Neglect of a Legal Matter Entrusted to an Attorney under DR 6-101(A) (3)

Introduction

Until the present Code of Professional Responsibility there were no earlier provisions specifically making an attorney's incompetence, neglect or carelessness an adequate basis for discipline.[1] When the American Bar Association promulgated the present Code of Professional Responsibility (hereinafter referred to as ABA Code), they included Canon 6 which states: "A lawyer should represent a client competently." Before Canon 6, it was questionable whether an attorney could be disciplined for his neglect, carelessness, or incompetence.[2] Some jurisdictions found authority to discipline attorneys for such conduct[3] with old Canons 15[4] and 21,[5] while other jurisdic-

1. V. COUNTRYMAN, T. FINMAN & T. SCHNEYER, THE LAWYER IN MODERN SOCIETY 101 (2d ed. 1976); Thode, *Canons Six and Seven: The Lawyer-Client Relationship*, 48 TEX. L. REV. 367, 374 (1970).

2. V. COUNTRYMAN, *supra* note 1.

3. *Id.*; THODE *supra* note 1. *See, e.g., In re* Van Spanckeren, 81 Ariz. 54, 299 P.2d 643 (1956) (Negligence in handling an estate held to violate Canon 21.); *In re* Lanza, 24 N.J. 191, 131 A.2d 497 (1957) (Negligence of an attorney held to violate Canons 15 and 21.) *See* notes 4 and 5 *infra*.

4. ABA CANONS of PROFESSIONAL ETHICS No. 15:

> Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim, often set up by the unscrupulous in defense of questionable transactions, that it is the duty of the lawyer to do whatever may enable him to succeed in winning his client's cause.
>
> It is improper for a lawyer to attest in argument his personal belief in his client's innocence or in the justice of his cause.
>
> The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty. In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may effect his lawyer to assert every such remedy or defense. But it is steadfastly to be borne in mind that the great trust of the lawyer is to be performed within and not without the bounds of the law. The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of

tions simply appeared to deny that such conduct was a basis for discipline.[6] In addition to specifically including the competency requirement, the present ABA Code also contains Disciplinary Rule (hereinafter referred to as DR) 6-101 (A)(3) which provides that a lawyer shall not "[n]eglect a legal matter entrusted to him." DR 6-101(A)(3) was apparently included in the ABA Code because of the ABA's concern over the number of complaints of attorney neglect.[7] In any event, when the final draft of the ABA Code was adopted, it contained a competency requirement of Canon status[8] and a Disciplinary Rule which prohibited the neglecting of legal matters.[9] It is the purpose of this comment to explore the meaning and the applicability of the phrase "neglect of a legal matter entrusted to an attorney" as contained in ABA Code, DR 6-101(A)(3).

Neglect as a Basis for Discipline Before the Adoption of the ABA Code

As previously indicated, before the ABA Code there was no specific basis in the Canons of Professional Ethics for discipline for an attorney's neglect. Therefore, some states held that neglect was a basis for discipline while others did not.[10] A prime example of the attitude of courts in jurisdictions were neglect was not considered a basis for discipline is demonstrated in *Gould v. State*.[11] In *Gould*, the court reversed an order of disbarment of an attorney who

---

fraud or chicane. He must obey his own conscience and not that of his client.

5. ABA CANONS OF PROFESSIONAL ETHICS No. 21: "It is the duty of the lawyer not only to his client, but also to the Courts and to the public to be punctual in attendance, and to be concise and direct in the trial and disposition of causes."

6. V. COUNTRYMAN, *supra* note 1; Thode, *supra* note 1. *See, e.g.*, Gould v. State, 99 Fla. 662, 127 So. 309 (1930) (A mere charge of laziness or inattention to duty without corrupt motive was not a sufficient basis for discipline.); *In re* Henning, 294 Minn. 336, 201 N.W.2d 208 (1972) (neglect not a basis for discipline in Minnesota prior to the adoption of the ABA Code).

7. ABA CODE, DR 6-101(A)(3), note 6: "The annual report for 1967-1968 of the Committee on Grievances of the Association of the Bar of the City of New York showed a receipt of 2,232 complaints; of the 828 offenses against clients, 76 involved conversion, 49 involved 'overreaching,' and 452, or more than half of all such offenses, involved neglect."

8. ABA CODE, Canon 6.

9. ABA CODE, DR 6-101(A)(3).

10. *See* note 6 *supra* and accompanying text.

11. 99 Fla. 662, 127 So. 309 (1930). *Accord, In re* McNabb, 395 P.2d 847 (Alaska 1964).

had been disciplined for the failure to diligently prosecute his client's claims. The court stated that to authorize disbarment not only the act charged but the bad faith or fraudulent motive of the attorney must be proved by a preponderance of the evidence. Similarly, in many of the jurisdictions which recognized neglect as a basis for punishment, the severest punishment allowed was censure or reprimand.[12] The Michigan Supreme Court held in *Attorney General v. Lane*,[13] that the mere inattention to duty to a client, when not accompanied by moral delinquency, might call for censure and subject the attorney to civil liability, but did not by itself warrant disbarment or suspension. If an attorney, however, retained a fee for services promised and that attorney did not perform those services by reason of his own negligence, then suspension would be warranted.[14]

In many jurisdictions neglect was a basis for disciplinary action even before the adoption of the ABA Code.[15] As previously men-

12. *See, e.g.* State *ex rel.* Fishkind, 107 So. 2d 131 (Fla. 1958) (Where an attorney was suspended from practice for six months for conduct amounting to carelessness, procrastination, and inattention to duty, the court found such punishment too severe and public reprimand to be sufficient.); Attorney Gen. v. Lane, 259 Mich. 283, 243 N.W. 6 (1932) (The court found mere inattention to duty to warrant only censure and not disbarment.); *In re* Disbarment of McCann, 181 Wash. 183, 42 P.2d 437 (1935) (The court found that an attorney's failure to be as diligent as he should have been in handling his client's affairs to only warrant reprimand.).

13. 259 Mich. 283, 243 N.W. 6 (1932).

14. *Id.* 243 N.W. at 8.

15. *See, e.g.*, People *ex rel.* Attorney General, 163 Cal. 527, 431 P.2d 781 (1967) (public reprimand for failure to appear in court for clients after due notice and for failing to prepare a complaint resulting in the running of the statute of limitations); State v. Martindale, 215 Kan. 667, 527 P.2d 703 (1974) (neglect a basis for discipline in Kansas long before the adoption of the ABA Code); State *ex rel.* Nebraska State Bar Ass'n v. Texas, 183 Neb. 272, 159 N.W.2d 572 (1968) (censure and reprimand for failure to institute proceedings to administer an estate and to prosecute an action for a client); *In re* Jaffe, 30 App. Div.2d 151, 291 N.Y.S.2d 52 (1968) (involved a failure by an attorney to prosecute a client's action resulting in a one year suspension); *In re* Robinson, 163 App. Div. 844, 147 N.Y.S. 103 (1914) (involved neglect of client's affairs for years coupled with misrepresentation of services performed); Cleveland Bar Ass'n v. McGinty, 18 Ohio St. 2d 71, 247 N.E.2d 459 (1969) (public reprimand for undue neglect of responsibilities to clients); *In re* Anderson, 244 Or. 347, 418 P.2d 498 (1966) (public reprimand for gross neglect of client's affairs); State *ex rel.* Supreme Court v. Anderson, 239 Or. 362, 397 P.2d 838 (1964) (permitting an indigent prisoner's appeal from conviction to expire violated Canon 22); *In re* Hutchings, 67 Wash. 2d 144, 406 P.2d 777 (1965) (involved neglect, delay and procrastination in managing clients' funds).

tioned, some of the jurisdictions that recognized neglect as a ground for discipline based that ground on Canons 15 and 21.[16] In the case of *In re Van Spanckeren*,[17] an attorney was guilty of not closing a probate estate for a period of twenty-two years. The court held the attorney guilty of gross negligence and of "rank procrastination."[18] The *Spanckeren* court further held that such conduct violated old Canon 21 and that the attorney's inattention to his client's business was "shocking and deserved severe censure."[19] In another case, *In re Lanza*,[20] an attorney negligently failed to protect a client's interest by failing to diligently prosecute his client's divorce action which resulted in the action being dismissed by the court for lack of prosecution. The *Lanza* court held that delay in the prosecution of a client's case without more is not necessarily malpractice, although such conduct may result in a reprimand and censure of the attorney. The court further held that such conduct violated Canons 15 and 21 of the old Code.[21]

California is an example of a jurisdiction that has consistently held that neglect of a legal matter by an attorney is a basis for discipline. In *Herron v. State Bar of California*,[22] the court indicated that an attorney who was guilty of successive breaches of duty to his clients was guilty of conduct involving deliberate moral turpitude and should be disbarred; however, the court also indicated that single instances of neglect would require lesser punishment.[23] In the later case of *Grove v. State Bar of California*, the California Supreme Court stated that "a habitual course of neglect of clients'

16. *See* notes 3, 4, 5 and 6 *supra* and accompanying text.

17. 81 Ariz. 54, 299 P.2d 643 (1956).

18. *Id.*, 299 P.2d at 645.

19. *Id.* The attorney in this case was also charged with commingling funds. The court dealt with the commingling of funds charge and the neglect charge separately and found the attorney guilty on both counts. The attorney was indefinitely suspended.

20. 24 N.J. 191, 131 A.2d 497 (1957).

21. The attorney in *In re Lanza* was also guilty of answering falsely to an affidavit of inquiry, of answering falsely to the client's inquiries concerning the status of the client's divorce, and of doing nothing to have the dismissed divorce action restored as an active case. The attorney was therefore also guilty of violating Canons 22 and 29 of the Canons of Professional Ethics which required an attorney to be candid and fair with his clients (Canon 22) and to uphold the honor of the profession (Canon 29). The attorney was suspended for 3 months. *Id.*, 131 A.2d at 499, 500.

22. 24 Cal.2d 53, 147 P.2d 543, *cert. denied*, 323 U.S. 753 (1944).

23. *Id.*, 147 P.2d at 551.

interests characterized a willful violation of an attorney's oath."[24] Such neglect by an attorney was considered by the court to be an act of moral turpitude and professional misconduct which warranted disbarment. The California Courts still follow this line of reasoning under the current code governing professional responsibility in California.[25]

Neglect of a Legal Matter Under DR 6-101(A)(3)

One problem with trying to delineate what neglect of a legal matter under DR 6-101(A)(3) encompasses is that no cases to date have really tried to define what neglect is. Very few cases, if any, have tried to analyze what courses of conduct by attorneys fall under DR 6-101(A)(3). In fact very little analysis of DR 6-101(A)(3) has been made by either the ABA or the courts.

In 1973 the ABA Committee on Professional Ethics rendered Informal Opinion No. 1273 which concerned DR 6-101(A)(3). The ABA Committee on Professional Ethics refused to answer four of five questions directed to them concerning neglect under DR 6-101.[26]

---

24. 66 Cal.2d 680, 682, 427 P.2d 164, 166, 58 Cal. Rptr. 564, 566 (1967).

25. *See, e.g.*, Martin v. State Bar, 20 Cal.3d 717, 575 P.2d 757, 144 Cal. Rptr. 214 (1978).

26. The five questions asked were the following:

1. A lawyer is retained to seek redress for losses sustained by his client. A year elapses and his file reveals that he has taken little, if any, affirmative action in the matter. Has the lawyer violated DR 6-101?
2. Assume the lawyer engaged in necessary investigation and adequately prepares the claim, but he fails to file a suit within the applicable statute of limitations. Has the lawyer violated DR 6-101? Is it relevant whether the omission by the lawyer was inadvertent?
3. Assume a lawyer has not neglected the matter entrusted to him, is his ordinary negligence involving an affirmative act or omission grounds for disciplinary action?
4. Assume the lawyer for the plaintiff does in fact file the suit but not within the applicable statute of limitations. Defense counsel, however, fails to plead the affirmative defense of the statute of limitations, and the suit goes to trial. Has defense counsel violated DR 6-101?
5. A lawyer, a member of the bar for two years, is retained to defend a client charged with a criminal offense for which the maximum sentence that could be imposed is twenty years. The lawyer has some limited experience in minor criminal matters but has not previously handled a case of equivalent seriousness. The lawyer does not associate himself with experienced counsel and represents the defendant at trial. Has the lawyer violated DR 6-101?

The Committee's reason for not answering four of the questions was that each question involved a fact situation which could be supplemented by additional facts. The Committee went on to state that whether or not there was neglect would depend on all relevant factors. The ABA Committee on Professional Ethics did address itself to the broad concept of neglect in Informal Opinion No.1273, stating:

> Neglect involves indifference and a consistent failure to carry out the obligations which the lawyer has assumed to his client or a conscious disregard for the responsibility owed to the client. The concept of ordinary negligence is different. Neglect usually involves more than a single act or omission. Neglect cannot be found if the acts or omissions complained of were inadvertent or the result of an error of judgement made in good faith.

Only one case, *In re Taylor*,[27] has discussed Informal Opinion No. 1273. In *Taylor* an attorney was charged with four counts of neglect. A Hearing Board found the attorney guilty of charges (1), (2), and (4).[28] The Hearing Board found that the attorney had violated DR 6-101(A)(3) and DR 7-101(A)(2).[29] The Board recom-

---

The four questions the Committee declined to answer were questions 1, 2, 4 and 5. ABA COMMITTEE ON PROFESSIONAL ETHICS, INFORMAL OPINIONS [hereinafter cited as INFORMAL OPINIONS], No. 1273 (1973).

27. 66 Ill. 2d 567, 363 N.E.2d 845 (1977).

28. The attorney was found guilty of the following counts:

(1) Taylor accepted $200 for an appearance at a criminal hearing. Taylor did not make the appearance. Taylor claimed he went to the wrong court, but he did not offer to return the money until the disciplinary hearing.

(2) Taylor accepted $75 to represent a client in a divorce. Taylor never commenced the divorce.

(4) A client retained Taylor to defend her in a wrongful death action. Taylor received $150 from the client. Taylor entered an appearance on behalf of the client, and he never withdrew his appearance. Taylor never filed an answer or any other pleading. A default judgement was entered against Taylor's client. She couldn't reach Taylor on several attempts; consequently, she had to retain other counsel to negotiate a settlement. Taylor never refunded the money paid to him by the client. *Id.*, 363 N.E.2d 846.

29. ABA CODE DR 7-101(A)(2) states that "a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105."

mended that the attorney be suspended for three years. The attorney involved filed exceptions with the Supreme Court of Illinois. One of the attorney's major defenses was that only moral turpitude, and not neglectful conduct, can be the basis for disciplinary proceedings. The attorney cited Informal Opinion No. 1273 in support of this contention. The court held that neglect in the performance of an attorney's duties can be sufficient to warrant disciplinary action and furthermore, that suspension is a proper punishment even where a corrupt motive and moral turpitude are not clearly shown. The court in *Taylor* stated that Informal Opinion No. 1273 was of only questionable benefit to the attorney's case. The *Taylor* court said:

> The examples listed in that "opinion" fail to exactly exemplify the charges against the respondent. Even if they were exactly on point, they would be of dubious value because, as "opinion" notes, additional facts would be necessary to ascertain a finding of neglect or of no neglect in each of the examples.[30]

The court in *Taylor* went on to conclude that the attorney's actions of agreeing to represent a client, accepting fees for costs, neglecting to perform and to complete legal services, and being inaccessible to a client demonstrated a pattern of consistent neglect that warranted a suspension for a one year period.[31]

ABA Informal Opinion No. 1273 suggests that the ABA Committee on Professional Ethics may be taking a less than firm position on DR 6-101(A)(3). In fact it appears that they are diluting the strength of DR 6-101(A)(3) as a firm basis for disciplinary action on grounds of imcompetence or carelessness.[32] The ABA Committee appears to have read into DR 6-101(A)(3) criteria not stated in the ABA Code. DR 6-101(A)(3) simply states that *"A lawyer shall not neglect a legal matter entrusted to him."* According to the Code "[t]he Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character . . . [and] state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[33] Therefore, a logical interpretation of DR 6-101(A)(3) would be that any time an attorney neglects a legal matter entrusted to himself, whether it be a single instance or in good

30. 66 Ill.2d 567, 363 N.E.2d 845, 847 (1977).
31. *Id.*
32. V. COUNTRYMAN, *supra* note 1.
33. Preamble to ABA CODE.

faith, some degree of disciplinary action would be warranted. ABA Informal Opinion No. 1273 seems to confuse the degree of punishment warranted and the effect of mitigating circumstances on punishment, with the definition of "neglect of a legal matter." In a practical sense, however, Informal Opinion No. 1273 is correct in that the vast majority of disciplinary actions concerning DR 6-101(A)(3) will involve more than a single act or omission. Furthermore, the opinion points out that all factors have to be evaluated before a determination can be made as to whether an attorney is guilty of neglect. Unfortunately, as the *Taylor* case points out, Informal Opinion No. 1273 does not help much in the determination of whether an attorney is guilty of neglect.

Some insight into the meaning of "neglect of a legal matter" can be derived from several recent court decisions. In *Maryland State Bar Assoc. v. Phoebus*,[34] an attorney was charged with five instances of neglect that violated DR 6-101(A)(3).[35] The attorney had also been disciplined on two prior occasions. The hearing panel determined that the attorney was guilty of all five charges, and the Supreme Court of Maryland affirmed their decision. The Maryland court held that the proper test for determining whether DR 6-101(A)(3) had been violated was by proof by clear and convincing evidence, and the court held this test had been met. The court also noted that the attorney plays an important role in the legal process, and that he must act with competence and proper care in representing his clients. The court in *Phoebus* further stated the following:

---

34. 276 Md. 353, 347 A.2d 556 (1975).

35. The charges against Phoebus were as follows:

(1) As counsel for a client, Phoebus had failed to file any proceedings in their behalf to foreclose the right of redemption in property purchased by them at a tax sale; and had represented to them that they could construct a building upon the property purchased (which they did) notwithstanding the fact that the period for redemption had not expired;

(2) Although instructed by a client to dissolve a corporation, Phoebus had failed to file the articles of dissolution with the state;

(3) As personal representative for an estate, Phoebus failed to properly administer the estate, and he failed to file a proper inventory;

(4) Phoebus failed to properly administer another estate; and

(5) Through Phoebus' inaction as an attorney for another estate, tangible personal property was lost.

Id., 347 A.2d at 557-58.

> His [the attorney's] admission to the Bar attests to the public that he has met the standards for admission and is competent to discharge his duties toward his clients with strictest fidelity. Once retained he must carefully safeguard the interests of his clients, must be diligent in his representation of the client's interests, must give appropriate attention to his legal work, and must observe the utmost good faith in his professional relationship.[36]

The *Phoebus* court went on to find that anytime an attorney's conduct showed him to be unfit to continue to exercise the duties and responsibilities of an attorney, that attorney's right to practice may be brought into question in a disciplinary proceeding.[37]

In *Phoebus* the Maryland Supreme Court found that the attorney in question should be disbarred. The court held that where an attorney has been shown to have been negligent, or inattentive to his client's interests, or to have exhibited a lack of professional competency in the handling of a client's affairs, in violation of canons or statutes, some punishment would be warranted. The court did say, however, that the severity of the conduct and the particular facts of the case would determine the extent of the discipline to be applied. In this case the court decided the attorney's conduct warranted disbarment.[38]

In the case of the *Committee on Legal Ethics of the W. Va. State Bar v. Mullins*,[39] an attorney was charged with failing to diligently protect the interests of a client in connection with claims arising out of an automobile accident. Mullins, the attorney, was specifically charged with failing to take action to advance his client's claim permitting an applicable statute of limitations to run and failing to respond to letters of inquiry sent to him by various West Virginia State Bar officials and committees. The Disciplinary Committee recommended that Mullins be suspended for one year. The case was then heard by the Supreme Court of West Virginia. The supreme court decided that Mullins' license would be suspended for an indefinite period with a right for him to at any time apply for reinstatement upon a showing by Mullins that he had solved his personality or emotional problems and that he would be able to practice law competently again. In making this determina-

36. *Id.*, 347 A.2d at 561.
37. *Id.*
38. *Id.*
39. 226 S.E.2d 427 (W. Va. 1976).

tion, the court in *Mullins* was very critical of the Disciplinary Committee's handling of the case. The court stated that for misconduct or malpractice consisting of negligence or inattention to justify suspension or disbarment, it must be demonstrated that the attorney is unworthy of public confidence and unfit to be entrusted with the duties of a member of the legal profession. The court further found that the Ethics Committee's intervention would not be warranted where there were "charges of isolated errors of judgment or malpractice in the ordinary sense of negligence."[40]

The court in *Mullins* pointed out that it would be a dangerous practice and unwarranted for an ethics committee to try and determine legal liability arising from possible causes of actions because of the existence of today's proliferation of malpractice cases.[41] The court stated that substantial liability should not be determined in collateral proceedings involving discipline;[42] furthermore, the court pointed out that an attorney's failure to cooperate with the disciplinary committee did not justify a disciplinary sanction.[43]

In the case of *In re Francovich*,[44] an attorney failed to communicate with a client, to respond to a request for a status report, and to return all or part of a retaining fee when it became apparent that a criminal appeal could not be perfected. The Board of Governors of the State Bar of Nevada recommended that attorney Francovich be suspended. The Supreme Court of Nevada reviewed the case and held that such a penalty was too severe. The court stated that "a failure to perform legal services, if it became a pervasive course of conduct by an attorney, may warrant suspension or disbarment."[45] The court found, however, that the *Francovich* case only involved a single instance of neglect and that the severest punishment warranted for a single instance of neglect is public reprimand. The Francovich court refused to infer a pattern of misconduct where the record did not show one.[46]

The question of the necessity for damage to the client has been raised in the cases. Only one decision, *In re Chapman*,[47] indicates

40. *Id.* at 430.
41. *Id.*
42. *Id.*
43. *Id.* at 431.
44. 575 P.2d 931 (Nev. 1978).
45. *Id.* at 932.
46. *Id.*
47. 69 Ill.2d 494, 372 N.E.2d 675 (1978).

that damage might be necessary. The *Chapman* case involved an attorney's neglect with respect to the prosecution of several appeals. The Illinois Supreme Court said that although evidence at the disciplinary hearing supported a determination that the attorney had neglected a legal matter entrusted to him by failing to prosecute several appeals, the evidence did not support a finding that the client had been damaged by the attorney's neglect. The Illinois Court also stated that the "traditionally high standards of the legal profession impose upon an attorney the duty to represent a client with zeal and diligence."[48] The court in *Chapman* therefore concluded that neglect in the performance of an attorney's duties can be sufficient to warrant disciplinary action, citing *In re Taylor*.[49] It was further concluded that suspension is a proper punishment where a corrupt motive and moral turpitude is not clearly shown, but the court did not discuss the significance of their finding that the evidence did not demonstrate that the client had been damaged. Cases in other jurisdictions have held that whether or not the client was damaged by the attorney's neglect is irrelevant, as to whether or not the attorney has violated the Code of Professional Responsibility.[50] Whether or not the client is damaged, however, is a mitigating factor in determining punishment.[51] In *Chapman*, the attorney

48. *Id.* 372 N.E.2d 678.

49. *See* notes 30-33 *supra* and accompanying text.

50. *See, e.g.*, Heavey v. State Bar, 17 Cal.3d 553, 131 Cal. Rptr. 406, 551 P.2d 1238 (1976) (actual financial detriment to client not the crucial element in a disciplinary proceeding); *In re* Bohan, 16 App. Div.2d 530, 229 N.Y.S.2d 873 (1962) (attorney censured even though it appeared that no client had suffered pecuniary loss).

51. *See, e.g., In re* Newman, 51 App. Div.2d 829, 379 N.Y.S.2d 195 (1976) (Estate monies being repaid, the contriteness of the attorney, the attorney's efforts to cure his misconduct, the attorney's charitable service in the community and the fact that the attorney had never been disciplined before were mitigating factors considered by the court.); *In re* Goldberg, 46 App. Div.2d 433, 363 N.Y.S.2d 4 (1975) (The court considered the attorney's waiver of any defense to a future malpractice action and the attorney's agreement to pay a sum of money to the client to be mitigating factors in regard to the punishment to be given.); *In re* Chase, 40 App. Div.2d 185, 338 N.Y.S.2d 918 (1972) (An attorney's past unblemished record and domestic problems along with the fact that no client was deprived of any cause of action or legal remedy and that the clients' fees were restored were mitigating circumstances warranting only censure of the attorney for his misconduct.); *In re* Greenlee, 82 Wash.2d 390, 510 P.2d 1120 (1973) (The court found that the length of an attorney's suspension is to some extent determined by the seriousness of the attorney's misconduct.).

was only given a three month suspension which may indicate that the court considered the lack of damages in determining the sanction to be given.[52]

Neglect Under Alabama's DR 6-101(A)

When Alabama adopted its version of the Code of Professional Responsibility a new twist was added to DR 6-101. Alabama's DR 6-101(A) states that "a lawyer shall not *willfully* neglect a legal matter entrusted to him."[53] Footnote one to Alabama's DR 6-101(A) cites *Nelson et al. Jury Commissioner v. State ex rel. Blackwell*[54] and *Attorney General v. Martin*[55] for a definition of "willful neglect."

The *Martin* case involved an impeachment proceeding of a Hale County sheriff. The Supreme Court of Alabama stated that willful neglect was an intentional failure or omission of a person to perform a plain and manifest duty which the person was able to perform but failed or omitted to do.[56] The case was dealing with a public official's statutory duty. The court went on to state that the definition of willful neglect implies a knowledge of the duty required of the person. The court further stated that a prolonged or persistent failure to perform one or more duties was not required to constitute willful neglect, and that willful neglect does not require an evil, bad or corrupt motive or intent in the failure to perform the duty. The court concluded that a reckless disregard of a "plain and manifest" duty would be sufficient to constitute willful neglect. The court in

52. One interesting case involving the ABA Code provision establishing neglect as a grounds for attorney discipline where such grounds had not previously existed is the Minnesota case, *In re* Henning, 294 Minn. 336, 201 N.W.2d 208 (1972). Attorney Henning was a part-time judge, and that job supposedly caused him to neglect legal matters entrusted to him. The Minnesota Supreme Court stated that until the adoption of the Code of Professional Responsibility, neglect was not a grounds for disciplining an attorney. The court in *Henning* did recognize that once the code was adopted, neglect became a basis for discipline. The court finally held that since the charges related solely to the attorney's dilatory tactics, and since the attorney was now a full-time judge and would thus be precluded from practicing law, severe censure would be sufficient punishment. The *Henning* court did note that in the future neglect of legal matters by attorneys would be considered a violation of the Code of Professional Responsibility.

53. Emphasis added.

54. 182 Ala. 449, 62 So. 189 (1913).

55. 180 Ala. 458, 61 So. 491 (1913).

56. *Id.* at 461, 61 So. at 492.

Martin divided "plain and manifest" duties into two classes. The first class were those duties provided by law either fundamentally or statutorily, and the second class were those duties which arise from the nature and purpose of the office.[57]

The *Nelson* case involved the impeachment of the jury commissioners of Morgan County. In this case the supreme court was construing willful neglect under the Constitution of Alabama and not willful neglect under statute as in the *Martin* case; however, the court specifically stated they were not deciding that there was any difference in the two meanings. The court in *Nelson* never adequately defined willful neglect in the case. The court did decide that willful neglect meant something more than simple neglect or inadvertent neglect.[58] The court also implied that willful neglect of a duty means not only an intentional omission of an act or duty, but also that the person is mentally or morally unfit.[59]

The *Nelson* and *Martin* cases do not completely define what willful neglect is. The two cases indicate that a single act can constitute neglect and that an evil or bad motive on the part of the person is not required; furthermore, a reckless disregard of a duty can constitute willful neglect, but willful neglect is more than simple neglect or mere inadvertence.[60]

The California courts have defined willful neglect differently from the two Alabama cases. In *Grove v. State Bar of California*,[61] an attorney was involved in a disciplinary proceeding. The attorney had a long record of misconduct. The court held that a habitual course of neglect of a client's interests constituted a willful violation of the attorney's oath as an attorney. The numerous instances of neglect made the neglect willful. The court held that such neglect was an act of moral turpitude justifying the disbarment of the attorney.[62]

---

57. *Id.* at 462-63, 61 So. at 492.

58. 182 Ala. 449, 458, 62 So. 189, 192 (1913).

59. *Id.* at 461, 62 So. at 193.

60. *See* Cohen, *The Fundamentals of Legal Ethics in Alabama*, 36 ALA. LAW. 160, 227 (1975).

61. 66 Cal.2d 680, 427 P.2d 164, 58 Cal. Rptr. (1967).

62. *Id.*, 427 P.2d at 166, 58 Cal. Rptr. at 566. *See also*, Martin v. State Bar, 20 Cal.3d 717, 575 P.2d 757, 144 Cal. Rptr. 214 (1978) (one year suspension for willful failure to perform within reasonable period of time duties for which attorney had been retained, failing to communicate with clients, and misrepresenting status of pending legal matters); Gassman v. State Bar, 18 Cal.3d 125, 553 P.2d 1147, 132 Cal. Rptr. 675 (1976) (one year actual suspension for failure to perform promised

Conclusion

"Neglect of a legal matter entrusted to an attorney" is too nebulous a concept to attach a precise and definite meaning that can be used in every situation. Consequently, ABA Code, DR 6-101(A)(3) leaves much to be desired as an enforceable disciplinary rule. The ABA's 1964 Special Committee to study the old Canons of Professional Ethics stated that the ultimate Code of Professional Responsibility to be adopted by the ABA should "identify, explain, and preserve those principles that are basic to the proper functioning of the legal profession in modern society."[63] ABA Code, DR 6-101(A)(3) falls far short of explaining and identifying what "neglect of a legal matter entrusted to an attorney" means. Consequently, DR 6-101(A)(3) has not been enforced in a consistent manner. The Preamble to the ABA Code states that "the Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." It seems manifestly unfair to have a vague and over broad disciplinary rule such as DR 6-101(A)(3) exist as a minimum level of conduct for an attorney, when the ABA Committee on Professional Ethics cannot even define what the section means.[64] Alabama's DR 6-101(A) is an improvement over the ABA's DR 6-101(A)(3) in that it limits somewhat the application of the term neglect, although willful neglect is still an ambiguous and vague concept. ABA Code, DR 6-101(A)(3) should be revised in a manner that will define and identify what "neglect of a legal matter" encompasses. Until such a revision occurs, many courts and disciplinary committees will continue to view "neglect of a legal matter entrusted to an attorney" like Justice Stewart views hard-core pornography:

---

legal services, making false representations to clients, commingling of clients' funds, and engaging illegal fee splitting agreement); Lester v. State Bar of Cal., 17 Cal.3d 547, 551 P.2d 841, 131 Cal. Rptr. 225 (1976) (two year suspension upon conditions of probation for a continued course of dishonest conduct exemplified by attorney's willful failure to perform legal services for which he was retained); Lavin v. State Bar of Cal., 14 Cal.3d 581, 535 P.2d 1185, 121 Cal. Rptr. 729 (1975) (Attorney's pattern of abdicating duties owed to clients constituted moral turpitude and violated the oath taken by the attorney.).

63. Wright, *The Code of Professional Responsibility*, 14 ST. LOUIS L.J. 643, 645 (1970).

64. *See* notes 27-29 *supra* and accompanying text.

> In saying this, I imply no criticism of the Court, which in those cases was faced with the task of trying to define what may be indefinable. . . . I shall not today attempt further to define the kinds of materials I understand to be embraced within the shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it. . . .[65]

Roger S. Morrow

---

65. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964).