PROFESSIONAL RESPONSIBILITY

POLICING THE LEGAL PROFESSION; KEEPING NEBRASKA CLEAN: SHOULD THE UGLY DUCKLING LAWYER BE DUMPED? — STATE EX REL. NEBRASKA BAR ASS'N V. DOERR

INTRODUCTION

This Note deals with a recent Nebraska attorney discipline case in which an attorney was disbarred. It briefly discusses the procedure for attorney discipline and the role played by the American Bar Association Code of Professional Responsibility. Nebraska case law will be discussed to ascertain the conduct which has been subject to discipline and the factors which the Nebraska Supreme Court considers in sanctioning that conduct. Finally, an attempt is made to analyze why the court decided on disbarment in this case rather than another sanction.

This Note will not seek to justify attorney misconduct. It assumes that misconduct is bad for the public and the profession. Careless attorneys cost their clients time and money. Moreover, the damage of carelessness may be more than monetary. Clients who have had bad experiences with attorneys may develop a tainted view of the legal profession as a whole. Hence, the private wrongdoings can bring the bar into public disrepute. Disbarment is a way of remedying this bad public image by showing people that bad lawyers are punished and that they will not be able to repeat their offenses.

This Note discusses the disciplining of the "negligent" attorney as opposed to the attorney guilty of intentional wrongdoing. It will be suggested that negligent misconduct is difficult to define and eludes simple sanctioning remedies. This Note will also suggest that disbarment may be a product of the court's disfavor for particular attorneys or their offenses. Attorneys with unpleasant attitudes and sloppy professional habits may offend the court enough that the court sanctions with disbarment.

Facing the problem of sanctioning negligent conduct, this Note suggests disciplinary measures alternative to disbarment. It will be suggested that in some cases, excluding attorneys from their chosen field is too costly in comparison to their acts. Rather, wrongdoing attorneys, especially those guilty of negligence or carelessness, might be dealt with better if a rehabilitative goal is sought. Sanctioning methods which attempt to correct faults and improve practice tech-
niques will be suggested as better serving the needs of the attorney, the bar, and the public.

FACTS AND HOLDING

Thomas Doerr's career as a Nebraska attorney was not a particularly enviable one. He began his practice with his father who allowed him to do little more than the work of a law clerk. Doerr never became comfortable with the adversarial aspect of the legal profession and in fact "[did not] particularly appreciate the legal profession." Also, Doerr's personal life strained his professional performance—a fire at his home in 1979 destroyed some of his records, and his family responsibilities were compounded by the prolonged illness of his wife.

Eventually, Doerr's struggling practice became the subject of Nebraska State Bar Association (NSBA) intervention. In 1981, Doerr was privately reprimanded for failing to handle estates with reasonable dispatch. Again, in 1984, Doerr was the subject of disciplinary action by the NSBA. This time, however, the action culminated in Doerr's being disbarred from the practice of law by the Nebraska Supreme Court.

The NSBA brought charges against Doerr before the supreme court on two counts. The first count concerned Doerr's handling of

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1. State ex rel. Nebraska State Bar Ass'n v. Doerr, 216 Neb. 504, 508, 344 N.W.2d 464, 467 (1981). See Brief of Respondent at 2, Doerr. Doerr performed "menial tasks" but was not allowed to interview clients or try cases. Doerr, 216 Neb. at 508, 344 N.W.2d at 467. From 1960 to 1974, Doerr sat in on only one courtroom proceeding. Brief of Respondent at 2.

2. Doerr, 216 Neb. at 508, 344 N.W.2d at 467. Doerr performed "menial tasks" but was not allowed to interview clients or try cases. Doerr, 216 Neb. at 508, 344 N.W.2d at 467. From 1960 to 1974, Doerr sat in on only one courtroom proceeding. Brief of Respondent at 2.

3. Doerr, 216 Neb. at 508, 344 N.W.2d at 467. A psychiatrist examined Doerr at the request of Doerr's attorney. Id. The doctor reported that Doerr had a "procrastinating" personality and that "it may be necessary for [Doerr] to consider a different vocation. . . ." Id.

4. Id. at 508, 344 N.W.2d at 467. The task of cleaning up after the fire demanded most of Doerr's time, taking "several months out of his working life." Brief of Respondent at 6; see also Doerr, 216 Neb. at 508, 344 N.W.2d at 467.

5. Doerr, 216 Neb. at 508, 344 N.W.2d at 467. Mrs. Doerr was hospitalized with nervous breakdowns for two weeks in 1969 and for one week in 1975. Brief of Respondent at 4. This required Doerr to undertake duties that would "normally be handled by a spouse"—Doerr had done all the grocery shopping, helped with the cooking, and handled all the transportation after his wife's breakdown. Id.

6. Doerr, 216 Neb. at 508, 344 N.W.2d at 467. The record does not reveal the number of cases or the specific type of misconduct involved. Id.

7. Id. at 511, 344 N.W.2d at 468.

8. Id. at 505, 344 N.W.2d at 465.
The estate created a trust for the Lutheran Family Social Service of Nebraska which had failed to receive any money from the trust as of 1982. Eventually, the county court removed the estate's personal representative, but the successor representative still could not get enough information from Doerr to file an estate accounting.

The NSBA charged that Doerr had violated his oath of office as well as the ABA's Disciplinary Rules 1-102, 6-101, and 9-102 by his handling of this estate matter. The Nebraska Supreme Court found that in handling this matter, Doerr may have failed to segregate funds, but that there was no evidence of misappropriation on Doerr's part.

The second formal charge involved a lawsuit in which Doerr was retained as defendants' counsel. Because Doerr "[failed] to act in accordance with his engagement," the defendants lost the case by

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9. Id.
10. Id.
11. Id. Eventually the Social Service filed a petition with the Douglas County Court seeking an immediate estate accounting. Id. At a hearing before the county court, Doerr said he would file an accounting report, but he never did so. Id.
12. Id. at 505-06, 344 N.W.2d at 465-66. The successor representative needed documents and information concerning the estate for the years 1977-82 in order to file tax returns which Doerr had not done. Id. at 506, 344 N.W.2d at 466. Later, the successor was able to file an accounting. Id.
13. Id. The court interpreted NEB. REV. STAT. § 7-104 (Reissue 1977) as requiring an attorney to faithfully discharge his duties and not impede the administration of justice. Id.
14. Doerr, 216 Neb. at 506, 344 N.W.2d at 466. DR 1-102 provides in pertinent part: "A. A lawyer shall not: (1) Violate a Disciplinary Rule. . . . (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-102 (1980) [hereinafter cited as ABA CODE].
15. Doerr, 216 Neb. at 506, 344 N.W.2d at 466. ABA CODE DR 6-101 (A)(3) provides: (A) "A lawyer shall not: Neglect a legal matter entrusted to him."
16. Doerr, 216 Neb. at 506, 344 N.W.2d at 466. DR 9-102 provides, in part: (B) A lawyer shall: (1) Promptly notify a client of the receipt of his funds, securities, or other properties. (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable. (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them. (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.
17. Doerr, 216 Neb. at 506-07, 344 N.W.2d at 466 (quoting DRs 1-102, 6-101, 9-102).
18. Id. at 506, 344 N.W.2d at 466.
19. Id. at 507, 344 N.W.2d at 466.
20. Id.
The defendants then sued Doerr and received the amount lost in the default judgment. Doerr's conduct in this matter led to charges by the NSBA that he again had violated his oath of office, as well as DR 1-102 and DR 6-101.

The court also considered a third count filed against Doerr by the NSBA in March of 1983. In that matter, Doerr had failed to file an estate accounting and had failed to deliver trust funds to the heirs of an estate originally handled by his father. Doerr was again charged with violating DR 6-101 and DR 9-101.

Before considering the formal charges, the Nebraska Supreme Court appointed a referee to consider questions of fact and to issue recommendations. The referee recommended that Doerr's license to practice law be suspended for one year. Since Doerr did not "dispute the conduct charged against him," the primary question for the supreme court to resolve was what sanction Doerr should receive.

The court went beyond the referee's recommendation of suspension and decided on disbarment, the most severe disciplinary san-

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21. Id. Cf. State ex rel. Nebraska State Bar Ass'n v. Tesar, 183 Neb. 272, 272-73, 159 N.W.2d 572, 573 (1968) (where the respondent's client lost a cause of action due to Tesar's mistaken belief that a longer statute of limitations applied).
22. Doerr, 216 Neb. at 507, 344 N.W.2d 466 (the exact amount of the recovery is not in the record).
23. Id. See notes 14-16 supra.
24. Doerr, 216 Neb. at 507, 344 N.W.2d at 466.
25. Id.
26. Id. See notes 15-17 supra.
27. Doerr, 216 Neb. at 510, 344 N.W.2d at 467. See note 28 infra.
Upon the filing of an answer raising an issue of fact the Court shall refer the matter to a member as referee within ten days. It shall be the duty of such referee . . . to hear such testimony as may be introduced under the pleadings. . . . The referee shall make a report . . . stating his findings of fact and recommendations.
29. Doerr, 216 Neb. at 510, 344 N.W.2d at 467.
30. Id. at 508, 344 N.W.2d at 467.
31. Id. at 509, 344 N.W.2d at 467. "The real question in this case is one of determining what disciplinary sanction is appropriate." Id. Note, however, that while the referee made findings of fact, the court heard the case de novo. Hence, the court was not bound by the referee's findings or recommendations. Id. at 510, 344 N.W.2d at 467-68. Compare State ex rel. Nebraska State Bar Ass'n v. Divis, 212 Neb. 699, 700-01, 325 N.W.2d 652, 653 (1982) (where the court placed an attorney on probation "[i]n accordance with the recommendation of the referee") with State ex rel. Nebraska State Bar Ass'n v. McArthur, 212 Neb. 815, 817-19, 326 N.W.2d 173, 175-76 (1982) (where the referee recommended a censure and reprimand but the court suspended the respondent for one year) and State ex rel. Nebraska State Bar Ass'n v. Frank, 214 Neb. 825, 828, 830, 336 N.W.2d 557, 559-60 (1983) (where the referee recommended a public reprimand and indefinite probation but the court suspended Frank for one year).
32. Doerr, 216 Neb. at 510-11, 344 N.W.2d at 468.
33. Id. at 511, 344 N.W.2d at 468.
Although Doerr's conduct involved no "dishonesty or other moral turpitude," the court reasoned that Doerr's behavior manifested a "long-established pattern of neglecting professional engagements" such that suspension would serve no useful purpose. The court also noted that Doerr's attitude toward the disciplinary proceedings was "inattentive" and that he was over an hour late for his hearing before the Disciplinary Review Board. In reaching its decision, the court considered the need to protect the public, the nature of Doerr's conduct, the need for deterrence, and the preservation of the bar's reputation as a whole and concluded that "the only appropriate judgment was to disbar [Doerr]."

Dissenting in part, Judge Caporale did not believe that disbarment was the appropriate sanction. Judge Caporale cited a recent Nebraska case in which the court suspended for one year an attorney who failed to disclose personal withdrawals from an estate and took a seventy-five dollar filing fee for a case which he never actually filed — seemingly more egregious conduct than Doerr's. Then, noting another recent Nebraska case in which an attorney was suspended for needless delay in handling an estate, Judge Caporale reasoned that disbarment was "too high a tax" to impose on Doerr in order that others may be deterred. Instead, he recommended a public repri-

34. Disbarment is the most final disciplinary sanction the court may extend, the other sanctions being suspension, probation, censure or reprimand, or any other appropriate sanction. Neb. Sup. Ct. R. 10(N) (1982).
35. Doerr, 216 Neb. at 510, 344 N.W.2d at 468.
36. Id.
37. Id. at 510-11, 344 N.W.2d at 468.
38. Id. at 508, 344 N.W.2d at 467. For a discussion of the Disciplinary Review Board, see notes 73-75 and accompanying text infra.
39. Doerr, 216 Neb. at 511, 344 N.W.2d at 468.
40. Id.
41. Id.
42. Id.
43. Id. (emphasis added).
44. Id. (Shanahan, J., joining).
45. Id. ("[T]he sanction in this case is entirely too harsh, unnecessary, and disproportionate to what has been done in the past.").
46. Id. (citing State ex rel. NSBA v. Tomek, 214 Neb. 220, 221, 333 N.W.2d 409, 410 (1983)).
47. Id. at 511-12, 344 N.W.2d at 468 (citing State ex rel. NSBA v. Divis, 212 Neb. 699, 325 N.W.2d 652 (1982)). In Divis, the respondent had failed for six years to properly administer a relatively simple estate. 212 Neb. at 700, 325 N.W.2d at 652. Note that while Divis' conduct appears very similar to Doerr's, Judge Caporale stated that Doerr's conduct exhibited a greater pattern of neglect than Divis, recognizing "there is both a quantitative and qualitative difference between the isolated acts presented by the record in Divis and the series of inordinate procrastinations presented by this record." Doerr, 216 Neb. at 512, 344 N.W.2d at 468-69 (Caporale, J., dissenting in part) (emphasis added).
48. Doerr, 216 Neb. at 512, 344 N.W.2d at 469 (Caporale, J., dissenting in part).
mand and censure, along with a three-year probationary period. As part of this probation, Doerr would have to maintain a $500,000 malpractice insurance policy and a calendar control system for his case load which would be monitored by the Counsel for Discipline. Judge Caporale concluded that these measures would adequately protect the public and accomplish "all other purposes of discipline."

BACKGROUND

The Procedure of Attorney Discipline in Nebraska

The legal profession, like other professions, has powers of self-governance. Lawyers, unlike other professionals, however, hold a virtual monopoly over the regulation of their profession. Since conduct for attorneys is prescribed by the bar in the form of the American Bar Association Code of Professional Responsibility, and the enforcement of these rules is left largely to bar members, the legal profession regulates itself almost wholly from within.

49. Id.
50. Id. (during the probationary period he "would be subject to disbarment should he lapse into his old habits.").
51. Id.
53. MODEL RULES Preamble. "The legal profession's monopoly control is unique among the licensed professions." Id. The Preamble to the Model Rules says that: [a]lthough other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that the ultimate authority over the legal profession is vested largely in the courts.

54. Forshee, Professional Responsibility in the Twenty-First Century, 39 OHIO ST. L.J. 689, 689 (1978) ("Today the legal profession in the United States enjoys a virtual monopoly over the practice of law.").
55. MODEL RULES Preamble. "Every lawyer is responsible for observance of the Rules of Professional Conduct." Id. See also Forshee, supra note 54 at 689, where the author states that other means of controlling attorneys, such as legislative measures, have not been undertaken. Id. But see 52 U.S.L.W. 1 (1983). "Many of a lawyer's professional responsibilities are prescribed by the rules of Professional Conduct, as well as substantive and procedural law." Id. at 1 (emphasis added). Note, however, that the U.S. Law Week article may have been referring to the capacity of the legislature to govern lawyer conduct. Forshee believes that such capacity exists but has not been greatly utilized. For example, in cases like Doerr, the attorney may be cited for violating his oath of office (a statutory provision) because he has violated a Disciplinary Rule. Thus, it is the violation of Disciplinary Rules which is the impetus for the disciplinary proceedings.
56. See Martyn, Lawyer Competence and Lawyer Discipline: Beyond the Bar?, 69 GEO. L.J. 705, 707 (1981) ("[I]n the United States, the separation of powers doctrine . . . vests almost exclusive control of the legal profession in the hands of a select group of its members: the courts.").
57. Id. ("Thus, unlike other professionals, who are supervised by state regulatory agencies, lawyers remain a virtually self-regulated profession.").
The Code sets forth Canons of Conduct, Ethical Considerations (EC), and Disciplinary Rules (DR) which attempt to clarify the ethical and legal responsibilities of attorneys. Violation of a DR may result in disciplinary action, but attorneys may also be cited for failure to comply with Ethical Considerations.

The DR's do not appear to be uniform in specificity or severity. For example, DR 1-102(1) simply proscribes attorneys from violating any DR while subsection four of that rule proscribes practices of "dishonesty, fraud, deceit, or misrepresentation." Disciplinary Rule 6-101 is a good example of the nebulous side of the rules as it simply states that a lawyer shall not "[n]eglect a legal matter entrusted to him." It is not easy to ascertain exactly when a lack of zeal becomes "negligence." On the well-defined side of the Disciplinary Rules is DR 9-102 which lays out a specific course to be followed when an attorney receives funds on behalf of a client.

In Nebraska, attorney conduct is subject to the ABA Rules of Professional Conduct as adopted by the state supreme court in 1970. The rules outline the procedure to be followed and the alternative sanctions available in disciplinary actions. Complaints of attorney misconduct made by the public to the bar are channeled to the Counsel for Discipline who may then investigate the matter. After the
investigation, if the Counsel for Discipline believes that an attorney might be subject to discipline, he will set forth specific charges to the Committee on Inquiry. The Committee on Inquiry then reviews the charges and may dismiss them, reprimand the attorney, or hold an investigatory hearing.

If, after hearing the charges, the Committee believes that there are reasonable grounds for disciplining the attorney, it issues a Formal Charge to be heard before the Disciplinary Review Board. The Disciplinary Review Board undertakes further hearings after which it may dismiss the charges, reprimand the attorney, or submit the Formal Charges to the Clerk of the Nebraska State Supreme Court to be heard before the court.

If the matter goes to the supreme court and the court determines there are issues of fact to be resolved, the court appoints a referee to resolve these factual questions and make recommendations. The court may then consider these findings and recommendations but

70. NEB. SUP. CT. R. 9(G). The Committee on Inquiry is also made up of bar members. NEB. SUP. CT. R. 7(A)(2).

71. NEB. SUP. CT. R. 9(H)(1). The charges are dismissed if the Committee determines that, even if true, the charges would not be grounds for discipline. NEB. SUP. CT. R. 9(H)(2).

72. NEB. SUP. CT. R. 9(H)(2). If the Committee determines that the charges, if true, would provide grounds for discipline, but that issuing a Formal Charge would not serve the public interest, then the Committee may reprimand the attorney. Id. This reprimand is not made public, but it is placed in a permanent file with the Counsel for Discipline and may be used as evidence in subsequent disciplinary actions, as was the case in Doerr. Id. See note 6 and accompanying text supra.

73. NEB. SUP. CT. R. 9(H)(3). The chairman of the committee appoints a hearing panel (or decides that the Committee as a whole shall hear the charges) if the committee determines that such a hearing is necessary to discover whether the attorney has done something which may require a Formal Charge. Id.

74. NEB. SUP. CT. R. 9(G)(3)(h). The Disciplinary Review Board consists of NSBA members appointed by the supreme court and two Nebraska residents not members of the bar who are to represent the lay public. NEB. SUP. CT. R. 6(A). Thus, the Disciplinary Review Board is the only portion of the disciplinary process, besides the initial complaint stage, where people from outside the profession have input. This exemplifies the bar’s virtual monopoly over the regulation of the legal profession. See notes 52-56 and accompanying text supra.

75. NEB. SUP. CT. R. 9(I). However, the Board may dispose of the charge without further hearings. Id.

76. NEB. SUP. CT. R. 9(K). The Formal Charge will be dismissed if the Board finds that there are no reasonable grounds for discipline. Id.

77. NEB. SUP. CT. R. 9(L). Note that when the Board determines that there are reasonable grounds for disciplining the attorney it may either issue a reprimand or pass the charges on to the supreme court. Here the Board may issue a reprimand without determining that “no public interest would be served” by further proceedings, unlike the Committee on Inquiry. See note 72 supra.

78. The court makes this determination after the answer is filed. NEB. SUP. CT. R. 10(J) (1982); see also note 28 supra.

79. Id.
hears the case de novo with the NSBA as relator. Upon hearing the case, the supreme court may "disbar, suspend, censure, or reprimand the Respondent, place him on probation, or take such other action as shall by the court be deemed appropriate." Since the court may look to the referee's findings of fact, the court often dwells mainly on the appropriate sanction in view of the attorney's conduct.

**Attorney Conduct Which Warrants Disciplinary Action**

(1) The "easy" cases

Deriving an appropriate sanction for intentional wrongdoing appears easier than disciplining acts of negligence or procrastination. In *State ex rel. Nebraska State Bar Association v. Hays*, the court disbarred an attorney for "misrepresentation, fraud, [and] dishonesty." Hays had agreed to hold $12,000 in trust for a client but had failed to open a separate trust account for the money. In another dealing, Hays accepted $500 from the mother of a client who was serving a four-month jail sentence for failure to pay child support. The money was to be paid toward the child support arrearage, but Hays never made the payments and the client served the entire four months. The court disbarred Hays, stating curtly that "[r]espondent's conduct warrants disbarment under the doctrines announced in the cited cases."

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80. E.g., *Doerr*, 216 Neb. at 509, 344 N.W.2d at 467; see also note 31 supra.  
81. NEB. SUP. CT. R. 10(B). The NSBA may act as relator without leave of the court, but a private party may also serve as relator if given leave of the court and if the person shows *prima facie* that probable grounds for discipline exist. *Id.* In any case, the matter must first have been considered by the Disciplinary Review Board and the Committee on Inquiry. *Id.*  
82. NEB. SUP. CT. R. 10(N).  
83. See note 31 supra.  
84. 212 Neb. 432, 322 N.W.2d 822 (1982).  
85. *Id.* at 432, 435, 322 N.W.2d at 822, 824.  
86. *Id.* at 434, 322 N.W.2d at 825. Hays kept the money in an account of his own and paid the client with checks drawn on that account. *Id.* Failing to segregate client's funds violates DR 9-102. See note 16 supra. Hays eventually paid the client an amount which "approximated but did not quite equal the $6,139.08 [due the client]." *Id.* However, the client hired another attorney who notified the NSBA that "full restitution had been made to his client." *Id.*  
87. *Id.* at 434-35, 322 N.W.2d at 823.  
88. *Id.* at 435, 322 N.W.2d at 823. The money was later returned to the client's mother by Hays' attorney. *Id.*  
89. *Id.* at 435, 322 N.W.2d at 824. The court cited *State ex rel. Nebraska State Bar Ass'n v. Bremers*, 200 Neb. 481, 264 N.W.2d 194 (1978) and *State ex rel. Nebraska State Bar Ass'n v. Blanchard*, 179 Neb. 452, 138 N.W.2d 804 (1965) to establish that Hays' conduct could be considered a violation of DR 1-102, DR 9-102, and DR 7-101. 212 Neb. at 435, 322 N.W.2d at 824. By failing to open a separate account for the money given to him by his client, Hays clearly violated the segregation requirement under DR 9-102. *Id.* See note 16 supra. In the child support matter, Hays failed to carry out a contract
In *NSBA v. Bremers*, a case cited in *Hays*, the court found that Bremers had filed erroneous records of a trust fund and had wrongfully paid out funds to his friends and relatives. The court disbarred Bremers, stating that his fraudulent conduct brought reproach on the legal profession. Furthermore, the court reiterated that conversion of trust funds by a lawyer not only allows for but "requires disbarment."

While a blatant breach of trust such as conversion of funds provides adequate grounds for disbarment, the court has also stated that *any* conduct which brings reproach on the profession is grounds for disbarment or suspension. Such reproachful conduct may include transgressions of statutory law that the court feels exhibit moral turpitude. Arguably, the court should focus on conduct which...
breaches the fiduciary duty of an attorney and strikes at the heart of an attorney’s function. Thus, the court could disbar an embezzler with much less reservation than it could a drunk driver.96

(2) The “hard” cases

In cases involving attorney deceit, fraud, and conversion, the rationale for disbarment is obvious. Attorneys guilty of this type of conduct have no place as officers of the courts.97 The more troublesome cases are those in which a court must decide what sanctions are appropriate for an attorney guilty of negligence.98 How to deal with the attorney who has not been blatantly fraudulent or law-breaking becomes the issue facing disciplinary bodies.

In State ex rel. Nebraska State Bar Association v. Tesar, the Nebraska Supreme Court censured and reprimanded an attorney for failing to timely initiate estate proceedings99 and for failing to prosecute an action before the statute of limitations had run.100 In its conclusion, the court said that the attorney’s misconduct was not that of “moral turpitude”101 but an “improper failure to act.”102 Thus, it appears that while the court thought that this “failure to act” did merit some form of sanction, disbarment was not appropriate.

on DR 1-102(A)(3), which states that “[a] lawyer shall not: [e]ngage in illegal conduct involving moral turpitude.” See ABA CODE DR 1-102(A)(3). Note that the proposed MODEL RULES, see note 58 supra, do not contain this “moral turpitude” clause so as to avoid the punishment of attorneys for such things as adultery which do not necessarily reflect on the attorney’s fitness to practice law. MODEL RULES (Alternative Draft 1981) DR 1-102 comment.

96. Generally, illegal conduct which involves moral turpitude and brings reproach on the profession involves a breach of trust or dishonesty which is unbecoming of attorneys. See MODEL RULES DR 1-102 comment.

97. See State ex rel. Nebraska State Bar Ass’n v. Niklaus, 149 Neb. 859, 33 N.W.2d 145 (1948) where the court stated:

An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his clients’ interests may seem to require a contrary course. The lawyers cannot serve two masters; and the one they have undertaken to serve primarily is the court.

Id. at 860, 33 N.W.2d at 146 (emphasis added). See also State ex rel. Nebraska State Bar Ass’n v. Wiebusch, 153 Neb. 583, 589, 45 N.W.2d 583, 586 (1951).

98. See note 115 infra for a discussion of the inadequacies of the Code’s negligence provision. DR 6-101(3) proscribes attorneys from neglecting legal matters.

99. State ex rel. Nebraska State Bar Ass’n v. Tesar, 183 Neb. 272, 272, 274, 159 N.W.2d 572, 573-74 (1968) (despite numerous requests by the heirs, the attorney failed for three years to initiate the estate proceedings he had agreed to perform).

100. Id. at 272, 159 N.W.2d at 573. The attorney thought a longer statute of limitations applied. When he discovered his error he “panicked” and told his client that the petition had already been filed.

101. Id. at 274, 159 N.W.2d at 574 (the conduct did not involve moral turpitude except for Tesar’s misrepresentation that the case had been filed).

102. Id. (emphasis added).
In *State ex rel. Nebraska State Bar Association v. Holscher*, a county attorney had filed premature claims for services not rendered. Holscher, claiming that he was not aware of a new legislative provision governing the matter, was censured by the court for “extreme negligence” in failing to know the new law. While Holscher was “extremely negligent,” his behavior was not malicious or fraudulent. Holscher’s innocent ignorance, in addition to extenuating circumstances such as his heavy workload as county attorney and relative inexperience with tax foreclosures, may have led the court to be satisfied with a censure and reprimand rather than disbarment.

While the Nebraska Supreme Court has expressed disdain for gross negligence, as in *Holscher*, determining whether a Disciplinary Rule regarding negligence or incompetence has even been violated, and to what extent, is problematic. Though negligence is one of the most commonly recurring complaints directed toward the

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104. *Id.* at 731-33, 230 N.W.2d at 77-78. Holscher filed claims for services in foreclosing tax liens, before entries of decrees and confirmations of sales. The statute required these before he could make his claims for services. *Id.*
105. *Id.* at 732, 230 N.W.2d at 77. The referee found that Holscher was aware that there was a new bill pertaining to county attorney’s fees for tax foreclosures, but he had not read the bill after it was passed.
106. *Id.* at 737, 230 N.W.2d at 80. In this case, the court also noted that Holscher faced an extremely large workload. *Id.* at 731, 230 N.W.2d at 77. When he took office there were over 400 tax sale certificates which had been left by previous administrations. *Id.* There was also a large number of felony cases which demanded much of Holscher’s time as a statute required that felony cases be tried within six months of the filing of the information. *Id.* Also, when he took office Holscher had never before handled tax foreclosures. *Id.*
107. *Id.* at 737, 230 N.W.2d at 80.
108. *See id.*
109. Note that the charges against Holscher included violating DR 7-102(A)(3), concealing or knowingly failing to reveal that which he is required by law to reveal, and DR 7-102(A)(5), knowingly making a false statement of law or fact, which both suggest acts of volitional misconduct. *Holscher*, 193 Neb. at 733-34, 230 N.W.2d at 78; see ABA CODE DR 7-102 (which has not been revised with respect to the relevant provisions involved in *Holscher*). Thus, if the court found that Holscher had violated these rules, there would have been ample grounds for disbarment.
110. *See note 106 and accompanying text supra.*
111. Marks & Cathcart, *Discipline Within the Legal Profession: Is it Self-Regulation?*, 2 U. ILL. L.F. 193, 201 (1974) conclude that because DR 6-101, the negligence provision, “lacks a meaningful frame of reference in the Code [and] the general literature of the profession [as well as] in the professional tradition, . . . its application is made difficult at the outset.” *Id.* Accord Martyn, *supra* note 56, at 714. There the author noted that the ABA Committee on Professional Ethics attempted to clarify the standard for negligence set forth by the Code, but after considering a number of hypothetical situations the committee concluded that there was “insufficient information” to discern whether DR 6-101 had been violated. *Id.* at 715-16. Martyn then noted that lawyer disciplinary bodies often ignore complaints of negligence and concluded that the bar is “unable to deal appropriately with issues of competence.” *Id.* at 716-17.
legal profession,\textsuperscript{112} the Code does not provide a straightforward standard for negligence.\textsuperscript{113}

It may not be desirable to have a strict formula for what conduct is to be considered negligent.\textsuperscript{114} A blurred distinction between intentional wrongdoing and negligent misconduct\textsuperscript{115} makes it difficult to discern exactly when inactivity becomes volitional.\textsuperscript{116} While it may be difficult to determine whether an isolated act is negligent,\textsuperscript{117} the court seems secure in suspending or disbarring an attorney with more than one transgression.\textsuperscript{118} Thus, the court has established a "pattern of misconduct" rationale\textsuperscript{119} which may clear up the blurred distinction between intentional wrongdoing and negligent misconduct.

\textit{Deriving a Sanction for Attorney Misconduct}

After the court finds misconduct which warrants sanctioning, it must decide what type of sanction is appropriate. In confronting this

\begin{itemize}
\item \textsuperscript{112} Martyn, supra note 56, at 718. A 1974-75 study reported that since 1969, negligence continued to comprise most of the complaints toward lawyers. \textit{Id.} \textit{See also} Marks & Cathcart, supra note 111, at 212-13 (showing that an overwhelming majority of lawyer-directed complaints in the New York area for the year of 1970 involved negligence).
\item \textsuperscript{113} See note 111 supra.
\item \textsuperscript{114} Note, \textit{Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions}, 65 IOWA L. REV. 1386, 1399 (1980). It is impossible to encompass every variety of unethical behavior by narrowly drawn rules of conduct. \textit{Id.} If such rules are attempted, loopholes may be found which might be used for "marginal behavior." \textit{Id.}
\item \textsuperscript{115} Martyn, supra note 56, at 716. Martyn discusses the ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1273 (1973), differentiating between simple negligence and neglect as concerns DR 6-101(A)(3). Martyn, supra note 56, at 716. "Neglect, according to the Opinion, 'involves more than a single act or omission' and is characterized not by inadvertent acts or omissions but by a 'conscious disregard for the responsibility owed to the client.'" \textit{Id.} (emphasis added) (citations omitted). \textit{See also} Adams, supra note 67, at 402: Disciplinary procedures normally involve some \textit{conscious and deliberate act} on the part of an offending lawyer with an element of \textit{intent} usually considered to be an essential part of the transgression. Of course, there is another area consisting of those cases which involve professional negligence, but even here the doing of that which should not have been done . . . does involve a \textit{considerable element of voluntary activity}. . . . \textit{Id.} (emphasis added).
\item \textsuperscript{116} Logic would seem to indicate that the more blatant the failure to act, the higher the degree of presumed volition.
\item \textsuperscript{117} See notes 111-15 and accompanying text supra.
\item \textsuperscript{118} \textit{See, e.g.}, Doerr, 216 Neb. at 510-11, 344 N.W.2d at 468 (court emphasized that the evidence showed a "long-established pattern" of transgressions); Frank, 214 Neb. at 829, 336 N.W.2d at 560 (see text accompanying notes 131-39 infra); Walsh, 206 Neb. at 744, 747, 294 N.W.2d at 877-78 (see note 94 supra).
\item \textsuperscript{119} Doerr, 216 Neb. at 509, 344 N.W.2d at 467 ("cumulative acts of misconduct are distinguishable from isolated incidents of negligence and therefore justify more serious sanctions."). \textit{See also} Frank, 214 Neb. at 829-30, 336 N.W.2d at 557; Walsh, 206 Neb. at 748, 294 N.W.2d at 879.
\end{itemize}
difficult issue, what factors should the court consider? In State ex rel. Nebraska State Bar Association v. McArthur, the Nebraska Supreme Court has outlined a list of factors to be considered in disciplinary actions. These include the nature of the offense, the need for deterring others, the maintenance of the bar's reputation, the public's protection, the respondent's attitude, and the respondent's fitness to continue practicing law. Once these factors have been weighed, the court may choose among reprimand and censure, probation, suspension, disbarment, or any other appropriate remedy as a disciplinary measure. Given the smorgasbord of alternative sanctions available to the court, what specific type of conduct warrants a certain type of sanction?

In State ex rel. Nebraska State Bar Association v. Statmore, the respondent was suspended from the practice of law for six months. As a result of his own accounting error, Statmore had received a double payment from a client and delayed repaying the client. Though Statmore's commingling of funds was accidental, the court stated that "poor accounting procedures and sloppy office management" were not excuses. While the court saw Statmore's conduct as deleterious to the reputation and trust of the profession, it decided that a six month suspension was "appropriate discipline."

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120. 212 Neb. 815, 819, 226 N.W.2d 173, 175-76 (1982).
121. Id.
122. NEB. SUP. CT. R. 10(N) (1982).
124. Id. at 143, 352 N.W.2d at 878.
125. Id. at 140-41, 352 N.W.2d at 876-77. Statmore's client owed $500 for services rendered and wrote Statmore several checks that were returned for insufficient funds. Id. at 140, 352 N.W.2d at 876. Statmore's bank collected on one of these checks. Statmore was not aware of this because he failed to reconcile his monthly bank statements, yet Statmore himself collected on a subsequent check. Id. at 141, 352 N.W.2d at 877.
126. Id. When Statmore realized he had received two payments he was unable to repay his client the full amount because of financial problems. Id. His office was in a "chaotic" state, some of his utilities had been disconnected, and he had to change offices on account of rent delinquency. Id. When Statmore's hearing came before the Committee on Inquiry he finally paid the amount due his client. Id.
127. Id. at 142, 352 N.W.2d at 878. On the mishandling of client funds, the court stated: "'The result is the same whether his money is deliberately misappropriated by an attorney or is unintentionally lost by circumstances beyond the control of the attorney.'" Id. (citation omitted).
128. Id. at 143-43, 352 N.W.2d at 878.
129. Id. at 143, 352 N.W.2d at 878. "[C]onduct such as before us... weakens the efforts of the overwhelming majority of lawyers in Nebraska whose conduct meets, if not exceeds, the code of Professional Responsibility." Id.
130. Id. (the court suggested that Statmore "reappraise the candor, fairness, and responsibility a lawyer owes to his client" and that he "revise his accounting procedures and office management.").
Another case in which the court saw suspension as appropriate was *State ex rel. Nebraska State Bar Association v. Frank.*\(^{131}\) Frank had failed to file a certain federal estate tax form for a client\(^{132}\) and had falsely assured the client on several occasions that the form had been filed\(^{133}\) or that extensions had been granted by the IRS.\(^{134}\) Frank also made these false representations to another attorney retained by the client.\(^{135}\) This delay in filing the federal estate tax form ultimately cost Frank's client over $26,000 in back-taxes and fines.\(^{136}\)

In reaching its sanctioning decision, the court reiterated that "[c]umulative acts of misconduct are distinguishable from isolated incidents of neglect and therefore justify more serious sanctions."\(^{137}\) Frank's deception, said the court, injured his client and reflected poorly on his own ability to practice law.\(^{138}\) Thus, the court deemed a one-year suspension as the appropriate penalty.\(^{139}\)

Disbarment was the appropriate remedy the court decided upon in *State ex rel. Nebraska State Bar Association v. Michaelis.*\(^{140}\) The respondent was charged with conduct which brought reproach on the profession and himself and which was prejudicial to the administration of justice.\(^{141}\) Michaelis' conduct consisted of a number of public statements criticizing other attorneys, the Nebraska Bar, and the Nebraska Supreme Court,\(^{142}\) statements which were later found to be

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132. *Id.* at 829, 336 N.W.2d at 560.
133. *Id.*
134. *Id.* at 827, 336 N.W.2d at 558-59.
135. *Id.*
136. *Id.* at 827, 336 N.W.2d at 559 (at the time of the referee's report, Frank was on a repayment schedule of $400 per month to reimburse the client).
137. *Id.* at 829-30, 336 N.W.2d at 560.
138. *Id.* at 829, 336 N.W.2d at 560.
139. *Id.* at 830, 336 N.W.2d at 560. Note that the court, as in *Doerr*, went beyond the referee's recommended sanction (see text at note 32 supra). In *Frank*, the referee recommended a public reprimand and an indefinite probationary period to end when Frank settled the debt to his client and was rehabilitated from his use of alcohol. *Id.* at 828, 336 N.W.2d at 559.
140. 210 Neb. 545, 553, 316 N.W.2d 46, 56 (1982).
141. *Id.* at 547, 316 N.W.2d at 48.
142. *Id.* at 549-51, 316 N.W.2d at 49-51. Among these statements was a newspaper advertisement alleging illegal conduct by other attorneys and a similar press release circular. *Id.* at 549, 316 N.W.2d at 49. Subsequent charges arose after disciplinary proceedings had begun against Michaelis. *Id.* These were prompted by statements by Michaelis in a local newspaper that the "Nebraska Supreme Court is scared of this, because they know they have a dirty house" and a radio release criticizing the NSBA stating that "[a]t least prostitutes, and prostitution has a sense of fairness and some decency. The Nebraska State Bar Association apparently has none." *Id.* at 550-51, 316 N.W.2d at 49-50. It is interesting to note that no charges of libel against Michaelis were mentioned in the record.
While the referee recommended a one-year suspension, the court reasoned that, because Michaelis showed no signs of remorse or change in attitude, a suspension would be "far too lenient." The court disbarred Michaelis, saying "clearly . . . he is not fit to engage in the practice of law. . . ."

Attorneys, then, might be suspended for negligent recordkeeping or intentional misrepresentations and disbarred for making false accusations condemning the bar and the courts. Is the seriousness of the attorney's conduct alone always a consistent barometer of the penalty applied? The court has considered other factors in sanctioning, such as the length of time the attorney has been in practice. The court has also considered the degree of injury to the client, and in some cases, the extent to which damages have been mitigated. However, the court has consistently relied on the "pat-

143. Id. at 553, 316 N.W.2d at 51. It was determined by the referee that Michaelis knew or should have known of the falsity of his statements. Id. The supreme court found that "the lack of specifics in respondent's allegations, as well as the lack of any reasonable proof of his claims, suggests a malicious motive on the part of respondent. . . ." Id. In his defense, Michaelis claimed that the statements were largely political rhetoric, but the court said these statements were "not made fairly or accurately upon the facts, and contained false representations" and were thus distinguishable from "general political rhetoric. . . ." Id. 554, 561, 316 N.W.2d at 52, 55.

144. Id. at 561, 316 N.W.2d at 55.
145. Id. at 562, 316 N.W.2d at 56.
146. Id. at 563, 316 N.W.2d at 56.
147. See notes 123-30 and accompanying text supra (discussing Statmore, 218 Neb. 138, 352 N.W.2d 875).
148. See notes 131-39 and accompanying text supra (discussing Frank, 214 Neb. 825, 336 N.W.2d 557).
149. See notes 140-46 and accompanying text supra (discussing Michaelis, 210 Neb. 545, 316 N.W.2d 46).
150. See text accompanying notes 163-67 infra.
151. See, e.g., Doerr, 216 Neb. at 510, 344 N.W.2d at 468 ("respondent has had 24 years in which to learn and understand the nature and demands of his profession"); Tesar, 183 Neb. at 274, 159 N.W.2d at 574 ("respondent has been engaged in the practice of law in this state for approximately eighteen years. He should have been, and obviously was, aware of the Canons of Professional Ethics which govern his professional conduct. . . ."). Cf. Holscher, 193 Neb. at 736, 230 N.W.2d at 77 (although the respondent was an experienced general practitioner, he had relatively little experience in the matters for which he was ultimately censured).
152. McArthur, 212 Neb. at 819, 326 N.W.2d at 176 (in suspending the attorney, the court noted: "[N]o specifically delineative injuries or other losses occurred as a consequence of respondent's dereliction. . . . [W]e therefore conclude it is not appropriate to disbar the respondent in this instance.").
153. Compare State ex rel. Nebraska State Bar Association v. Tomek, 214 Neb. 220, 221, 333 N.W.2d 409, 410 (1983) (the respondent received a one year suspension pursuant to his admission of converting estate funds and making misrepresentations to his client, provided he make restitution of converted funds) with State ex rel. Nebraska State Bar Ass'n v. Hays, 212 Neb. 432, 435, 322 N.W.2d 822, 824 (1982) (the court held that restitution of funds wrongfully converted will not exonerate a lawyer of his professional misconduct; therefore, the lawyer was disbarred) and State ex rel. Nebraska State Bar Ass'n v. Bremers, 200 Neb. 481, 484, 264 N.W.2d 194, 197 (1978) ("restitution
tern of misconduct" rationale in gauging the appropriate sanction.\textsuperscript{154}

Although the Nebraska Supreme Court has applied these factors\textsuperscript{155} in disciplining attorneys, conduct that is outwardly less offensive remains more difficult to discipline than more affronting conduct. For example, an attorney who puts client funds to his own use\textsuperscript{156} seems to be a more likely candidate for disbarment than one who was ignorant or negligent as to a legal matter.\textsuperscript{157} However, attorneys may be disbarred for what is in essence negligence.\textsuperscript{158} Since discerning the severity of negligent conduct is problematical,\textsuperscript{159} the court may consider factors other than conduct before disbarring a negligent attorney. The next portion of this Note discusses other factors which the court might consider in these problem cases.

\section*{Analysis}

\textit{Subjective Factors in Sanctioning: The Ugly Duckling Attorney?}

The Nebraska case law seems to echo strains of discord as well as consistency in attorney discipline. Conduct warranting discipline is easier to identify when well-defined ABA codes have been violated\textsuperscript{160} than when an attorney has been negligent.\textsuperscript{161} In the more elusive cases, the court may look for a pattern of misconduct which supports sanctioning.\textsuperscript{162}

After the court determines that conduct requires discipline, the issue becomes: "Which sanction is appropriate?" Although it would seem that the severity of the conduct itself is the focal point, the court often considers other factors\textsuperscript{163} to arrive at an appropriate sanction. The court has repeated several relatively objective elements to be considered in attorney discipline,\textsuperscript{164} but subjective factors may...
enter into the decision as well.\textsuperscript{165} Given that attorney misconduct is not always blatant and correct remedies not always readily apparent, the court may rely on the “gut level” for the final decision. Without psychoanalyzing the court, one can only speculate whether such subjective — “gut level” — impressions enter into the decision and of what they might consist.

It might have been these untold reasons which led the court to disbar Doerr when only months before it had suspended Frank\textsuperscript{166} for seemingly more outrageous conduct. The attorneys in both Frank and Doerr engaged in what appeared to be a pattern of misconduct.\textsuperscript{167} Yet, in Frank, the successive lies apparently did not exhibit a pattern of misconduct sufficient to warrant disbarment.\textsuperscript{168} The court may have distinguished the “pattern” in Doerr from other cases in a more subtle way. Frank’s string of falsehoods revolved around one client and one case.\textsuperscript{169} Doerr, on the other hand, exhibited a more pervasive pattern of irresponsibility.\textsuperscript{170} A psychiatrist’s testimony at Doerr’s hearing indicated a pattern of procrastination and sloth which undermined his legal work.\textsuperscript{171} The Statmore case also involved an attorney with sloppy office habits, but these habits were only detrimental to one client.\textsuperscript{172} Conversely, Doerr’s pattern of neglect affected several clients.\textsuperscript{173}

The court in Doerr also had before it a wealth of information concerning Doerr’s personal life\textsuperscript{174} and a personality profile which was not particularly helpful to his cause.\textsuperscript{175} In view of the record

\textsuperscript{165} See notes 174-78 and accompanying text infra.

\textsuperscript{166} Doerr was decided on February 17, 1984 and Frank was decided on July 15, 1983.

\textsuperscript{167} Compare the facts and decision of Doerr (at notes 1-45 and accompanying text supra) with those of Frank (at notes 131-39 and accompanying text supra).

\textsuperscript{168} Frank, 214 Neb. at 830, 336 N.W.2d at 560. But see notes 169-71 and accompanying text infra.

\textsuperscript{169} See Frank, 214 Neb. passim, 336 N.W.2d passim (the disciplinary action against Frank concerned only his dealings with the Lewis estate).

\textsuperscript{170} Doerr, 216 Neb. at 510, 344 N.W.2d at 468 (the court saw a “long-established pattern of neglecting professional [responsibilities]”).

\textsuperscript{171} Id. at 509, 344 N.W.2d at 467.

\textsuperscript{172} See notes 123-30 and accompanying text supra (discussing Statmore, 218 Neb. 138, 352 N.W.2d 875; the disciplinary action against Statmore revolved around one transaction with one client).

\textsuperscript{173} See Doerr, 216 Neb. at 505-07, 344 N.W.2d 465-66 (Doerr’s misconduct involved three separate clients).

\textsuperscript{174} See notes 1-6 supra (discussing Doerr’s personal life and background).

\textsuperscript{175} See Doerr, 216 Neb. 509, 344 N.W.2d at 467. The court could not have felt a great deal of compassion for someone who “‘doesn’t particularly appreciate the legal profession.’” Id. (quoting the psychiatrist who testified on Doerr’s behalf). It is possible that by telling the court his legal life story, including his past disinterest in the legal profession, his propensity for procrastination, and his lack of assertiveness in practicing with his father, Doerr fueled the finding that he was just not fit for the legal profession.
which Doerr established, the court could have had negative feelings toward Doerr himself rather than toward just his conduct.\textsuperscript{176} Likewise, in Michaelis,\textsuperscript{177} the court disbarred an attorney who was far from complimentary toward his colleagues and the court.\textsuperscript{178} It might seem unfair for the court to place any weight on its subjective impressions of the attorney; however, since one of the considerations on the McArthur list\textsuperscript{179} is the “attitude” of the respondent,\textsuperscript{180} perhaps the court should consider the person as well as his conduct.\textsuperscript{181} Doerr’s indifferent attitude\textsuperscript{182} may support the court’s conclusion that Doerr, like Michaelis, as a person, was not suited to represent the Nebraska Bar.\textsuperscript{183}

But is Doerr’s indifference more damming to the profession than Frank’s fraud? Doerr’s indifference affected several clients, whereas Frank’s misrepresentations affected only one client.\textsuperscript{184} If damage to the profession is a product of the negative reactions of injured clients, Doerr’s misconduct would be seen as more severe than Frank’s since Doerr “injured” more clients. Yet, perhaps it was Doerr’s attitude which made him unattractive in the eyes of the court. Perhaps in the final analysis Doerr was so unattractive to the court that it felt moved to disbar him more so than others whose conduct alone was possibly more serious.\textsuperscript{185}

\textit{Proposing Alternative Solutions to Attorney Misconduct}

If the court did believe that Doerr was unfit as an attorney, might it have taken a course less serious than disbarment? In the dissent, Judge Caporale outlined a plan that he believed would meet the needs of discipline.\textsuperscript{186} Stating that disbarment was too harsh,\textsuperscript{187}

\begin{itemize}
  \item 176. \textit{See id.}
  \item 177. 210 Neb. 545, 316 N.W.2d 46 (1982).
  \item 178. \textit{See note 143 supra.}
  \item 179. \textit{See text at note 121 supra.}
  \item 180. \textit{McArthur,} 212 Neb. at 819, 326 N.W.2d at 175-76.
  \item 181. \textit{But see Marks & Cathcart, supra} note 111, at 235. “It is an ironic twist of equity: the system pays more attention to the actor than the performance.” \textit{Id.} To a certain extent it seems that the court should consider the actor — whether he is fit to perform the duties of an attorney. However, it may be unfortunate if the court places too much emphasis on its reactions to a particular attorney rather than the acts which have brought him before the tribunal.
  \item 182. \textit{See note 176 supra.}
  \item 183. Doerr’s conduct could have had an indirect effect on the bar’s reputation — via the complaints of dissatisfied clients — while Michaelis’ inflammatory remarks about the legal profession and the courts brought the bar into immediate disrepute without injuring clients. \textit{See note 142 supra} (discussing Michaelis’ inflammatory remarks).
  \item 184. \textit{See notes} 169-70 and accompanying text \textit{supra.}
  \item 185. Frank’s lying, on its face, is certainly more serious than negligence.
  \item 186. \textit{Doerr,} 216 Neb. at 512, 344 N.W.2d at 469 (Caporale, J., dissenting in part).
\end{itemize}
he recommended a public censure and a three year probationary period during which the bar could monitor Doerr's progress. The plan allowed for Doerr's disbarment should he "lapse into his old habits."

Doerr's counsel recommended a reprimand and a plan by which Doerr could continue to practice on a limited basis in tax work, which was his "forte," under the supervision of a fellow attorney.

One can only speculate whether either of these plans would have succeeded, but the idea behind them is admirable. Might it not be better, in some cases, to use such alternative remedies? While the court considers the need to protect the public and the bar's reputation, should not some consideration also be given to the attorney? Might there not be remedies which would protect the public without sacrificing the attorney's career? Though alternative remedies are available in Nebraska, there are few cases in which the court has used them.

Nebraska has changed other areas of attorney regulation which may suggest that there are alternatives in the sanctioning decision. The Nebraska Supreme Court has adopted a procedure to deal with attorneys rendered incompetent as a result of mental illness or chemical dependency. This procedure allows for the temporary suspension of incapacitated attorneys and for reinstatement once they demonstrate their capacity to practice law. While this procedure does not encompass attorney misconduct, suspension until demon-
strating a fitness to practice law is one alternative to total disbarment. Of course, as the court stated in *Doerr*, the inactivity during a suspension might not further one's legal prowess. However, allowing for a supervised practice, such as Doerr's counsel suggested, may keep the attorney in touch with the profession.

The Florida Supreme Court has held that a suspended attorney may work as a law clerk, allowing him to "support his family . . . maintain his legal proficiency . . ." and ideally [situate him] to demonstrate his rehabilitation." This result at least suggests that there are ways to discipline attorneys other than total disbarment or suspension.

Minnesota has implemented a different approach to attorney regulation in the form of a client fee arbitration system. It has been suggested that a competency review program could be patterned after this system to allow clients to bring grievances before an arbitration board. California has developed a similar program in which clients may seek the intervention of a bar relations committee to resolve minor conflicts. The purpose of this program is to promote informal resolutions to minor complaints. The Nebraska Supreme Court could consider the goals of these programs in disciplining attorneys. Perhaps sanctions could be devised which would heighten the attorney's awareness of what clients expect and educate clients as to some of the realities of the legal profession.

The court does not necessarily need to implement totally new programs in the disciplinary process. The presently available sanctions allow the court to take a more active role in tailoring the sanction to fit the individual attorney as well as meeting the goals of discipline. In some cases, the disgrace of a public disciplinary proceeding alone may jolt the errant attorney back into good practices.

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200. *Doerr*, 216 Neb. at 468, 344 N.W.2d at 511 ("the resulting period of professional inactivity would not further respondent's understanding of the requirements and demands of the practice of law").
201. *See* notes 190-91 *supra*.
202. Of course one might question how astute the attorney's legal proficiency was before he was suspended.
205. *Id.*
206. *Id.* at 731.
207. *Id.* at n.182.
208. *See* note 194 *supra*.
209. *Hollstein*, 202 Neb. at 59, 274 N.W.2d at 518. "We feel that what we have stated in this opinion is a sufficient censure of respondent's failure to fully live up to his responsibility as a lawyer. . . ." *Id.* *See also Forshee, supra* note 54, at 697-98, cit-
Another alternative sanction may include a supervised probation like the one suggested by Judge Caporale in *Doerr*. Since the court has the ability to customize sanctions, it could create other remedies like Judge Caporale’s. It could create remedies which may better serve the public interest by disciplining errant attorneys while allowing them to maintain a livelihood. Might not society benefit more, in some cases, by rehabilitating the attorney back into good practice rather than excluding him from his profession? Of course, such remedies are not appropriate in all cases and there is the troubling question of whether it is appropriate to use the public as a guinea pig to rehabilitate bad attorneys. But remedies could, arguably, be enforced while taking precautions to protect the public. Society can never be insulated from all possible wrongdoing by attorneys any more than it can from other professional groups. Insulation from the chance of harm should perhaps be weighed against the total sacrifice of a person’s career.

Judge Caporale recognized in *Doerr* an alternative to disbarment that he believed would best serve the ends of discipline. Doerr’s counsel also proffered an alternative to disbarment or suspension. Perhaps changes in attorney discipline could be initiated by the respondents themselves. While the majority of the court did not accept the remedy proposed by Doerr’s counsel, two judges did support a similar solution. Counsel for respondents in attorney discipline cases might consider making a stronger case for a unique remedy. They could put forth a plausible solution, well-supported by the record, and show the court why and how the proposal could benefit the bar, the public, and the attorney.

For example, an attorney who fails to segregate funds because of faulty record keeping techniques could show the court how he plans to alter his accounting procedures. He might hire an accountant or a bookeeper to handle such affairs if he cannot manage his own records. Further, he could suggest that the court or the bar periodically monitor the success or failure of his new system.

Consider an attorney who has lost a case because the statute of
limitations has lapsed or because a statute was negligently construed. This makes the profession look bad, but disbarment seems too severe for such mistakes. The respondent may suggest steps that could be or have been undertaken to heighten his legal awareness. For example, the respondent could enroll in a bar review course or other similar retraining programs. Also, the respondent could propose that another attorney, perhaps someone within his firm, oversee his practice, acting as a tutor in difficult assignments.

Respondents could stress that these types of programs allow them to improve their legal skills. By improving their skills, the argument could run, the public enjoys a better quality of lawyering and the bar does not have to lose members who still show some promise as attorneys. Focusing on the contributions that respondents could make to society may bring the court to a decision other than disbarment.

CONCLUSION

Doerr may have been disbarred because he did not have the proper qualities of an attorney in the eyes of the Nebraska Supreme Court. Conduct such as Doerr’s — negligence, procrastination, poor office management — seems difficult to sanction since carelessness and laziness seem less “evil” than stealing and lying. Yet an attorney like Doerr is detrimental to the image of the profession and must be disciplined. The court perhaps could better protect the bar and the public by formulating remedies more appropriate to the specific attorneys and their wrongdoings. Remedies which improve the quality of an attorney’s practice rather than ending it could benefit the profession and the public as well.

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