



1940

# Grounds for Disbarment and Suspension in Kentucky

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## Recommended Citation

Curry, J. Paul (1940) "Grounds for Disbarment and Suspension in Kentucky," *Kentucky Law Journal*: Vol. 28 : Iss. 3 , Article 6.  
Available at: <https://uknowledge.uky.edu/klj/vol28/iss3/6>

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The Kentucky court apparently has seen the reasons against attempting to effectuate the testator's intention in this jurisdiction by an application of the rule of *Wild's Case* and has consistently held that a life estate should go to the parent with remainder to his children.<sup>25</sup> In situations analogous to the first proposition in that case this is logical, for the children are not in being and the fee tail of *Wild's Case* cannot be effectuated in this state. The supposed intention of the testator is secured under the Kentucky holding, while it could not be achieved by an application of the principles of *Wild's Case*.

In situations similar to proposition two, the court's holdings have been consistent with its decisions under the first rule. If Simes is correct in his criticism of the distinction between situations in which there are children and those in which there are none *in esse* at the time of the testator's death, then that is another reason for refusing to follow *Wild's Case*. But what is more important is that in Kentucky a fee simple is presumed where there is any doubt as to the quantity of the estate to be taken, thus giving A and his children a joint tenancy in fee simple instead of a joint tenancy for life as in *Wild's Case*. The court has rejected this alternative as not being in accord with the testator's intention, because he would never have meant to give in such a manner that the exact estate which each would hold would be so uncertain. Thus the Kentucky court's interpretation of situations similar to proposition two of *Wild's Case* is no less logical than the one there embodied.

B. H. HENARD

#### GROUND FOR DISBARMENT AND SUSPENSION IN KENTUCKY.

The Court of Appeals has often stated that suspension and disbarment are not means of punishment, but are designed to protect the bar and the court and to promote the administration of justice.<sup>1</sup> How-

v. Union Trust Co., 235 Pa. 610, 84 Atl. 512 (1912) (stating that the second proposition in *Wild's Case* is not law in Pa.); *Keown's Estate*, 238 Pa. 343, 86 Atl. 270 (1913); *Scruggs v. Mayberry*, 135 Tenn. (8 Thomp.) 586, 188 S. W. 207 (1916).

<sup>25</sup> See cases cited, *supra*, note 2.

<sup>1</sup> *Baker v. Commonwealth*, 73 Ky. 592 (1874): "it would be unjust to the profession, . . . and a disregard of public welfare to permit an attorney who has forfeited his right to public confidence to continue (to practice)"; *Chreste v. Commonwealth*, 178 Ky. 311, 198 S. W. 929, 933 (1917): "It is recognized that . . . (disbarment) . . . is not in its nature a punishment . . . but is inflicted with a view of purifying and maintaining the high standard for integrity so essential to the office of attorney at law"; *Accord: Lenihan v. Commonwealth*, 165 Ky. 93, 176 S. W. 948, 955 (1915): "The purpose of disbarment is not to punish the attorney, but to protect the court and the administration of justice . . ." *Commonwealth v. Porter*, 242 Ky. 561, 46 S. W. (2d) 1096, 1097 (1932): "The purpose of a disbarment proceeding is not to punish the attorney but to protect the court in the administration of justice." For general treatment of the subject of this note see: *Warvelle, Legal Ethics* (1902) secs. 65, 68, 69, 73, 74; *Cohen, The Law: Business or Profession?* (1924), pp. 1-23; *Bolts, Ethics for Success at the Bar* (1928) pp. 17-37; *Brown, Lawyers and the Promotion of Justice* (1938) pp. 210-215.

ever, either one, but especially disbarment is a serious handicap to the one so suspended or disbarred. He is deprived of his usual means of livelihood for a varying period of time, perhaps permanently and he acquires a reputation which is difficult indeed for him to overcome. For these reasons, and the additional one that "(lawyers) . . . do not want to get mixed up in such a dirty mess"<sup>2</sup> (disbarment or suspension proceedings), there are few investigations of cases of unprofessional conduct, and fewer still are the cases found to warrant action.<sup>3</sup>

It has been suggested that "(an integrated bar association) . . . generally brings more disbarment proceedings than do local bar associations".<sup>4</sup> Although there has been no marked increase in cases of disciplinary nature in the Court of Appeals since 1934, the date of the establishment of the integrated bar in this state,<sup>5</sup> it may not be inferred that discipline has become lax under the new order. The Board of Bar Commissioners are empowered to take action by public or private reprimand without reporting the case to the Court of Appeals.<sup>6</sup> However, since suspension or disbarment requires action by the Court,<sup>7</sup> it follows that there has been no increase of such actions by reason of the new State Bar Association. Perhaps such drastic action is not regarded as necessary by the Board to maintain a high standard of ethics. The fact that the lawyers themselves are the ones who must maintain and raise their standards of conduct is shown by the identity of the persons who have initiated inquiries into the professional conduct of members of the bar. The instigators of such investigations have without exception been either other lawyers or the local bar associa-

<sup>2</sup> Brown, *Lawyers and the Administration of Justice* (1938) 212.

<sup>3</sup> *Id.* at 213. About one per cent of the complaints brought before the Association of the Bar of the City New York result in punishment of the offender. That percentage is probably typical of the whole country. As to its applicability to this state, see Caldwell, *The Problems of the Kentucky State Bar and Their Solution* (1936); Michigan Section (A Supplement to the Michigan Law Review), Vol. 1, Nos. 3, 47, 54: "As our first Board of Commissioners was organized November 26, 1934, . . . the actual handling of complaints was not begun until early in 1935. Of the 21 complaints that were handled by the board during the year five were adjusted to the satisfaction of the parties and withdrawn by consent, seven were dismissed as groundless following investigations and two . . . were pending. . . . Of the remaining seven which were referred to Trial Committees for hearing, one was pending at the close of the year and six had been prosecuted to final awards before the Board of Commissioners. "Of these six cases passed on by the Board, one was dismissed upon recommendation of the Trial Committee; in the other five, the charges were sustained and disciplinary action by the court recommended, including recommendation of disbarment in three cases and suspension in the other two."

<sup>4</sup> *Id.* at 214, n. 1.

<sup>5</sup> Carroll's Ky. Stat. (1936), sec. 101-1 (enacted in 1934).

<sup>6</sup> Rule 13, Practice and Procedure for Disciplining, Suspending and Disbarring Attorneys-at-Law. (This is a supplement to the Proceedings of the Kentucky State Bar Association for each year since 1935. Cited herewith as "rule—".)

<sup>7</sup> *Id.* Rule 13.

tion.<sup>8</sup> This is true although anyone may do so,<sup>9</sup> and there is widespread distrust of the lawyer by the layman.

### GROUND'S FOR DISBARMENT

Grounds for disbarment may be statutory or non-statutory. Statutory causes are those which popular opinion required to be set out by the legislature because of the intense feeling against the Commission. Non-statutory causes are those which the court has established in the exercises of its inherent power to regulate its bar. (It may be assumed that there is a stronger policy against those acts which constituted the statutory causes of disbarment.)

#### A. NON-STATUTORY CAUSES FOR DISBARMENT

##### 1. *Character Conduct in General*

A certificate of character signed by the Circuit Judge and the Commonwealth's attorney of the applicant's home judicial district is a prerequisite for permission to take the bar examination in Kentucky. The Court of Appeals reasons that one must have a good reputation before he can be admitted to the bar, and must retain it in order to continue his membership.<sup>10</sup> Then the first cause for disbarment to be considered is that of a bad character. Although that ground is somewhat general, the conception of the meaning of "bad character" is too indefinite to enable us to avoid the appearance of evil. It will not be amiss to recite some examples of conduct which have been held reprehensible.

In one case a lawyer erased words in a letter he was to deliver from one judge to another, so that the meaning was changed from "no" to "yes."<sup>11</sup> The alteration resulted in the release on bail of a relative of the offender. Again, the sale of liquor by the county attorney of a dry county (under local option) has been condemned.<sup>12</sup> That was compared to the acquisition of an interest adverse to one's client, since the attorney was required to enforce the law which he disobeyed. The procurement of employment in a pending suit in exchange for furnishing the name of an important witness,<sup>13</sup> and the

<sup>8</sup> See *Commonwealth v. Harrington*, 256 Ky. 41, 98 S. W. (2d) 53 (1936); *Re Sparks*, 261 Ky. 93, 101 S. W. (2d) 194 (1937); *Commonwealth v. Ward*, 265 Ky. 627, 103 S. W. (2d) 117 (1937); in *Re Gilbert*, 274 Ky. 187, 118 S. W. (2d) 535 (1938).

<sup>9</sup> Rule 12.

<sup>10</sup> *Underwood v. Commonwealth*, 32 Ky. Law Rep. 32, 105 S. W. 151 (1907). Accord: *Nelson v. Commonwealth*, 128 Ky. 779, 109 S. W. 337 (1908); *Commonwealth v. Roe*, 129 Ky. 650, 112 S. W. 683 (1908).

<sup>11</sup> *Baker v. Commonwealth*, 73 Ky. 592 (1875). The addressee had asked the writer for an opinion about his jurisdiction in defendant's relative's case.

<sup>12</sup> *Underwood v. Commonwealth*, 32 Ky. Law Rep. 32, 105 S. W. 151 (1907).

<sup>13</sup> *Chreste v. Commonwealth*, 178 Ky. 311, 198 S. W. 929 (1908); cf. *Commonwealth v. Stump*, 247 Ky. 589, 57 S. W. (2d) 524 (1933).

solicitation of employment through an intermediary have been held evidence of such bad character as to warrant disbarment.<sup>14</sup> So defendant's instigating a suit while the claim sued on was in the process of settlement, and making deceitful representations concerning the necessity of appointing a guardian for the infant plaintiff warrants suspension.<sup>15</sup>

Most of these situations are not provided for by statute. Under these circumstances the conduct has been described as ". . . grossly unprofessional or dishonorable . . . of a character likely to deceive or defraud a client or the public."<sup>16</sup> It is not necessary that the offense be criminal<sup>17</sup> or be performed while the attorney is occupied in the discharge of his duties as an attorney.<sup>18</sup> The effect of the conduct must be to deprive the public of confidence in the attorney.<sup>19</sup> Gross negligence alone in the conduct of one's business is not evidence of such bad character.<sup>20</sup> It has been suggested that each case involving a charge of bad character rests on its own facts.<sup>21</sup> This method of handling such cases results in a flexible rule which can accommodate itself to the circumstances.

(a) Falsification or abstraction of records and papers

The falsification of records or papers used in a trial is justly actionable as a fraud on the court and an obstruction to the administration of justice. Thus in *Rice v. Commonwealth*,<sup>22</sup> one Rice altered a letter which was to be offered in evidence by his co-counsel by adding the word "Pres.", to the signature. This act made it appear that the letter had been written by the sender in his official capacity as president of the Kentucky Trust Company. The letter having been offered in evidence by the co-counsel, the attorney who altered it was disbarred. This seems to be harsh action in this case, and it is submitted that a suspension would have been sufficient to discourage such a practice on the part of this offender.

A related problem is the filing of a paper which apparently has been altered, without an investigation to determine its correctness. It has been held that such failure warrants a reprimand by the court.<sup>23</sup>

<sup>14</sup> *Chreste v. Commonwealth*, 178 Ky. 311, 198 S. W. 929 (1917). Solicitation in person by the attorney is condemned in *Lenihan v. Commonwealth*, 165 Ky. 93, 176 S. W. 948, 952 (1915).

<sup>15</sup> *Lenihan v. Commonwealth*, 165 Ky. 93, 176 S. W. 948 (1915).

<sup>16</sup> Rule 12.

<sup>17</sup> *Chreste v. Commonwealth*, 178 Ky. 311, 198 S. W. 929 (1917); cf. *Baker v. Commonwealth*, 73 Ky. 592, 598 (1874); *Underwood v. Commonwealth*, 32 Ky. Law Rep. 32, 105 S. W. 151 (1907).

<sup>18</sup> See *Baker v. Commonwealth*, 73 Ky. 592 (1874); *Underwood v. Commonwealth*, 32 Ky. Law Rep. 32, 105 S. W. 151 (1907).

<sup>19</sup> *Baker v. Commonwealth*, 73 Ky. 592, 597, 598 (1875); *Chreste v. Commonwealth*, 178 Ky. 311, 198 S. W. 933 (1917); cf. *Underwood v. Commonwealth*, 32 Ky. Law Rep. 32, 105 S. W. 151 (1907); Rule 12.

<sup>20</sup> *Duffin v. Commonwealth*, 208 Ky. 452, 272 S. W. 555 (1925).

<sup>21</sup> *Commonwealth v. Roe*, 129 Ky. 600, 112 S. W. 683 (1908).

<sup>22</sup> 57 Ky. 472 (1857).

<sup>23</sup> *Sparks v. Commonwealth*, 225 Ky. 334, 8 S. W. (2d) 397 (1928).

It is suggested such conduct if grossly negligent would be as culpable as the act of making the alteration and should be punished with a suspension. Another fraud on the court is the abstraction of material from court files when a suit is pending on the material stolen. This offense has been declared to be grounds for disbarment.<sup>24</sup>

(b) Deception of the Court; obstruction of the administration of justice

The placing on file of depositions falsely certified to have been taken before a named notary in Ohio when in fact they had been taken in Kentucky in the absence of a notary,<sup>25</sup> and the falsification of a deposition by the addition of questions and answers after it was completed<sup>26</sup> have been condemned as acts of gross professional misconduct warranting disbarment. They constitute a fraud on the court which may not be overlooked.

The obstruction of the administration of justice by an attorney, who is an officer of the court, is a serious offense. In the only Kentucky case on this subject the offender was disbarred.<sup>27</sup> The charge was that of paying a witness not to appear against the defendant's client in a criminal prosecution.

(c) Gross contempt of court

Gross contempt of court was formerly a ground for disbarment.<sup>28</sup> The wisdom of this attitude is shown by *In Re Wooley*.<sup>29</sup> One Wooley in a petition to the Court of Appeals for a rehearing stated that the court had overlooked the facts of his case, had assumed facts not in the record, and had ignored others which appeared; that the court was careless of the rights of a litigant; that the result of this was a ruinous, disastrous and unjust judgment against a party wholly innocent of all offense. He was disbarred, and his conduct was classified as a disparagement of the court. Subsequent to the *Wooley* case a statute was passed limiting the punishment for contempt without the intervention of a jury to thirty dollars and/or thirty hours.<sup>30</sup> In *Adams v. Gardner*,<sup>31</sup> this statute was held to preclude suspension for contempt. The reasoning in that case that the statutory methods of punishment were exclusive would prevent disbarment under the circumstances of the *Wooley* case. Such a result is unfortunate, depriving the court of the right to punish a gross contempt which tends to bring it into public disrepute.

(d) Misconduct toward the client

There are certain types of dishonesty toward the client which have been held to require disbarment. "Selling out" to the other

<sup>24</sup> *Commonwealth v. Ward*, 265 Ky. 627, 103 S. W. (2d) 117 (1937).

<sup>25</sup> *Davis v. Commonwealth*, 223 Ky. 90, 2 S. W. (2d) 1038 (1928).

<sup>26</sup> *In re Gilbert*, 274 Ky. 187, 118 S. W. (2d) 535 (1938).

<sup>27</sup> *Taylor v. Commonwealth*, 192 Ky. 410, 233 S. W. 895 (1921).

<sup>28</sup> *In re Wooley*, 74 Ky. 95 (1874).

<sup>29</sup> *Ibid.*

<sup>30</sup> *Carroll's Ky. Stat.* (1936), sec. 1291.

<sup>31</sup> 176 Ky. 252, 195 S. W. 412 (1917).

party,<sup>32</sup> failure to act when the time to act has arrived,<sup>33</sup> and fraudulent conduct toward the client are examples.<sup>34</sup> An interesting factual set-up occurred in *Re McDonald*.<sup>35</sup> There the defendant attorney represented to his client that he had obtained a divorce for him while in fact he had not. The client remarried, and the attorney's breach of duty was brought to light when the client was prosecuted for bigamy. Defendant was disbarred.

## B. STATUTORY GROUNDS FOR DISBARMENT

### 1. *Conviction of criminal offenses; the commission of acts for which liability to prosecution arises.*

The state legislature has provided that conviction of treason or of a felony shall be cause for disbarment.<sup>36</sup> This has been extended by rule of the Court of Appeals to include conviction under federal law.<sup>37</sup> The *conviction* is the thing for which disbarment is prescribed, and conviction is held to be conclusive evidence of guilt, requiring disbarment.<sup>38</sup> The fact that the attorney may be pardoned for the offense before the disbarment proceedings is no defense.<sup>39</sup> The case of *Beckner v. Commonwealth*<sup>40</sup> suggests an interesting, but anomalous exception to this rule. Beckner represented the defendant, Harrison, in a suit which the defendant lost. The plaintiff sued on the judgment, which he had obtained against Harrison, in England. To prevent summary proceedings, Beckner drew up for his former client a false affidavit to support a charge of unfairness and fraud on the part of the trial judge. Beckner's affidavit was presented in the suit in the English court, and he was later suspended for having committed acts rendering him liable to prosecution for perjury. This judgment was reversed on appeal, the court stating that a witness should not be harassed except by a criminal prosecution for perjury, on account of any statement he may make as a witness. The court further said that an attorney who is a witness can claim this protection.

Both perjury and false swearing are felonies in this state,<sup>41</sup> and the court usually disbars the one who commits those acts for which liability to criminal prosecution exists.<sup>42</sup> Under this principle Beckner

<sup>32</sup> *Tudor v. Commonwealth*, 27 Ky. Law Rep. 87, 84 S. W. 522 (1905).

<sup>33</sup> *Re Gilbert*, 274 Ky. 187, 118 S. W. (2d) 535 (1938).

<sup>34</sup> *Commonwealth v. Harrington*, 266 Ky. 41, 98 S. W. (2d) 53 (1936); *Re Sparks*, 261 Ky. 93, 101 S. W. (2d) 194 (1937).

<sup>35</sup> 157 Ky. 93, 162 S. W. 66 (1914).

<sup>36</sup> Carroll's Ky. Stat. (1936), sec. 97.

<sup>37</sup> Rule 12.

<sup>38</sup> *Commonwealth v. Porter*, 242 Ky. 561, 46 S. W. (2d) 1096 (1932).

<sup>39</sup> *Nelson v. Commonwealth*, 128 Ky. 779, 109 S. W. 337 (1908).

<sup>40</sup> 126 Ky. 318, 103 S. W. 378 (1907). But see *Re Ulmer*, 208 Fed. 461 (1913); *Re Thorn*, 164 App. Div. 151, 149 N. Y. S. 507 (1914); *Re Nichols*, 165 App. Div. 901, 149 N. Y. S. 1099 (1914).

<sup>41</sup> Carroll's Ky. Stat. (1936), secs. 1173, 1174.

<sup>42</sup> Rule 12.

would have been disbarred but for the fact that his offense was perjury, and he could claim a right to be punished only in a criminal trial. The decision in the *Beckner* case is subject to criticism in that it loses sight of the policy which looks to the maintenance of an honest bar. This policy should be deemed controlling although its effect is to deny to attorneys who are witnesses freedom from proceedings other than criminal action as a result of their testimony. The commission of perjury by an attorney could be held to constitute evidence of bad character. Then the attorney-witness could be disbarred without overruling the *Beckner* case. If that is not possible, the effect of the *Beckner* case in its fullest implications is certainly unfortunate, since it must be admitted that one who has been guilty of perjury is not a fit person to remain a member of the profession.

Rule twelve<sup>43</sup> of the Court of Appeals' rules relating to disbarment extends the statute by providing for the investigation of "... any professional act for which liability to prosecution exists under the laws of this state or of the United States. . . ." This includes both felonies and misdemeanors and is broad enough to include civil prosecution. Its implications would tend to making obedience to traffic regulations and the regular payment of bills of vital importance to an attorney. However, an examination of the entire rule leads to the belief that such trifling offenses are not grounds for its application. A misdemeanor which involves moral turpitude and invites the imposition of a heavy fine and/or jail sentence may require serious consideration.

2. *The payment of dues of other members by nominees for offices in the State Bar Association.*

The payment of dues of other members by nominees for office in the State Bar Association is declared to constitute "unprofessional conduct"<sup>44</sup> but the effect of it is not stated. Since rule twelve of the Court of Appeals rules relating to disbarment provides for an investigation of acts of "professional misconduct" with a view to taking the proper disciplinary action, it is suggested that a flagrant case of dues-paying by nominees may result in suspension or disbarment.

#### GROUND FORS FOR SUSPENSION

It may be stated generally that any act which is described *supra* as a cause for disbarment may be considered to warrant suspension only when there are extenuating circumstances in favor of the accused.

##### A. STATUTORY GROUND FORS FOR SUSPENSION

1. *Misappropriation of the client's money.*

A very important part of every attorney's relation with his client is the matter of the collection of money judgments. That is covered

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<sup>43</sup> See n. 6, *supra*.

<sup>44</sup> Rule 5.

by a statute which provides:<sup>46</sup> "if an attorney . . . shall collect the money of his client, and, on demand, wrongfully neglect or refuse to pay over the same, the circuit court . . . shall . . . suspend him from practice in any court for twelve months and until the money shall be paid . . . A demand for the money shall be made of such attorney in the county of his residence . . ."

Attention is called in *Evans v. Wade*<sup>46</sup> to the fact that the money which is withheld must have been collected from a third person for the client and not be money paid the attorney under a contract of employment. That case arose over the amount of a fee in dispute. The necessity of a demand by the client in order to afford the attorney an opportunity to repay the sum claimed before suit was instituted, was emphasized. A bona fide refusal to pay over was held a good defense in a proceeding under the statute in *Bonner v. Goodloe*<sup>47</sup> which stressed the word "wrongful." *Denney v. Commonwealth*<sup>48</sup> asserted the following principles on this question: A reasonable delay in payment after demand is not wrongful; the reasonableness of the delay depends on the circumstances in each case; a delay of ten months after collection and three months after demand is not reasonable.

#### 2. Failure to pay dues to the State Bar Association.

Another ground for suspension is the omission to pay dues to the State Bar Association.<sup>49</sup> Suspension for that reason is for the period of default, and may take effect only after a rule from the Court of Appeals has been directed toward the delinquent member.

### CONCLUSION

In conclusion it may be stated that the decided grounds so far for disbarment in Kentucky are: (1) evincing a bad character; (2) the commission of an act which may be the subject of a criminal prosecution under state or federal law; (3) treason on the part of the attorney or the conviction of a felony (except perjury); and perhaps (4) the payment of dues of other members by nominees for offices in the State Bar Association. The causes for suspension are: (1) misappropriation of the client's money, and (2) failure to pay dues to the State Bar Association.

There is little reason to take the risk of a disciplinary proceeding in the event of a doubtful course of conduct in view of rule seventeen of the rules promulgated by the Court of Appeals. This rule provides for advisory opinions on the propriety of a contemplated professional act or course of conduct to be rendered by the Board of Bar Commissioners of the State Bar Association. There is also a right of appeal to the Court of Appeals. These opinions will be rendered on application of any member of the Association. Suspension for the non-payment of dues to the Association may be avoided by becoming

<sup>46</sup> Carroll's Ky. Stat. (1936), sec. 104.

<sup>47</sup> 212 Ky. 238, 278 S. W. 604 (1925).

<sup>48</sup> 205 Ky. 555, 266 S. W. 62 (1924).

<sup>49</sup> 175 Ky. 357, 194 S. W. 330 (1917).

\*Rule S. (Rule made returnable on Nov. 20 of this year.)

a retired member. Retirement is accomplished by directing a request therefor to the Secretary of the Association.<sup>50</sup>

The Bar Association has not taken many cases involving ethical questions to the Court of Appeals, but it should not be condemned on that point. It has been in existence for only about five years,<sup>51</sup> and there is another method which is not subject to the surveillance of the Court by which to enforce discipline.

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<sup>50</sup> Rule 9.

<sup>51</sup> The Integrated Bar Act (Ky. Stat., sec. 101-1) was passed in 1934.