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Kentucky Law Survey: Professional Responsibility

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PROFESSIONAL RESPONSIBILITY

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INTRODUCTION

The legal profession is currently the subject of much criticism. A recent opinion survey of public confidence in sixteen institutions ranked law firms next to last, tied with organized labor, finishing barely ahead of advertising agencies.[1] As if Watergate were not enough, the papers are now reporting on lawyers who attempt to make a fast buck on sensational cases.[2] Traditionally "self-regulated," the legal profession is facing the prospect of control from the outside from consumer groups and governmental units.[3] However, there is evidence in Kentucky as well as elsewhere that members of the legal profession are seeking to improve self-regulation by means of attorney-discipline systems. Les Whitmer, director of the Kentucky Bar Association, reports that his case load of disciplinary matters has doubled in the past three years.[4]

Some have charged that self-regulation has collapsed except for the expulsion of felons.[5] However, the decisions from the last term of the Kentucky Supreme Court are substantially broader in scope and illustrate the Court's concern with attorneys who neglect clients' affairs and those who compromise their loyalty to a client in disregard for the Code of Professional Responsibility. Lawyer misconduct traditionally has been divided into that occurring within a lawyer's professional capacity and that occurring outside of his professional capacity.[6] The

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[1] Falk, Wall St. J., Aug. 17, 1977, at 1, col. 1.

[2] *Id.* Philip Peltz, hired to represent David Berkowitz, the accused in the "Son of Sam" murders, offered for sale taped interviews with his client for sums in excess of $100,000. The public was further outraged to learn that, although a convicted felon, Peltz was allowed to retain his license to practice law in New York.

[3] Marks and Cathcart, *Discipline Within the Profession: Is It Self-Regulation?*, 1974 ILL. L.F. 193.

[4] Presentation to a University of Kentucky Professional Responsibility Class, Jan. 25, 1977.

[5] Garbus and Seligman, *Sanctions and Disbarment: They Sit in Judgment*, in VERDICTS ON LAWYERS 47, 48 (R. Nader and R. Green eds. 1976). *See* Steele and Nimmer, *Lawyers, Clients, and Professional Regulation*, 1976 A.B.F. RES. J. 919.

[6] ABA Formal Opinion 339 (1974) confirms the application of the Code of Profes-

four cases to be discussed in the first section involve lawyers who were disciplined for criminal activity or nonprofessional misconduct. The second section will analyze three cases dealing with lawyers who received sanctions for professional misconduct.[7]

I. NON-PROFESSIONAL MISCONDUCT

Kentucky continues to discipline lawyers for nonprofessional misconduct on the grounds that it is conduct that brings the bench and bar into disrepute.[8] The majority of disciplinary cases decided last term involved lawyers convicted of criminal acts.

In *Kentucky Bar Association v. Pope*[9] the Supreme Court disbarred a private practitioner-Commonwealth's Attorney in accordance with Rule of the Supreme Court (RSC) 3.320,[10]

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sional Responsibility to a lawyer's conduct arising from a non-professional as well as a professional capacity.

[7] Only seven of the 10 cases dealing with professional responsibility decided by the Court this term will be discussed. The remaining three involved appeals from opinions of the Kentucky Bar Association Ethics Committee. *See* Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Ass'n, 540 S.W.2d 14 (Ky. 1976); DeJonge v. Kentucky Bar Ass'n, 540 S.W.2d 601 (Ky. 1976); Tucker v. Kentucky Bar Ass'n, 550 S.W.2d 467 (Ky. 1976).

[8] *See* Kentucky Bar Ass'n v. Vincent, 537 S.W.2d 171, 173 (Ky. 1976). In that case Vincent had been convicted of willfully and knowingly failing to file income tax returns. As a result, he was suspended from the practice of law for six months. The Court indicated that apart from any consideration of whether the crime was a felony, serious misdemeanor, or one which involved moral turpitude, "the real criterion is and should be whether the attorney is guilty of such unprofessional and uethical conduct which is calculated to bring the bench and bar into disrepute." 537 S.W.2d at 173. The Court then articulated a seemingly high standard which should govern attorney conduct:

> He [the lawyer] is an officer of the court . . . and it is his duty—yes, even more so, it is his responsibility—to conduct his personal and professional life in a manner as to be above reproach. Is this too much to ask of any attorney? We think not. Other than one's own confidante, no person occupies such close relationship to the general public as do the members of the legal profession. It is the attorney to whom the intimacies of family relations are confided; . . . it is the attorney who is entrusted with the protection of our constitutional and statutory rights. Such a burden resting upon the members of the legal profession must not be taken lightly. "* * * that you will faithfully execute, to the best of your ability, the office of attorney at law * * *" are not idle words, to which all attorneys have pledged their allegiance. The conduct of even one attorney which would embarrass the legal profession will not be tolerated.

Id.

[9] 549 S.W.2d 296 (Ky. 1976).

[10] RULE OF THE SUPREME COURT [hereinafter cited as RSC] 3.320 provides:

which requires automatic disbarment for conviction of a felony.[11] Pope entered a plea of *nolo contendere*[12] to the offenses of attempting to evade income tax by means of a false and fraudulent income tax return[13] and knowingly making and subscribing an untrue and incorrect income tax return[14] for the calendar year 1971.

The Supreme Court also sanctioned attorneys in three cases involving federal misdemeanor convictions for failure to file income tax returns.[15] *Kentucky Bar Association v. Vincent*[16] was cited as controlling. The first of these cases, *Kentucky Bar Association v. Kramer*,[17] involved a lawyer who was convicted pursuant to his plea of *nolo contendere*, fined seventy-five hundred dollars and sentenced to one year on each of three counts of failure to file federal income tax returns for 1970, 1971, and 1972. The Court was not impressed by the attorney's

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When any member of the Association has been convicted of a serious misdemeanor or of a felony a copy of the judgment shall be filed with the Court by the President or Vice-President. If the offense is a felony or if it is a misdemeanor which the court finds to involve dishonesty or stealing within the concept of Cotton v. Commonwealth (Ky.), 454 S.W. (2d) 698, the member shall be suspended ipso facto. If no appeal is taken the Court shall enter an order of disbarment. In the event an appeal is taken from such conviction, the final question of discipline shall be deferred until such time as the Court finally determines the matter.

If such appeal results in affirmance of the conviction, then an order of disbarment shall issue forthwith. If the appeal results in reversal, without retrial, then procedures shall be concluded and the suspension shall terminate. If such reversal involves retrial, the suspension shall cease and the matter shall be held in abeyance until such time as the retrial is concluded. If reconvicted, the foregoing procedures shall be as upon the first conviction as hereinabove set out. If not convicted upon such retrial, all proceedings shall cease.

[11] RSC 3.320 was amended effective January 1, 1978. The new rule 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 [of the Kentucky Bar Association] for action under Rule 3.160. The Director shall submit copies of the judgment to the Tribunal who take action under Rule 3.165.

[12] For purposes of disciplinary measures this is treated as a plea of guilty according to Kentucky Bar Ass'n v. Taylor, 549 S.W.2d 508 (Ky. 1976).

[13] 26 U.S.C. § 7201 (1970).

[14] 26 U.S.C. § 7206 (1970).

[15] 26 U.S.C. § 7203 (1970). For comment on the problem of lawyers and income tax offenses see Stoddard and Stutsman, *Income Tax Offenses by Lawyers: An Ethical Problem*, 58 A.B.A.J. 842 (1972).

[16] 537 S.W.2d 171 (Ky. 1976).

[17] 555 S.W.2d 245 (Ky. 1977).

argument of mitigating circumstances. He referred to his earlier substantial income resulting in previous payments of income tax in the five-figure range, his fine professional reputation, and his disgust for the Nixon administration prompting a "mental block" when it came to filling out the tax form. Kramer was found guilty of unethical and unprofessional conduct under RSC 3.130[18] and suspended from the practice of law for a period of six months.

Second in this group of cases was *Kentucky Bar Association v. Trimble.*[19] Trimble was charged with three counts of failure to file federal income tax returns for the calendar years 1967, 1968, and 1969. Pursuant to a plea of *nolo contendere*, he was found guilty on count three and sentenced to one year in prison. Proceedings were commenced under current RSC 3.320.[20] The Court remanded the proceedings to the Kentucky Bar Association for proceedings consistent with the rules prevailing at the time the offenses were committed.[21] Finding that the lawyer's conduct constituted unethical and unprofessional conduct calculated to bring the bench and bar into disrepute, the Court suspended Trimble for six months. Mitigating circumstances such as the lawyer's divorce, overburdening indebtedness, and high degree of competence as a lawyer did not deter the Court from its course commenced in *Vincent.*[22]

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[18] RSC 3.130 provides:

> The court recognizes and accepts the principles embodied in the American Bar Association's code of professional responsibility as a sound statement of the standard of professional conduct required of members of the bar, and the board may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.

[19] 540 S.W.2d 599 (Ky. 1976).

[20] *See supra* note 11 for the text of current RSC 3.320.

[21] RSC 3.320 became effective on July 2, 1971. Prior to that date Kentucky Court of Appeals Rule 3.330 was controlling:

> Whenever it shall come to the attention of the board that an attorney had been convicted of an offense involving moral turpitude, it shall order the director to promptly obtain a certified copy of the judgment of conviction. The board shall direct that a charge be filed against such attorney. If an answer is filed from which it appears that facts or circumstances may exist which would be in mitigation of the offense or of the discipline which may be imposed, the board may order the appointment of a trial committee and the board shall by order confine the issues to be considered, and the evidentiary material to be received.

[22] The Court waxed eloquent in quoting from Omar Khayyam: "'The moving

The third member of this trilogy of cases was *Kentucky Bar Association v. Taylor*.[23] Taylor had already been suspended for six months in 1972 for intimidation of a witness and being disrespectful in the courtroom.[24] Respondent entered a *nolo contendere* plea to failure to file federal income tax returns for the calendar years 1968, 1969, and 1970 and was sentenced to one year imprisonment on each count. The Supreme Court found him guilty of unethical and unprofessional conduct calculated to bring the bench and bar into disrepute and suspended him from the practice of law for six months. No mitigating circumstances were discussed. It should be noted that this case had been remanded to the Board of Governors in 1974 following a decision by the Court that the Bar could not proceed under RSC 3.320 since it was not in effect at the time of the criminal offense.[25]

The *Kramer, Trimble*, and *Taylor* cases evidence the Supreme Court's concern for uniformity of sanctions for similar attorney misconduct. Lawyers should be on notice that one or more convictions for failure to file a federal income tax return will result in a six-month suspension from practice regardless of the mitigating circumstances. All three cases were considered under court rules in effect prior to July 1, 1971. By applying the unprofessional and unethical conduct section of the rules, the Court has avoided direct confrontation of the question of whether failure to file a federal income tax return constitutes conduct involving dishonesty or stealing within the concept of *Cotton v. Commonwealth*.[26] The Court has yet to disbar an attorney for a conviction of a misdemeanor under the new rule.

The Court often has been troubled by its decisions in *Kentucky State Bar Association v. McAfee*[27] and *Kentucky*

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finger writes; and, having writ, moves on: Nor all your piety nor wit shall lure it back to cancel half a line nor all your tears wash out a word of it.'" 540 S.W.2d at 601.

[23] 549 S.W.2d 508 (Ky. 1976).

[24] Kentucky Bar Ass'n v. Taylor, 482 S.W.2d 574 (Ky. 1972).

[25] Kentucky Bar Ass'n v. Taylor, 516 S.W.2d 871 (Ky. 1974). In this case, the former Court of Appeals refused to adopt the Kentucky Bar Association's interpretation of RCA 3.320. The Bar contended that automatic disbarment ought to be had upon any conviction of a serious misdemeanor regardless of whether it was a crime of moral turpitude.

[26] 454 S.W.2d 698 (Ky. 1970).

[27] 301 S.W.2d 899 (Ky. 1957). The Court later reaffirmed its decision in *McAfee*,

State Bar Association v. Brown.[28] McAfee was convicted of the misdemeanor of failure to file a federal income tax return while Brown was convicted of income tax evasion, a felony. McAfee's conduct was not found to involve moral turpitude, but he did receive a reprimand. The disciplinary proceeding against Brown was dismissed. In *Kentucky Bar Association v. Ball*[29] the Court discussed its decisions in the earlier cases explaining its adherence to a California opinion that was later overruled. Despite the earlier decisions, it seems the Court would be hard-pressed to defend the position that a conviction of failure to file federal income tax returns does not involve dishonest conduct. Certainly, a lawyer who knows that he is legally bound to file an income tax return and does not do so acts dishonestly.[30]

II. PROFESSIONAL MISCONDUCT

The Court considered occurrences of professional misconduct ranging from a violation of the Code's rules against advertising to borrowing money from an opposing party in a divorce action. There is little information supplied about the attorney's conduct in *Kentucky Bar Association v. Albert*[31] other than that it was in violation of Disciplinary Rule (DR) 2-103 of the Code of Professionally Responsibility, which governs the recommendation of professional employment. Albert's conduct probably involved suggesting his employment to a non-client or employing a third party to solicit business. The Court adopted the recommendation of the Board of Governors and reprimanded the attorney. Although the Court traditionally has been active in the area of sanctions for violations of Canon 2 of the Code,[32] the disciplinary activity will undoubtedly decrease in light of the United States Supreme Court decision in *Bates & O'Steen v. State Bar of Arizona*[33] and the resulting uncertainty of the

noting that it did not condone the conduct. *See* Kentucky Bar Ass'n v. Vincent, 537 S.W.2d 171, 172 (Ky. 1976).

[28] 302 S.W.2d 834 (Ky. 1957).

[29] 501 S.W.2d 253 (Ky. 1973).

[30] *See* Annot., 63 A.L.R.3d 476, 483, (1975).

[31] 549 S.W.2d 295 (Ky. 1976).

[32] *See In re* Rielley, 310 S.W.2d 524 (Ky. 1957); *In re* Walton, 310 S.W.2d 524 (Ky. 1957); *In re* Richard, 244 S.W.2d 476 (Ky. 1951).

[33] 97 S. Ct. 2691 (1977).

status of Kentucky's current Disciplinary Rules pertaining to advertising.

John W. Murphy, Jr., the lawyer involved in *Kentucky Bar Association v. Murphy*,[34] failed to attend a deposition taken by the opposing party, failed to offer proof on behalf of his client, and failed to take any action to protect his client's interest after judgment was entered for the opposing party in a lawsuit dealing with title to real estate. The Court was not convinced by the lawyer's claim that he had withdrawn as counsel since his signature appeared on an order directing him to complete proof within thirty days. *Kentucky Bar Association v. Dillman*[35] was cited as controlling authority concerning the penalty. Murphy was suspended for one year. However, the Court discussed neither the merits of the client's case nor the harm that befell the client as a consequence of Murphy's neglect. In the absence of this information it is difficult to compare the penalty with that of Dillman. However, it is clear that the Court is imposing a harsher penalty for lawyer neglect of client's affairs (one year) than it is for lawyer criminal conduct constituting a misdemeanor (six months). This case is particularly important since it signals the Court's imposition of a fairly serious sanction in an area that poses problems for every practicing attorney beset with an overwhelming caseload and insufficient means for controlling it. Murphy's neglect could easily be repeated by any practitioner. The attorney faces the two-edged sword of malpractice and discipline for such neglect.

Kentucky Bar Association v. DeCamillis[36] marks the Court's use of disbarment as a sanction which is generally limited to lawyers convicted of felonies or conduct approximating criminal conduct such as misuse or conversion of a client's funds.[37] This decision clearly removes Kentucky from the list of jurisdictions where the disciplinary apparatus simply imitates the criminal justice system. The case also illustrates the Supreme Court's attempt to intensify the deterrence value of the disciplinary rules other than those pertaining to advertising

[34] 549 S.W.2d 295 (Ky. 1976).

[35] 539 S.W.2d 294 (Ky. 1976).

[36] 547 S.W.2d 446 (Ky. 1977).

[37] *See* Kentucky Bar Ass'n v. Friedlander, 536 S.W.2d 454 (Ky. 1976); Kentucky Bar Ass'n v. Tucker, 535 S.W.2d 97 (Ky. 1975); Kentucky Bar Ass'n v. Colis, 535 S.W.2d 95 (Ky. 1975).

and solicitation. This deterrent had heretofore been missing. DeCamillis did not fail to act for his client in the same sense as Murphy but failed to insulate himself from outside influences as lawyers are required to do under Canon 5 of the Code. Acting as attorney for Jacqueline Foley in a divorce proceeding against her husband, DeCamillis contacted the husband in advance of a hearing to determine the disposition of property. He did this even though Mr. Foley was then represented by counsel. The Court found this to violate DR 7-104(A).[38] In addition, the attorney borrowed fifteen hundred dollars from Mr. Foley. Later, the attorney again saw Mr. Foley, who was concerned about DeCamillis' fees and the disposition of the couple's furniture. Without consulting his client, DeCamillis promised to buy furniture for Mrs. Foley from his own funds and drafted a document stating that all of Mrs. Foley's attorneys fees had been paid. The Court found the acceptance of the fifteen hundred dollar loan to be in violation of DR 5-101(A),[39] 5-105(A),[40] and 5-107(A)(2).[41] The Court further noted that the client should have been consulted before waiver of the fees.[42]

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[38] DISCIPLINARY RULE 7-104(A)(1), AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as DR] provides:

> During the course of his representation of a client a lawyer shall not: Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

[39] DR 5-101(A) provides: "Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests."

[40] DR 5-105(A) provides: "A lawyer shall decline proferred employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C)." DR 5-105(C) allows the attorney to represent multiple clients only if "it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each."

[41] DR 5-107(A)(2) provides: "Except with the consent of his client after full disclosure, a lawyer shall not: . . . Accept from one other than his client anything of value related to his representation of or his employment by his client."

[42] The Court also cited ETHICAL CONSIDERATIONS 5-1, 5-2, AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY, which set the stage for the aforementioned disciplinary rules:

> EC 5-1 The professional judgment of a lawyer should be exercised, within

Buying furniture for the client constituted advancing funds to the client to pursue litigation in violation of DR 5-103(B).[43]

In what may be described as its most surprising and harshest disciplinary decision to date, the Court disbarred DeCamillis for totally disregarding certain prohibitions of the Code.[44] There is no more basic provision than DR 7-104(A) in the area of a lawyer's conduct in litigation. The rule would seem to be more than a matter of simple professional courtesy but would also suggest the Bar's concern with opposing counsel's securing an unfair advantage. The adverse party might misconceive the duty owed to him by the opponent's lawyer and thus place undue reliance on that lawyer. Ethical Consideration 7-18 of the Code says that the reason for the rule is that the "legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel." In making the adverse party his creditor, DeCamillis also violated DR 9-101, which provides that a lawyer should avoid even the appearance of impropriety. As the Court noted, such a move smacked of bribery, occurring as it did during the course of a divorce proceeding. According to the opinion, Mr. Foley obtained the consent of his own counsel prior to making the loan. Ironically enough, this same attorney is the one who sought a continuance in order for Mrs. Foley to

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the bounds of the law, soley for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interest of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

EC 5-2 . . . . "After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client."

[43] DR 5-103(B) provides:

While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses or litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

[44] *See* Carpenter v. State Bar of California, 292 P. 450 (Cal. 1930). *See generally* Annot., 1 A.L.R. 3d 1113 (1965). Many observers believe the Court's "get tough" policy was first announced in Kentucky Bar Ass'n v. Getty, 535 S.W.2d 91 (Ky. 1975). In *Getty* the lawyer had been held in contempt of court and in disregard of the court's warnings. The Supreme Court indicated that the fact that Getty had been held in contempt did not preclude disciplinary action, but reinforced the need for such discipline. Getty was suspended by the Court from the practice of law for six months.

obtain other counsel and who advised the Court of DeCamillis' unethical conduct. It appears that DeCamillis met with Mr. Foley on more than one occasion making arrangements suitable to him rather than to his own client. Clearly the lawyer failed to represent zealously his own client[45] and failed to exercise his judgment solely for the benefit of his client.[46]

CONCLUSION

The disciplinary cases decided by the Supreme Court this past term are evidence of its effort to improve self-regulation of the profession. The Court should be commended on imposing sanctions in the traditional area of criminal misconduct as well as in other areas involving attorney neglect and disloyalty to clients. Lawyers should pay particular attention to the ever-present danger of neglect of a client's affairs. Finally, all practitioners should take time to familiarize themselves thoroughly with the Code of Professional Responsibility.

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[45] CANON 7, AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY.

[46] *See* note 42 *supra* for the text of EC 5-1, 5-2, which deal with the lawyer's exercise of judgment solely for his client's benefit.