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Recent Developments: Attorney Grievance Comm'n v. Kenney: Alcoholism Is a Mitigating Factor in Disciplinary Actions Only When the Attorney Establishes Truly Compelling Circumstances

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*Attorney Grievance
Comm'n v. Kenney:*

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In *Attorney Grievance Comm'n v. Kenney*, 339 Md. 578, 664 A.2d 854 (1995), the Court of Appeals of Maryland held that the sanction of disbarment will not be mitigated by the defense of alcoholism, unless the attorney can establish truly compelling circumstances. In recognizing alcoholism as a serious medical condition, however, the court stated that it would be more sympathetic to alcoholic attorneys who seek help for their disability.

During his twenty-five years of practicing law, Samuel Kenney ("Kenney") suffered from alcoholism. Although his alcoholism was noticed early on by other attorneys, he continued to function competently until the late 1980's. Between the late 1980's and 1993, however, Kenney's alcoholism became more severe and his practice suffered. Kenney has been sober since August, 1993.

Kenny's neglect of his practice and legal obligations became apparent when the Attorney Grievance Commission ("Commission") received two separate complaints. The estate of Donald Peters ("Peters") filed the first complaint alleging that Kenney had acted inappropriately as the Personal Representative of the estate. Robert and Christina Long ("Longs") reported the second complaint and alleged mishandling of settlement funds. In its investigation, the Commission found Kenney guilty of additional wrongdoings related to his practice.

On October 19, 1994, the Commission charged Kenney with the following violations of the Maryland Rules of Professional Conduct: (1) Rule 1.1-Competence, (2) Rule 1.3- Diligence, (3) Rule 1.4-Communication, (4) Rule 1.15-Safekeeping of Property, (5) Rules 8.1 and 8.4- Misconduct. Additionally, the Commission charged him with violating Maryland Rules BU7 and BU9, and Maryland Code Annotated, Business Occupations and Professions, section 10-306 (1989). Kenney was also charged with violating sections 10-906(a) and (b) of the Tax-General article of the Maryland Code. Under Maryland Rule BV9b, the court of appeals referred the matter to the Circuit Court for Baltimore County for findings of fact and conclusions of law.

The circuit court found that several of Kenney's actions violated the Maryland Rules of Professional Conduct. First, Kenney failed to: (1) file the necessary papers for the Peters' estate and (2) keep the estate beneficiaries informed about the status of the estate. Second, Kenney withdrew estate account funds for his personal use. Third, Kenney did not diligently and promptly disburse settlement funds to the Longs and failed to keep them informed about the status of these funds. Finally, Kenney diverted settlement funds for personal matters.

The circuit court also found that Kenney violated sev-

eral income tax withholding provisions of the Maryland Code. First, Kenney failed to: (1) withhold taxes from his employees, (2) hold such taxes in trust for the State, and (3) maintain a separate ledger for these withholdings. The court also noted that failing to withhold these taxes reflected Kenney's lack of trustworthiness.

In determining the appropriate sanction, the Court of Appeals of Maryland examined the facts and circumstances of this case, as it does with all cases coming before it via Rule BV9, and considered previous disciplinary sanctions and misconduct in mitigation. *Id.* at 587, 664 A.2d at 858 (quoting *Attorney Grievance Comm'n v. Pollack*, 279 Md. 225, 238, 369 A.2d 61, 68 (1977)). If the court does not find compelling circumstances, an attorney who misappropriated funds would be disbarred. *Id.* (quoting *Attorney Grievance Comm'n v. Bakas*, 323 Md. 395, 403, 593 A.2d 1087, 1091 (1991)). Finally, the court of appeals concluded that when extenuating circumstances are proven, less severe sanctions may be imposed. *Id.* at 588, 664 A.2d at 858.

The court held that "problems attributed to alcohol addiction may present circumstances sufficient to warrant [a] sanction less severe than disbarment." *Id.* at 588, 664 A.2d at 859 (quoting *Attorney Grievance Comm'n v. Miller*, 301 Md. 592, 608, 483 A.2d

1281, 1290 (1984)). For this reason, the court looked at the misconduct of alcoholic attorneys differently when their actions have substantially resulted from the physical and mental problems associated with the disease. *Id.* (citing *Attorney Grievance Comm'n v. Willemain*, 297 Md. 386, 395, 466 A.2d 1271, 1275 (1983)). Furthermore, the court stated that a causal relationship must be found between the misconduct and the alcoholism to receive the lesser sanction. *Id.* (citing *Attorney Grievance Comm'n v. White*, 328 Md. 412, 418, 614 A.2d 955, 959 (1992)).

In cases such as *Kenney*, the court has ordered an indefinite suspension when alcoholism was the cause of the misconduct. *Id.* at 590, 664 A.2d at 860. See *Attorney Grievance Comm'n v. White*, 328 Md. 412, 419, 614 A.2d at 959 (1992). In this matter, the lower court judge found a causal link between the alcoholism and Kenney's misconduct. As a result, the court of appeals determined that a sanction less severe than disbarment was appropriate. *Kenney*, 339 Md. at 590, 664 A.2d at 860 (1995). The court further stated that the only way Kenney could have the sanction removed was to provide clear and convincing evidence that "the malady ha[d] been removed and rehabilitation [was] complete so that the illegal and improper acts [would] never be repeated." *Id.* at 591, 664 A.2d at 860 (quoting *Attorney Grievance Comm'n v.*

Flynn, 283 Md. 41, 46-47, 387 A.2d 775, 778 (1978)).

In *Attorney Grievance Comm'n v. Kenney*, the Court of Appeals of Maryland sanctioned Kenney to an indefinite suspension instead of disbarment. Since Kenney established truly compelling circumstances, the court allowed alcoholism to mitigate his disbarment. The court, nevertheless, strongly cautioned that absent these circumstances alcoholism will not be allowed as a defense. Yet, the compelling circumstances standard was not clearly defined. Therefore, it appears that the court will determine whether such circumstances exist on a case by case basis as it evaluates whether the alcoholism was substantially responsible for the misconduct.

-Michele L. Katz

