Bar Association v. Reed*,⁵³ the respondent attorney's neglect of legal matters entrusted to him resulted in significant harm to his clients, including the removal of an adverse party's assets from the state,⁵⁴ the entry of summary judgment against one client,⁵⁵ and a delay of nearly six years in the receipt of workers' compensation benefits by another.⁵⁶ In the face of Reed's failure to respond to the charges of neglect, the Court suspended him for one year.⁵⁷

be of a different nature, and lesser degree, than those in *Hammond* and *Cohen*, and the Court's more lenient treatment of the respondent attorney seems justified.

⁴⁸ See the text accompanying notes 6 *supra* for a discussion of the Court's general failure to justify such leniency.

⁴⁹ See the text accompanying notes 9-34 *supra* for a discussion of the misuse of clients' funds.

⁵⁰ See the text accompanying notes 36-48 *supra* for a discussion of misrepresentation and false statements.

⁵¹ Such conduct is prohibited by the Code under the Canon 6 exhortation that "a lawyer should represent a client competently." DR 6-101(A)(3) provides that an attorney shall not "[n]eglect a legal matter entrusted to him."

⁵² The two types of complaints most frequently lodged with the Kentucky Bar Association regarding the conduct of Kentucky practitioners involve excessive fees and neglect of clients' affairs. Address by Michael M. Hooper, Assistant Director, Kentucky Bar Association, to Professional Responsibility Class, University of Kentucky College of Law (January 19, 1982). The Kentucky Bar Association generally does not utilize the disciplinary process for fee disputes, choosing instead to suggest a voluntary arbitration procedure. *Id.*

⁵³ 623 S.W.2d 228 (Ky. 1981).

⁵⁴ *Id.* at 229.

⁵⁵ *Id.* at 229-30.

⁵⁶ *Id.* at 230-32.

⁵⁷ *Id.* at 232.

A one-year suspension⁵⁸ from the practice of law for such a pattern of serious and prejudicial neglect seems unduly lenient.⁵⁹ If the Court is intent on reducing the level of public disillusionment with the legal profession,⁶⁰ it must act unequivocally to punish harshly—that is, to disbar—those attorneys guilty of such gross neglect.⁶¹

⁵⁸ Two other cases involving neglect resulted in one-year suspensions during the survey period. In *Kentucky Bar Ass'n v. Marshall*, 613 S.W.2d 129 (Ky. 1981), the respondent was found to have neglected a divorce matter entrusted to him for more than four years. *Id.* Even though Marshall was also found to have appeared in court while under an order of suspension for failure to pay bar dues and to have misrepresented to a circuit court his status as attorney for the client, the Court imposed only a one-year suspension. *Id.*

In *Kentucky Bar Ass'n v. Morton*, 613 S.W.2d 416 (Ky. 1981), the respondent attorney failed to take any action whatsoever to prosecute a personal injury claim on behalf of an injured client even though he had agreed to do so. *Id.* at 417. That neglect resulted in the running of the statute of limitations on the claim some ten months after Morton commenced the representation. *Id.* The Court suspended Morton for one year, despite his failure even to respond to the charge before the Supreme Court. *Id.*

In fact, only two cases of neglect have resulted in disbarment in Kentucky. In *Kentucky Bar Ass'n v. Dillman*, 562 S.W.2d 318 (Ky. 1978), the attorney was disbarred for neglect which resulted in the running of the statutory appeal period for a Federal Coal Mine Health and Safety Act proceeding, and for misrepresentating to his client the status of such proceeding. *Id.* at 318. It should be noted, however, that Dillman had previously been suspended twice for one year for similar instances of gross neglect and misrepresentation. See *Kentucky Bar Ass'n v. Dillman*, 554 S.W.2d 362 (Ky. 1977); *Kentucky Bar Ass'n v. Dillman*, 539 S.W.2d 294 (Ky. 1976).

The *Dillman* result must be contrasted with *Kentucky State Bar Ass'n v. Jansen*, 459 S.W.2d 140 (Ky. 1970), in which the respondent attorney was disbarred for neglecting a divorce case. *Id.* at 141. The Court's harsh reaction to this single instance of neglect apparently was a product of the Court's outrage at its inability to contact Jansen, even with the use of a specially appointed "warning order attorney," rather than a product of its outrage at the neglect charge. *Id.* at 140.

Thus the crackdown on neglect threatened by the Court in *Kentucky Bar Ass'n v. Clem*, 554 S.W.2d 360, 361 (Ky. 1977), has not materialized. *Dillman* remains the single instance of disbarment for neglect since *Clem*.

⁵⁹ In one case during the survey period the Court imposed a three-year suspension for neglecting legal matters. In *Kentucky Bar Ass'n v. Brown*, 599 S.W.2d 169, the respondent attorney was found to have neglected the legal affairs of four clients. No further description of the conduct is mentioned in the Court's opinion. It is impossible, therefore, to discern what factors led the Court to impose a more serious sanction in *Brown* than in *Reed*. See the text accompanying notes 53-57 *supra* for a discussion of the *Reed* case. The respondent attorney in *Brown* was subsequently disbarred for misuse of clients' funds. See the text accompanying notes 17-21 *supra* for a discussion of this later case involving Brown's misuse of client's funds.

⁶⁰ See notes 1, 2, & 52 *supra* and the accompanying text for discussions of public discontent with the legal profession.

⁶¹ No Kentucky cases during the survey period involved forms of legal incompetence

IV. NONPROFESSIONAL MISCONDUCT

Occasionally the Court is called upon to discipline attorneys for misconduct occurring outside of their law practices.⁶² Understandably, the punishment imposed by the Court in such cases depends on the seriousness of the misconduct and its reflection both upon the individual attorney's fitness to practice law and upon the profession.⁶³ In one case involving nonprofessional mis-

other than neglect. The Code provides that an attorney shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.

DR 6-101(A)(1)-(2). The dearth of Kentucky disciplinary cases involving charges of incompetence may indicate an attitude on the part of the state bar association and the Court that such claims are better made and resolved in the context of private malpractice litigation.

While the present disciplinary process may not be ideal for the resolution of incompetence claims, it seems unwise to rely upon the initiative of private litigants to police the competence of the practicing bar in malpractice actions. See, e.g., Marks & Cathcart, *Discipline Within the Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193, 194 nn.4-6; Martyn, *Lawyer Competence and Lawyer Discipline: Beyond the Bar?*, 69 GEO. L.J. 705, 709-10 (1980).

⁶² The Code prohibits illegal activity *within* the practice itself in several provisions. For example, in the representation of a client an attorney is not to "[k]nowingly engage in . . . illegal conduct." DR 7-102(A)(8). An attorney is prohibited from charging an "illegal" fee. DR 2-106(A). An attorney is also prohibited from aiding non-lawyers in the unauthorized practice of law and from practicing law in jurisdictions in which the attorney is not admitted. DR 3-101(A)-(B).

But the Code also prohibits certain other misconduct whether committed in the representation of a client or not. DR 1-102(A) provides that an attorney shall not:

- (3) Engage in illegal conduct involving moral turpitude.
- (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
- (5) Engage in conduct that is prejudicial to the administration of justice.
- (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-102(A)(3)-(6). In disciplining attorneys for illegal conduct outside the practice of law, however, the Court generally refers to the conduct only as "unprofessional or unethical conduct tending to bring the bench and bar into disrepute." See SCR 3.130(1). See note 10 *supra* for a discussion of the Court's tendency to rely on this catch-all language and to avoid relying on specific provisions of the Code.

⁶³ From 1971 to 1978, SCR 3.320 provided for the automatic disbarment of attorneys convicted of a misdemeanor involving dishonesty or stealing or a felony. Several attorneys were disbarred under that rule. See, e.g., *Kentucky Bar Ass'n v. Clem*, 561 S.W.2d 90 (Ky. 1978); *Kentucky Bar Ass'n v. Rinehart*, 558 S.W.2d 611 (Ky. 1977). By a

conduct during this survey period,⁶⁴ however, the Court responded with unjustifiable leniency.

In *Kentucky Bar Association v. Clay*,⁶⁵ the respondent attorney had previously been charged by his former wife with criminal mischief in the third degree, assault in the third degree, and terroristic threatening.⁶⁶ He had been convicted of all three offenses.⁶⁷ Despite the serious nature of the offenses⁶⁸ and their reflection on Clay's attitude toward an ordered system of conduct and the peaceful resolution of disputes,⁶⁹ the Court chose only to

1978 amendment, however, SCR 3.320 now provides:

When any member of the Association has been convicted of a felony or class "A" misdemeanor a copy of the judgment shall be filed with the Director for action under Rule 3.160. The Director shall submit copies of the judgment to the Tribunal who may take action under Rule 3.165.

Under SCR 3.165, the Court may also temporarily suspend an attorney convicted of a felony or class A misdemeanor upon a finding that the conduct was such "as to put in grave issue whether he has the moral fitness to continue to practice law."

The substance of the previous SCR 3.320 may, however, survive the rule's amendment. In the two cases concerning convictions of an attorney which have arisen since the rule's amendment, the Court disbarred an attorney convicted of a felony, *Kentucky Bar Ass'n v. White*, 613 S.W.2d 132, and publicly reprimanded another attorney convicted of a misdemeanor not involving dishonesty or stealing, *Kentucky Bar Ass'n v. Clay*, 601 S.W.2d 287 (Ky. 1980). It is too early to tell, however, whether the Court's treatment of these cases will be the same under the amended SCR 3.320.

One conviction which uniformly results in a six-month suspension from the practice of law is that of failure to file tax returns. See *Kentucky Bar Ass'n v. Kramer*, 555 S.W.2d 245; *Kentucky Bar Ass'n v. Taylor*, 549 S.W.2d 508 (Ky. 1976); *Kentucky Bar Ass'n v. Trimble*, 540 S.W.2d 599; *Kentucky State Bar Ass'n v. Vincent*, 537 S.W.2d 171; *Kentucky State Bar Ass'n v. McAfee*, 301 S.W.2d 899 (Ky. 1957).

⁶⁴ The only other disciplinary case which arose during this survey period involving a respondent attorney convicted of a crime was *Kentucky Bar Ass'n v. White*, 613 S.W.2d 132. Because the crime in *White* involved fraud, the case is discussed in the context of misrepresentation by attorneys. See note 37 *supra* for a discussion of *White*.

⁶⁵ 601 S.W.2d 287 (Ky. 1980).

⁶⁶ *Id.* at 287.

⁶⁷ *Id.*

⁶⁸ Criminal mischief in the third degree, KY. REV. STAT. ANN. § 512.040 (Bobbs-Merrill 1975) [hereinafter cited as KRS], is a class B misdemeanor, but assault in the third degree, KRS § 508.030 (1975), and terroristic threatening, KRS § 508.080 (1975), are both class A misdemeanors. For committing the offenses, Clay was sentenced to 60 days imprisonment for each offense, the sentences to run concurrently. The sentence was suspended for two years. 601 S.W.2d at 287.

⁶⁹ Such acts certainly reflect negatively on the attorney's "fitness to practice law." DR 1-102(A)(6). Furthermore, if any misconduct falls within the "other unprofessional or unethical conduct tending to bring the bench and bar into disrepute" language of SCR 3.130(1), it would seem to be that involved in *Clay*.

publicly reprimand him.⁷⁰ While there may have been evidence before the Court of factors warranting such lenient treatment of the respondent attorney,⁷¹ none was disclosed in the opinion. In the absence of such evidence, the Court's disposition of *Clay* seems unduly protective of the attorney. The public reprimand of an attorney convicted of criminal acts of violence suggests to the bar and, more importantly, to the public that the Court does not take such misconduct seriously.

V. MISCONDUCT AND FREE SPEECH

One category of professional misconduct to which the Court correctly reacts with considerable caution is activity involving free speech. The dictates of the first amendment justify a policy of erring on the side of leniency in such cases.

In *Kentucky Bar Association v. Nall*,⁷² for example, the respondent attorney stated in a radio interview that a state agency's proceedings were a "mere farce" and a "kangaroo court."⁷³ He also claimed to appear at the agency hearing on behalf of several persons he did not actually represent,⁷⁴ was rude and sarcastic to the hearing officer,⁷⁵ and sought in writing the governor's assistance in the agency proceeding.⁷⁶ Without further discussion the Court found that such conduct was "not acceptable"⁷⁷ and publicly reprimanded the attorney.⁷⁸

⁷⁰ 601 S.W.2d at 287.

⁷¹ Apparently the acts of violence were related to "serious difficulties which resulted in a dissolution of [the respondent attorney's] marriage." *Id.* No further mention is made, however, of any factors considered in mitigation of the punishment.

⁷² 599 S.W.2d 899 (Ky. 1980).

⁷³ *Id.* Such statements are arguably violative of DR 7-107(H)(5) in that they are "reasonably likely to interfere with a fair hearing."

⁷⁴ 599 S.W.2d at 899. Such conduct is violative of DR 7-102(A)(5) as the making of a false statement of fact and is also arguably violative of DR 1-102(A)(4) as conduct involving misrepresentation.

⁷⁵ 599 S.W.2d at 899. Such conduct before a tribunal is violative of DR 7-106(C)(6) in that it is "undignified or discourteous conduct which is degrading to a tribunal."

⁷⁶ 599 S.W.2d at 899. Such conduct is arguably violative of DR 7-110(B) in that it is a communication regarding the merits of a pending case with an "official before whom the proceeding is pending." Since the proceeding was pending in an administrative agency within the executive branch of government, it might be said that the governor, as head of the executive branch, was such an official.

⁷⁷ 599 S.W.2d at 899.

⁷⁸ *Id.*

The Court's thinking regarding such cases was further explained in *Kentucky Bar Association v. Heleringer*.⁷⁹ In *Heleringer*, the respondent attorney—at a press conference—referred to a circuit court's *ex parte* hearing of a motion for a temporary restraining order as “‘highly unethical and grossly unfair.’”⁸⁰ The Kentucky Supreme Court noted that the statement was totally incorrect since under the rules of civil procedure, temporary restraining orders may indeed be issued on an *ex parte* basis.⁸¹ Thus Heleringer's statement was a false accusation against a judge⁸² and was conduct “prejudicial to the administration of justice.”⁸³ In deciding whether such speech was nonetheless protected under the first amendment,⁸⁴ the Court indicated that there were four categories of criticism which may not be prohibited: criticism of the state of the law itself,⁸⁵ criticism of the agencies enforcing the law,⁸⁶ criticism of a court's view of the law,⁸⁷ and criticism of a court's ethics or motive when “made in good faith and supported by substantial competent evidence.”⁸⁸ Since the statements made by the respondent attorney in *Heleringer* impuned the ethics of the circuit court in hearing the matter *ex parte*, and since Heleringer knew or should have known that the statements were without basis in fact, the speech was not protected by the first amendment.⁸⁹ The Court chose, as in *Nall*,⁹⁰ to issue a public reprimand of the respondent attorney.⁹¹

⁷⁹ 602 S.W.2d 165 (Ky. 1980).

⁸⁰ *Id.* at 166.

⁸¹ *Id.* at 166-67. See KY. R. CIV. P. 65.03.

⁸² 602 S.W.2d at 166. See DR 8-102(B).

⁸³ 602 S.W.2d at 166. See DR 1-102(A)(5).

⁸⁴ The Court analyzed the matter under *In re Sawyer*, 360 U.S. 622 (1959). See 602 S.W.2d at 167-68.

⁸⁵ 602 S.W.2d at 167.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 168.

⁸⁹ *Id.* at 167-68.

⁹⁰ See the text accompanying notes 72-78 *supra* for a discussion of *Nall*.

⁹¹ 602 S.W.2d at 169. The Court noted further, however, that “while two recent instances such as this one may be a coincidence, three would certainly indicate an unwelcome trend. It is enough to say that in the future a stiffer penalty may be imposed.” *Id.* at 168. In two earlier cases the Court imposed six-month suspensions for, in part, unsupported criticism of judicial competence. See *Kentucky Bar Ass'n v. Getty*, 535 S.W.2d 91 (Ky. 1975); *Kentucky State Bar Ass'n v. Lewis*, 282 S.W.2d 321 (Ky. 1955).

In an unpublished opinion, *Kentucky Bar Association v. Wilkey*,⁹² the Court addressed yet another aspect of attorney speech. There the respondent attorney, employed by a legal assistance organization,⁹³ gave unsolicited legal advice to a juvenile inmate of a county jail suggesting that the juvenile institute civil rights litigation against several public officials.⁹⁴ Wilkey then commenced the action on the juvenile's behalf.⁹⁵ While such solicitation is generally prohibited by the Code,⁹⁶ the Court found that Wilkey's conduct fell within an exception to those general proscriptions for attorneys employed by legal service organizations.⁹⁷ Since the Code specifically permitted such solicitation,

⁹² No. 80-SC-671-KB (Ky. Dec. 16, 1980).

⁹³ *Id.*, slip op. at 2.

⁹⁴ *Id.*, slip op. at 1.

⁹⁵ *Id.*, slip op. at 2. The action was subsequently dismissed when the plaintiff-jvenile testified in a deposition that he had not authorized an action for damages and that he no longer wished to pursue the matter. *Id.*, slip op. at 2-3.

⁹⁶ The Code generally prohibits an attorney from recommending the employment of himself or an associate, DR 2-103(A), requesting another to make that recommendation, DR 2-103(C), or compensating another for having done so, DR 2-103(B). Additionally, DR 2-104(A) generally prohibits an attorney from giving unsolicited legal advice that a person institute legal action and then accepting employment in the case, except in certain situations specified in the rule. The question in *Wilkey* was whether the respondent attorney's conduct came within one of the exceptions to DR 2-104(A). See note 97 *infra* for the text of DR 2-104(A).

⁹⁷ The applicable Code provision states in pertinent part:

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

...

(3) A lawyer who is furnished or paid by any of the offices or organizations enumerated in DR 2-103(D)(1), (2), or (5) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

DR 2-104(A)(3). DR 2-103(D)(1)(c) states:

(D) A lawyer shall not knowingly assist a person or organization that recommends, furnishes, or pays for legal services to promote the use of his services or those of his partners or associates. However, he may cooperate in a dignified manner with the legal service activities of any of the following, provided that his independent professional judgment is exercised in behalf of his client without interference or control by any organization or other person:

(1) A legal aid office or public defender office:

...

(c) Operated or sponsored by a governmental agency.

It should be noted, however, that the provisions quoted above are from the original 1969 version of the Code, not the Code as amended by the American Bar Association since then. It is the Court's position that the 1969 version of the Code is applicable in Kentucky. See

the Court did not have to address the constitutional issues often raised by solicitation cases.⁹⁸

Two other aspects of *Wilkey*, however, are more significant than its actual holding. First, the Court announced unequivocally that only the original 1969 version of the American Bar Association's Code of Professional Responsibility is applicable in Kentucky;⁹⁹ and none of the amendments of the Code which have been subsequently adopted by that organization apply.¹⁰⁰ It is, of course, unfortunate that the Court chose an unpublished opinion for this pronouncement. Second, the Court urged the bar association in the future to phrase its charges against attorneys in terms of the Code¹⁰¹ rather than advancing them under the rubric of "unprofessional or unethical conduct tending to bring the bench and bar into disrepute."¹⁰² To the extent the bar association adheres to that suggestion,¹⁰³ the entire disciplinary process in Kentucky will be greatly enhanced.¹⁰⁴

the text accompanying notes 99-100 *infra* for a discussion of the Court's view on the applicability of the 1969 version. Both DR 2-103 and DR 2-104 were amended by the American Bar Association in 1974, 1975, and 1977. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-103 & DR 2-104 (as amended through February, 1981).

⁹⁸ Certain solicitation which is prohibited by the Code is, nonetheless, constitutionally protected speech under the first amendment. See, e.g., *In re Primus*, 436 U.S. 412 (1978).

⁹⁹ No. 80-SC-671-KB, slip op. at 3-4.

¹⁰⁰ The Code has been amended by the American Bar Association every year between 1974 and 1980. The apparent rationale of the Court in concluding that these amendments are not applicable in Kentucky is that SCR 3.130(1) was promulgated by an order of the Court on November 11, 1969, and that no subsequent amendment of that rule has expressly adopted any of the American Bar Association's amendments.

¹⁰¹ No. 80-SC-671-KB, slip op. at 3.

¹⁰² SCR 3.130(1).

¹⁰³ The Court merely indicated in *Wilkey* that it would be a "salutary practice" for the bar association to state its charges in terms of the Code provisions. No. 80-SC-671-KB, slip op. at 3. It is difficult to perceive from the published opinions whether the Court's urging has been followed by the bar association. Of the eight disciplinary decisions in the survey period following *Wilkey*, only one makes any reference to Code provisions. This is not to say, however, that the bar association's charges also failed to make reference to the Code, although it may indicate that the bar association has not changed its practices.

¹⁰⁴ Presumably the court's suggestion to the bar association indicates that the Court will analyze attorneys' conduct in disciplinary cases under the Code provisions as well. Such a practice would provide greater notice and guidance to the practicing bar regarding the Court's construction of the applicable body of disciplinary law. See notes 6 & 10 *supra* for a discussion of the need for the Court to make more specific reference to relevant Code provisions.

CONCLUSION

Considerable improvement in the Court's regulation of misconduct within the legal profession could be obtained by the abandonment of the current use of unduly abbreviated opinions in disciplinary cases. Such opinions generally provide no guidance to the Court's construction of the Code or the factors it has relied upon in imposing a particular sanction. As a result, the Court's supervision of legal ethics at times appears inconsistent and unjustifiably lenient. Such appearances may not accurately reflect the reality of the Court's treatment of professional ethics. If that is so, the Court can correct the misimpression by more carefully explaining its disposition of disciplinary cases. Such an effort would better inform the practicing bar about the professional standards it is expected to meet and would provide the general public, the ultimate beneficiaries of the regulatory process, with greater assurance as to the Court's resolve in its task.

