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Kentucky Law Survey: Professional Responsibility

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Professional Responsibility

BY JOHN R. LEATHERS*

Members of the legal profession have generally agreed that the revelations of Watergate cast long shadows over the profession and that public confidence in the bar has ebbed. As a result, by the summer of 1974 rumors around the legal community in Lexington indicated that the Supreme Court of Kentucky would soon be reacting to the involvement of lawyers in the Watergate scandals by increasing their disciplinary control over the Kentucky Bar Association. Although review of the disciplinary cases handed down by the Court during the 1974-1975 term did not substantiate those rumors, the cases for the 1975-1976 term show a significant increase in the Court's disciplinary activity. A number of these cases are in areas traditionally watched closely by the Court, and the sanctions imposed have been heavy. The most significant development, however, is a group of cases in which the Court has taken steps toward disciplining competence.

It is no surprise that the Supreme Court continues to deal severely with lawyers who follow a course of conduct unacceptable to the profession in a traditional sense. A survey of discipline in state bars in 1974 concluded that all state bars disciplined their members for soliciting business, misusing client's funds, and splitting fees with laymen.¹ The same survey noted, however, that despite a disciplinary rule² requiring a lawyer to be competent in the handling of his clients' matters, no state

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¹ Marks and Cathcart, *Discipline Within the Profession: Is It Self-Regulation?*, 1974 *ILL. L.F.* 193 (1974).

² DISCIPLINARY RULE 6-101(a), AMERICAN BAR ASSOCIATION CODE OF PROFESSIONAL RESPONSIBILITY, [hereinafter cited as DR] which provides as follows:

A lawyer 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.
- (3) Neglect a legal matter entrusted to him.

bar had begun to discipline its members for such violations.³ Three cases from the last term of the Supreme Court, while not directly addressing the question of competence, do raise related issues. These cases will be discussed in detail since they indicate an important and praiseworthy new trend in bar discipline. Finally, the cases in both areas of control will be discussed in terms of the penalties imposed by the Court, examining the severity of the sanctions and comparing the penalties imposed by the Supreme Court with those recommended by the Kentucky Bar Association.⁴

I. CONTROL OF CONDUCT IN TRADITIONAL AREAS

Misuse of a client's funds has long been regarded as one of the most serious offenses which a practicing lawyer can commit. The significance of this danger led the American Bar Asso-

³ Marks and Cathcart, *supra* note 1, at 236.

⁴ Before undertaking an analysis of the cases, a brief discussion of the Kentucky Bar Association and its disciplinary procedures is in order. Kentucky has an integrated bar, meaning that each member of the profession in Kentucky must be licensed by the Kentucky Bar Association in order to practice law. RULES OF THE SUPREME COURT 3.030 [hereinafter cited as RSC]. The implications which such licensing carries to the public bear heavily on the duties of the Bar Association. The integrated bar is not a creature of statute, but is created by the highest court of the state, which is vested with its total control. In Kentucky, extensive rules have been formulated by the Supreme Court to control the practice of law, admission to practice, and procedure for both areas. RSC 3.010 *et seq.* In addition, the Court has the power to control the unauthorized practice of law. RSC 3.460. The Court utilized this power in the past term in *Kentucky Bar Ass'n. v. Fox*, 536 S.W.2d 469 (Ky. 1976), where they fined a collection agency and permanently enjoined them from the unauthorized practice of law.

Complaints to the Kentucky Bar Association are referred by the director of the Association to an Inquiry Tribunal. RSC 3.170. The Tribunal measures the complaints against the American Bar Association Code of Professional Responsibility, the standard of conduct adopted by the Kentucky Supreme Court. RSC 3.130. If the Inquiry Tribunal decides by majority vote that charges against the lawyer are in order, the matter is referred to a Trial Committee for findings of fact. RSC 3.190. This procedure is designed to afford the lawyer an opportunity to be represented and heard on the charges. All decisions of the Trial Committee are referred to the Board of Governors of the Kentucky Bar Association, which makes a full review of both fact and law. If the Board determines that the lawyer is guilty and recommends a punishment more severe than a private reprimand, the case is referred to the Supreme Court. RSC 3.370.

Under RSC 3.150 disciplinary cases are private matters while pending, so there is no way to ascertain what happens to a great many of the complaints filed with the Association. The cases discussed here constitute only those in which the charges were found by the Board of Governors to be true and a sanction more severe than a private reprimand was recommended.

ciation to promulgate a disciplinary rule specifically directed toward the protection of the clients' property,⁵ portions of which require the creation of a system of separate accounts to ease a determination of whether a misuse of funds has occurred.⁶ This area is one which the courts of various states have traditionally controlled very tightly to prevent abuses.⁷ In view of this, it is not surprising that in *Kentucky Bar Association v. Friedlander*⁸ the Supreme Court permanently disbarred a lawyer who had misused his clients' funds.

The facts of the *Friedlander* case appear simple on the surface but present a strange twist not usually present in such cases. Checks issued by the lawyer, William Friedlander, on an escrow account held for a title company were returned for insufficient funds. The checks could not be paid because a portion of the money in the escrow account had been withdrawn for the benefit of the law firm of which Friedlander was a partner. Friedlander admitted knowing that the escrow account was technically overdrawn, but stated that he had expected no trouble because it was a common practice to "play the float." In simple terms, he was stating that checks were usually paid because the cash flow in the account concealed the fact that some \$82,000 from the account had been misused. As the Supreme Court stated, the misuse of funds belonging to a client is an offense of the most serious nature. The problem in *Friedlander* is in the application of that generality to the peculiar facts of the case because the title company which owned the funds in question was wholly owned by the law firm of which Friedlander was a partner. The Court noted that the partnership meetings of the law firm served as the only meetings for the officers of the title company. Friedlander's testimony, uncontroverted by the Court, indicated that it was common knowledge in the law firm that the escrow account was overdrawn and that it was common practice for other members of the firm to "play the float." Given the relationship of the law firm to the title company and the knowledge within the law

⁵ DR 9-102.

⁶ DR 9-102(B)(3).

⁷ See, e.g., *Peck v. State Bar*, 17 P.2d 112 (Cal. 1932); and *In re White*, 132 A.2d 777 (N.J. 1951).

⁸ 536 S.W.2d 454 (Ky. 1976).

firm of the condition of the escrow account, the obvious question is "How can a person misuse his own money?" Certainly the normal sanction for such misuse of the escrow account of a client would have been disbarment, but in this case the client was in a very real sense the law firm of which Friedlander was a partner. In light of all this, it would seem that disbarment was an overly severe penalty.

Another area of traditional bar association control over the conduct of lawyers involves the splitting of fees with laymen. To discourage this abuse, one disciplinary rule concerning the unauthorized practice of law expressly forbids such divisions.⁹ However, it is not uncommon to see such divisions in cases where a layman has been employed to solicit business for the lawyer.¹⁰ In a slightly different factual context the Supreme Court in *Kentucky Bar Association v. Burbank*¹¹ approved a public reprimand for a lawyer who had demanded that a commission on the sale of real estate be split with him, even though he was not a licensed real estate agent. The Bar Association contended that Burbank attempted to collect the fee in a setting wherein he was not acting within the scope of his duties as lawyer for his client. The taking of such a real estate fee by an unlicensed person is violative of Kentucky statutory law,¹² although lawyers are exempt from the provisions if the sale in question is within the scope of their representation of a client.¹³ Although not discussed by the Supreme Court, the real problem in a setting like *Burbank* is that the lawyer, whose sole compensation is dependent on the purchase and a split fee with a real estate agent, will not adequately counsel his client on the wisdom of the purchase. The implication of *Burbank* is that the statutory exception allowing a lawyer to sell property and receive a commission would apply only where the sale was incidental to other employment. This makes little sense. The real objection in *Burbank* is the payment by commission and the securing of that commission from the real estate agent rather than from the client. The Supreme Court found that such con-

⁹ DR 3-102.

¹⁰ See, e.g., *In re Cohn*, 139 N.E.2d 301 (Ill. 1957).

¹¹ 539 S.W.2d 312 (Ky. 1976).

¹² KY. REV. STAT. § 324.020 [hereinafter cited as KRS].

¹³ KRS § 324.030.

duct was likely to call the bench and bar into disrepute, and admittedly it does smack of a shakedown. A conflict of interest charge might have been more appropriate, but the resulting penalty would probably have been more severe than a public reprimand. Also, a conflict of interest charge might not have been well received because Burbank sought to purchase the property for his wife. Thus, the peculiar facts of this case, as in *Friedlander*, make it a bit out of the ordinary. Given his relationship to his client, it was the image presented to the brokers in the shakedown attempt that implicated Burbank, and hence the penalty was not as severe as it might otherwise have been.

In addition to the types of conduct traditionally controlled, the Supreme Court has provided a special rule to cover cases involving lawyers who are convicted of crimes,¹⁴ and the Court had occasion during the past term to deal with this rule in two cases. In *Kentucky Bar Association v. Vincent*,¹⁵ the rule itself was not involved since the offense for which Vincent was convicted (tax evasion) was committed before the effective date of the rule, which was not retroactive.¹⁶ Vincent had failed to file tax returns for a 3 year period and was convicted and sentenced to a year in prison. The Court continued to follow its previous holding in *Kentucky Bar Association v. McAfee*¹⁷ that a conviction for tax evasion was not a conviction involving moral turpitude. Vincent was suspended from practice for 6 months for conduct calculated to call the bench and bar into disrepute.

James A. King did not fare as well; in *Kentucky Bar Association v. King*¹⁸ he was ordered permanently disbarred. King had been accused of conspiring to bribe a public official in Florida and had pleaded nolo contendere to the charge. He was convicted and sentenced to a 5 year probation. The case is illustrative of the workings of rule 3.320 of the Rules of the Supreme Court which provides that any lawyer convicted of a

¹⁴ RSC 3.320.

¹⁵ 538 S.W.2d 39 (Ky. 1976).

¹⁶ *Kentucky Bar Ass'n v. Ball*, 501 S.W.2d 253 (Ky. 1971).

¹⁷ 301 S.W.2d 899 (Ky. 1957).

¹⁸ 535 S.W.2d 83 (Ky. 1975).

felony will be disbarred.¹⁹ This is a provision which has been the subject of some controversy, but disbarment seems the only defensible alternative for those convicted of felonies or other serious crimes. It is hard to imagine anything that would shake the confidence of the public more than to allow a convicted felon to continue in the practice of the law. If he cannot keep that trust and obey that oath, he should not be allowed to flaunt his disregard by continuing to practice.

It should be noted that the conduct which the Court found unacceptable in the preceding four cases was conduct which might have directly or indirectly affected the interests of clients. Misuse of funds and fee splitting are directly harmful, with the former much more serious than the latter. Conviction of a felony or a serious misdemeanor is indirectly harmful in that it indicates a bent of character which may suggest that the lawyer is not likely to perform correctly for a client. The convictions themselves are not dangerous to clients, but they stand as a warning about the character of the lawyer convicted, and the convictions are certainly detrimental to the image of the legal profession. It is always possible to engage in legal sophistry and question the result in any given disciplinary case, but the distinct feeling gained from these four cases is that the goal of the Court, protection of the public, is beyond dispute. The conduct in the cases was not only dangerous to the clients, it also cast dark shadows over that vast majority of the profession which is both honest and competent. In a sense the Court was exercising its power as head of the integrated bar to protect the reputation of its members not engaged in such conduct. For those who remember how unpleasant it was during the Watergate scandal to admit to being a lawyer, the memory is still too painful to find fault in Court decisions trying to protect the image of the profession it supervises. The cases discussed are illustrative of well-accepted legal principles. Hopefully they will serve as a warning to potential offenders and a promise to the public.

¹⁹ Disbarment will also result where a lawyer is convicted of a misdemeanor involving moral turpitude as defined in *Colton v. Commonwealth*, 454 S.W.2d 698 (Ky. 1970).

II. CONTROL OF COMPETENCE AND RELATED AREAS

It is likely that unless the various state bar associations begin to discipline their members for incompetence as well as for unacceptable forms of conduct, the legal profession will have the dubious honor of following the medical profession down the path of expanded malpractice actions. The conclusion in a survey sponsored by the American Bar Foundation, however, was that no efforts to police competence were being undertaken. The study suggested that a lack of adequate standards of competence was the reason for that failure.²⁰ However, it has simply become too common to hear lawyers at social events trading horror stories about incompetent conduct they have witnessed for the conclusion about lack of standards to be true. Competent practicing lawyers *do* know when they have seen incompetence. Perhaps it is time to remind them that the incompetent has violated a duty to his client²¹ and that the witnessing lawyer is under an affirmative duty to report such violation to the proper authorities.²²

While the cases from the last term of the Supreme Court do not discipline the involved lawyers for incompetence in the classic sense, they do apply sanctions for neglect in the handling of their clients' cases. Hopefully the distinction between negligence or incompetence and simply neglect, if not readily apparent, will be seen from a discussion of the facts of the following three cases.

Duane Vincent, the lawyer involved in *Kentucky Bar Association v. Vincent*,²³ had already been disciplined by the Court for his conviction for tax evasion²⁴ before the complaint relating to his neglect in handling the affairs of his clients came before the Court. Count One alleged that Vincent had been retained to secure a divorce for a woman. After he had filed a complaint and a reply to a counterclaim of the husband, Vin-

²⁰ Marks and Cathcart, *supra* note 1, at 236.

²¹ DR 6-101(A)(1) and (2).

²² "A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." DR 1-103(A). DR 1-102 provides that a lawyer shall not violate a Disciplinary Rule.

²³ 538 S.W.2d 39 (Ky. 1976).

²⁴ *Kentucky Bar Ass'n v. Vincent*, 538 S.W.2d 39 (Ky. 1976).

cent told his client that it would be necessary to take a deposition from a witness on the issue of the client's residency status. When the client came to Vincent's office with the witness, however, counsel for the defendant husband did not appear. The client alleged that the deposition was taken by Vincent's secretary, although Vincent alleged that he himself took the deposition. The deposition, notarized by Vincent's secretary, showed that opposing counsel had been notified and failed to appear and that the plaintiff was present in person and by counsel. In any event, Vincent assured his client that the deposition had been filed with the court in which the divorce was pending and that a decree would be forthcoming. This proved to be untrue and the client had to obtain other counsel to complete the divorce. The Court found Vincent guilty of neglect in his failure to file the deposition.²⁵

The second count in *Vincent* alleged that Vincent had been retained to file a damage claim for a client. Vincent told the client that the claim had been filed. He first said he filed it in Boone County, then said it was filed in Kenton County, and finally said that the complaint had been filed in federal district court in Lexington. In fact, the action had not been filed at all. Vincent contended that he had failed to file because the defendant in the action was judgment proof. This certainly is an unacceptable excuse. Vincent had been retained on a claim that could be brought in good faith and the client was entitled to maintain the suit. The fact that recovery of a judgment in the event of victory would not be possible was a factor of which the client might have been advised in deciding whether to continue with the claim. The crucial factor is that the decision belonged to the client, not to Vincent. In no circumstance did Vincent have the right not to file the claim after having been paid a retainer to do so. The Supreme Court found Vincent guilty of neglect in his failure to file and noted that he had lied to his clients.

The third count in *Vincent*, which was quite similar to the second count, alleged that Vincent had been retained to file a foreclosure suit for his clients. Vincent assured his clients that

²⁵ The evidence was not sufficiently clear to find that he had perjured himself on the question of his presence at the taking of the deposition. *Id.* at 40.

the case had been filed in Boone County and told them that the case probably would be tried in December of 1970. When nothing more was heard from Vincent, a lawyer from Virginia made an inquiry on behalf of the clients. Vincent replied to him that a complaint had been filed and an answer received from the defendants. In fact, no action in the matter had ever been taken by Vincent—no complaint had been filed, no answer had been received, and certainly no trial date had ever been set. Vincent argued that he had confused the client in this matter with another client, but the Court did not believe his contention.²⁶ Vincent also argued that he could not be disciplined in the matter since his conduct had taken place more than 5 years prior to the filing of the complaint against him and was therefore barred by the statute of limitations.²⁷ The Court correctly rejected the statute of limitations argument. Since the discipline of lawyers is clearly a matter controlled by the Supreme Court, there can be no legislative control over that process,²⁸ and no time limitation can be placed on the process by the legislature. Vincent was found guilty of neglecting his clients' case and of lying to his clients, conduct which would bring the bench and bar into disrepute. It must be agreed that Vincent's conduct did nothing to improve the image of the profession in the eyes of the clients whom he neglected and deceived. The penalty in the case was a 12 month suspension from practice.

The second case from the Supreme Court involving neglect of clients' affairs was *Kentucky Bar Association v. Dillman*.²⁹ Both counts in that action involved the failure of Gene Dillman to file legal actions he had been retained to handle. In the first instance he had been hired to file a bankruptcy petition for a client who was moving to another state, and as a result of his failure to file the action, his client lost his house and all the other property he owned in Kentucky. In the second instance, in which Dillman was retained to file a damage claim, his failure to file resulted in the claim becoming barred by the statute of limitations. The neglected claim appears to have

²⁶ The Court placed emphasis on the fact that the name involved, Boatright, was not a common name. *Id.* at 41.

²⁷ KRS § 413.120(2).

²⁸ *Kentucky Bar Ass'n v. Vincent*, 538 S.W.2d 39 (Ky. 1976).

²⁹ 539 S.W.2d 294 (Ky. 1976).

been worth in excess of \$10,000. In addition, Dillman lied to his client in telling him that the action had been filed. Dillman failed to offer any defense to the charges against him, and the Supreme Court found him guilty on both counts and suspended him from practice for 12 months. This sanction seems questionable and hardly severe enough considering the dire consequences to Dillman's clients resulting from his conduct. This is a factor not present in the *Vincent* case and hence the identical sanction in both seems inappropriate. Vincent deserved his 12 month suspension, but the sanction for Dillman should have been disbarment.

The third case of neglect heard by the Supreme Court was *Kentucky Bar Association v. Franklin*³⁰ in which Britton Franklin was suspended from practice for 6 months. Franklin had represented the plaintiff in a divorce action but was unable to secure a final decree in the action because he had failed to sign an amended complaint, obtain opposing counsel's signature to a property settlement, and pay the court costs. Franklin had been paid in full for his services by the client, which included an amount to cover court costs. It was necessary for the client to retain other counsel to secure a decree and to pay the court costs which had previously been advanced to Franklin. As noted by the Court, Franklin should have been charged by the Bar Association with misuse of his client's funds, which would have resulted in a much more serious penalty. A second charge was added to the case after the prosecution of the first charge had begun alleging that Franklin had lied to bar members investigating the first charge when he told them that the costs had been paid and further that he had planted a letter in the court clerk's file to substantiate that defense. Having been found guilty on both counts, Franklin was suspended for 6 months and can count himself lucky on the light sanction received.

These three cases from the last term involve what should be called neglect rather than negligence because they involve a failure to do a promised act rather than the doing of the act in an unsatisfactory manner³¹ and as a result represent fairly

³⁰ 534 S.W.2d 459 (Ky. 1976).

³¹ The Code of Professional Responsibility distinguishes between the two and

easy decisions. It is not at all difficult to say that a lawyer who has undertaken to represent a person must in fact act for that person and that the failure to act at all is unacceptable. The dire consequences resulting to their clients were compounded when the lawyers lied about the course of action taken, thus misleading the clients and preventing them from taking corrective action. The Court was quite correct in taking disciplinary action against the lawyers involved.

If neglect is unacceptable to the Supreme Court, it is time for the Court to take an equally firm stand that negligence and incompetence are also unacceptable. Where a lawyer is in fact acting, but acting poorly, it is even more misleading to the client than simple representations that he is acting. It is more difficult for a client to ascertain that actions are being taken badly than to ascertain that no actions are being taken at all. The offenses of negligence or neglect seem equally damaging to the reputation of the profession. The existence of the licensing system for lawyers implies that the public can trust a lawyer to be competent. It is the duty of the Court and the Bar to advance that confidence. Clients have malpractice options in cases of negligence just as they do in cases of neglect, but the existence of that option is not an effective deterrent to such conduct. The Supreme Court must in the future address the problem of incompetence. The three cases involving neglect show a definite trend in that direction.

III. SANCTIONS APPLIED IN DISCIPLINARY CASES

The disciplinary cases decided in the last term reveal an interesting pattern in the area of sanctions applied.

*Lester v. Kentucky Bar Association*³² was an action by a previously disbarred lawyer for reinstatement to the practice of law. Lester had been disbarred following a federal court conviction of a felony. The Trial Committee had recommended that Lester be reinstated. The Board of Governors recommended that the disbarment continue. The Supreme Court continued the disbarment on the grounds that Lester did not show suffi-

contains a disciplinary rule covering neglect as well as incompetence. See DR 6-101, *supra* note 2.

³² 532 S.W.2d 435 (Ky. 1975).

cient rehabilitation and that he might have been engaged in the practice of law in Kentucky while under the disbarment order.

In the cases of *Burbank*³³ and *Friedlander*,³⁴ the Supreme Court disciplined the lawyers for, respectively, fee splitting and misuse of a client's funds. In *Burbank*, the Board of Governors had recommended a public reprimand and the Supreme Court concurred. In *Friedlander*, the Trial Committee had recommended a 1 year suspension. The Board of Governors recommended disbarment and the Supreme Court ordered Friedlander disbarred.

In the criminal conduct cases of *Vincent*³⁵ and *King*,³⁶ the lawyers were disciplined for, respectively, tax evasion and bribery. The Trial Committee in *Vincent* had recommended a public reprimand. The Board of Governors recommended a 6 month suspension and that was the sanction applied by the Court. King, pursuant to rule 3.320 of the Rules of the Supreme Court was not heard before any tribunal other than the Supreme Court and he was disbarred.

The cases of *Vincent*,³⁷ *Dillman*³⁸ and *Franklin*³⁹ all involved lawyers who neglected the affairs of clients. The Trial Committee in *Vincent* had recommended a private reprimand and the Board of Governors recommended a 30 day suspension from practice. The Supreme Court suspended Vincent for 6 months. In *Dillman*, the Board of Governors recommended a 1 year suspension and the Supreme Court concurred. The Trial Committee in *Franklin* recommended a 60 day suspension and the Board of Governors concurred. The Supreme Court suspended Franklin from practice for 6 months.

Two interesting facts emerge from these cases. First, in no instance did the Supreme Court apply a sanction less severe than that recommended by the Kentucky Bar Association. It could be concluded from this that a lawyer who is disciplined

³³ Kentucky Bar Ass'n v. Burbank, 539 S.W.2d 312 (Ky. 1976).

³⁴ Kentucky Bar Ass'n v. Friedlander, 536 S.W.2d 454 (Ky. 1976).

³⁵ Kentucky Bar Ass'n v. Vincent, 538 S.W.2d 39 (Ky. 1976).

³⁶ Kentucky Bar Ass'n v. King, 535 S.W.2d 83 (Ky. 1975).

³⁷ Kentucky Bar Ass'n v. Vincent, 538 S.W.2d 39 (Ky. 1976).

³⁸ Kentucky Bar Ass'n v. Dillman, 539 S.W.2d 294 (Ky. 1976).

³⁹ Kentucky Bar Ass'n v. Franklin, 534 S.W.2d 459 (Ky. 1976).

by the Bar can expect little in the way of relief or comfort from the Supreme Court. The Kentucky Bar Association might take note that in some instances they have been too lenient in light of the sanctions later applied by the Court. The second fact that emerges is that the Court regards cases of neglect of clients' affairs in a much more serious light than does the Bar Association. In the cases of *Vincent* and *Franklin*, the Court applied sanctions which were much more severe than those which had been recommended. The Kentucky Bar Association should take this as an indication that it is the desire of the Court for Bar control over the area to be more thorough and strict.

IV. CONCLUSION

It should be obvious that the earlier rumors concerning discipline are true. The Supreme Court is taking very positive steps to improve the quality of the practice of law in Kentucky by increasing discipline within the profession. This trend is both noteworthy and praiseworthy. If the legal profession will not control itself through the appropriate disciplinary channels, the public will compel that control through malpractice actions. The position of the Court as head of the Bar is a blessing in that it leaves the profession outside the control of the legislature. However, that blessing carries with it a responsibility for self-discipline. The practicing lawyers in Kentucky should take note of the recent decisions and help the Court to restore some of the lost prestige to the profession.

