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# The Burdened Privilege: Defending Lawyers in Disciplinary Proceedings

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# THE BURDENED PRIVILEGE: DEFENDING LAWYERS IN DISCIPLINARY PROCEEDINGS

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## An Overview of the Disciplinary Process

### I. A BRIEF AND UNEASY LOOK AT THE DEVELOPMENT AND PRESENT STATE OF THE BAR AND THE BASIS OF LAWYER DISCIPLINE

#### *A. Our "Scandalous Situation"*

In the past decade the prestige of the legal profession in the United States has sustained an unprecedented series of blows. As a result, the bar has been forced to reconsider the attitudes and the criteria by which it regulates itself. Nineteen-seventy gave us the Clark Report,[1] a culmination of three years of study that revealed "a scandalous situation" both in the attitudes of lawyers toward disciplinary enforcement and in the ineffectiveness (often the nonexistence) of disciplinary agencies.[2]

As if to confirm this alarm, at the very time the Clark Report was being released, a theretofore obscure twenty-nine year old White House aide named Tom Charles Huston was organizing an intelligence and security scheme involving a number of the country's most conspicuous lawyers in, among other things, the "clearly illegal" device of surreptitious entry.[3] On June 17, 1972, the Watergate burglary was discovered, and thus began the astonishing disclosures that led to the disgrace and discipline of lawyers including the President and two Attorneys General of the United States, and a variety of other high-ranking government and party officials.[4] Almost incidentally, in October of 1973, the Vice President, who also happened to be a lawyer, resigned under threat of felony conviction for misconduct unrelated to Water-

1. AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (Hon. Tom C. Clark, Chairman 1970) [hereinafter cited as CLARK REPORT].

2. *Id.* at 1. The CLARK REPORT warned that "[u]nless the profession as a whole is itself prepared to initiate radical reforms promptly, fundamental changes in the disciplinary structure, imposed by those outside the profession, can be expected." *Id.* at 9. See also Mr. Justice Powell's article, *The President's Annual Address: The State of the Legal Profession,* 51 A.B.A.J. 821 (1965), for a slightly earlier admonition.

3. *See* B. SUSSMAN, THE GREAT COVER-UP: NIXON AND THE SCANDAL OF WATERGATE 207 (1974). While it was never absolutely established whether the Huston plan was approved in all its detail by the President, it clearly was the prototype if not the direct ancestor of the Watergate break-in. *Id.* at 208.

4. The ABA Standing Committee on Professional Discipline and Center for Professional Discipline has compiled a table entitled "Public Disciplinary Action Against Attorneys Named as Defendants or Co-Conspirators in Watergate and Related Criminal Proceedings" that may be obtained from the American Bar Association office in Chicago. *See generally An Awful Lot of Lawyers Involved,* TIME, July 9, 1973; NEW YORK TIMES, THE END OF A PRESIDENCY 128-29 (1974); Hertzberg, *Watergate: Has the Image of the Lawyer Been Diminished?,* 79 COM. L.J. 73 (1974); Thomason, *What the Public Thinks of Lawyers,* 46 N.Y.S.B.J. 151 (1974).

gate,[5] and a year later was disbarred in Maryland where he had taught and practiced law and held the highest public office.[6]

Nor was the bench immune in these years from its own humiliations. Just before the decade began, Clement Haynsworth, the respected Chief Judge of the Fourth Circuit Court of Appeals, was denied a Supreme Court seat because of his alleged insensitivity to conflicts of interest,[7] and in early 1970 Judge Harold Carswell of the Fifth Circuit was dramatically rejected by the Senate for reasons ranging from symptoms of racism to signs of incompetence.[8] The seat to which these men aspired, of course, was vacated by the resignation of Justice Abe Fortas, who had earlier been unsuccessfully nominated for the position of Chief Justice, amidst allegations of his own impropriety.[9] Judge Otto Kerner of the Seventh Circuit, war hero, former United States Attorney, former governor of Illinois, and head of the Presidential Commission on Civil Disorders, was convicted of bribery, conspir-

5. R. COHEN & J. WITCOVER, A HEARTBEAT AWAY 329-56 (1974).

6. Maryland State Bar Association v. Agnew, 271 Md. 543, 318 A.2d 811 (1974). The court said, apropos Agnew's arguments that his misconduct was not in his capacity as a lawyer, and that disbarment was excessive punishment:

> The professional ethical obligations of an attorney, as long as he remains a member of the bar, are not affected by a decision to pursue his livelihood by practicing law, entering the business world, becoming a public servant, or embarking upon any other endeavor. If a lawyer elects to become a business man [sic], he brings to his merchantry the professional requirements of honesty, uprightness, and fair dealing. Equally, a lawyer who enters public life does not leave behind the canons of legal ethics. A willful and serious malefaction committed by a lawyer-public servant brings dishonor to both the bar and the democratic institutions of our nation, and its destructive effect is thereby magnified.

*Id.* at 550-51, 318 A.2d at 815.

7. See D. HARRIS, DECISION 5-6 *passim* (1971). In fairness to Judge Haynsworth, and for a sense of perspective, we might recall that blatant conflicts of interest were common among our earliest and some of our greatest judges. Marshall was for a time both Secretary of State and Chief Justice, was a militant Federalist while on the court, and together with his brother was heavily involved in land speculation affected by the decision in Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), which, though Marshall officially abstained, was announced by Justice Story, but generally is believed to have been written by Marshall. L. PFEFFER, THIS HONORABLE COURT, 54, 89, 101-04 (1965). The Harris book provides an excellent portrait of the forces at work when a controversial federal judicial nomination is under consideration. *See also* J. ALSOP & T. CATLEDGE, THE 168 DAYS (1938) (the F. Roosevelt court-packing attempt); D. DAVELSKI, A SUPREME COURT JUSTICE IS APPOINTED (1964) (the appointment of Pierce Butler).

8. D. HARRIS *supra* note 7, at 21-29, *passim*.

9. C. ASHMAN, THE FINEST JUDGES MONEY CAN BUY, 211-20 (1973). For a detailed study of the Fortas incident and its aftermath, see R. SHOGAN, A QUESTION OF JUDGMENT (1972). See also President Johnson's nomination of Homer Thornberry to replace Justice Fortas was also rejected. R. SHOGAN, 149-52, 171-72.

acy, mail fraud, perjury, and tax evasion, and was forced to resign the bench, jailed, and disbarred.[10]

In 1975 the profession itself was in effect found guilty of widespread antitrust violations in the use of minimum fee schedules,[11] and two years later application of the long-standing and widely enforced provisions of the Code of Professional Responsibility regulating lawyer advertising was struck down as violating the Constitution.[12] Throughout all this we have been told by the Chief Justice that a staggering percentage of trial lawyers are, in his judgment, incompetent.[13] For the bar these have undeniably been, in the words of the Chinese curse, interesting times.[14]

### *B. The Development of the Bar in a Nutshell*

Recent scandal does not, of course, mean that until recently lawyers have always enjoyed universal approbation. It might be said, and not altogether figuratively, that the profession itself got off on the wrong foot. Among the earliest forms of litigation was the battle, which the Normans probably introduced to England.[15] The hired champion, a product of the system of trial by battle and one progenitor of the modern lawyer, was early if not always illegal in England, but flourished for a time anyway.[16] Indeed, in what might be called the earliest Anglo-American lawyer disciplinary case, Bracton tells us that one Elias Piggun was convicted

10. United States v. Isaacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974). *See* C. ASHMAN, THE FINEST JUDGES MONEY CAN BUY, 200-206 (1973). Ashman lists some 74 judges who have been accused of, though not necessarily proved to have committed, serious misconduct.

11. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

12. Bates v. Arizona State Bar, 433 U.S. 350 (1977).

13. Chief Justice Burger, Annual Report on the State of the Judiciary, Midyear Meeting of the American Bar Association (February 12, 1978), 64 A.B.A.J. 211 (1978). The Chief Justice's persistent remarks are both troubling and puzzling. If it is true that half our trial lawyers are incompetent, it is a matter of the gravest concern. The Chief Justice, however, does not seem to have produced authority or sources for his estimate, and he has been challenged by bar groups and trial judges. Perhaps he is merely attempting to be provocative, but surely by virtue of his position his remarks can reasonably be expected to diminish public confidence in the profession, to encourage lawsuits against lawyers (both civil malpractice actions, and habeas corpus petitions by prisoners who conclude *their* lawyers must have been in the tainted half) and to affect *pending* malpractice cases. Though the profession certainly needs and deserves more critical scrutiny than it has had, see J. AUERBACH, UNEQUAL JUSTICE (1976), the remarks of the Chief Justice seem a peculiarly inappropriate source.

14. The curse, "May you live in interesting times," was said to be among the worst fates to be wished on anyone. This phrase is no less telling even if it is apocryphal.

15. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 111-16 417-18 (1956).

16. *See* H. DRINKER, LEGAL ETHICS 11-13 (1953).

of being a hired champion and in consequence lost a foot and a fist.[17]

The earliest true prototypes of the modern lawyer, that is, men who appeared as advocates for others' interests, were clergymen, for the good reason that at the time only they were literate.[18] The church proscribed the practice of law by priests in the thirteenth century, however.[19] About the same time lay pleaders proliferated, and the first secular regulation of lawyers appeared in the First Statute of Westminster[20] providing that any "Serjeant, Pleader or other" who should practice "Deceit or Collusion" or "beguile the Court" would be imprisoned for a year and a day and banished from the court.[21] In England regulation of lawyers fell increasingly to the profession itself, particularly after the development of the Inns of Court, from which barristers (and, therefore, judges) emerged. This power of self-regulation depended upon judicial sanction, and the authority was said from early times to be ultimately and inherently judicial.[22]

The American bar did not simply transplant English practice, and the barrister-solicitor distinction never took root here.[23] From the earliest colonial days through and after the Revolution the profession was generally unpopular, perhaps partly because the bar was in disrepute in England in those times[24] and partly because the first lawyers *were* English and thus in appearance if not in fact were Tories.[25] Paradoxically, although about half of those who signed the Declaration of Independence and half of these same men, most notably John Adams and Alexander Hamilton, became prominent representing Tory interests as lawyers.[26]

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17. *Id.* at 12. *See also* G. NEILSON, TRIAL BY COMBAT 48-49 (1909). The American bar's closet has some skeletons as well. Many of our early immigrants were banished convicts; in 1736 one of these was "a Gentlemen of Fortune, and a Barrister at Law" who had been convicted of the curious offense of stealing books from Trinity College Library. P. SMITH, A NEW AGE NOW BEGINS 39 (1976).

18. A. BALUSTEIN & C. PORTER, THE AMERICAN LAWYER 284 (1954).

19. *Id.*

20. 3 Edw. 1, c. 29 (1275).

21. *Id. See also* E. COKE, SECOND INSTITUTES [13] Another statute forbidding practice by "Attorneys, ignorant and not learned in the Law" was enacted in 1402. 4 Henry IV, c. 18.

22. *See* R. v. Benches of Gray's Inn, 99 Eng. Rep. 227 (K.B. 1780)

23. H. DRINKER, *supra* note 16, at 13-20; H. COHEN, HISTORY OF THE ENGLISH BAR 181 *passim* (1929).

24. R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES, 135-39 (1953).

25. L. FRIEDMAN, A HISTORY OF AMERICAN LAW, 265 (1973).

26. John Adams (with Josiah Quincy), is one of the greatest examples of the lawyer's duty to represent the rights of the unpopular, defended the British soldiers charged with murder for their part in the "Boston Massacre" of 1770. Adams here used the principle

One observer wrote in 1782 that

> [l]awyers are plants that will grow in any soil that is cultivated by the hands of others; and when once they have taken root they will extinguish every other vegetable that grows around them. The fortunes they daily acquire in every province, from the misfortunes of their fellow citizens, are surprising![27]

These early lawyers were trained largely by working with English-educated lawyers and, in the later Eighteenth Century, by reading Blackstone's *Commentaries,* which appeared in England between 1765 and 1768 and promptly in America as well.[28] The first American professorship of "law and police" was established by Thomas Jefferson at William and Mary College in 1779 and chaired by Judge George Wythe, under whom John Marshall studied briefly in 1779-1780.[29] A private law school was established at Litchfield, Connecticut, in 1784 and flourished until 1833, and other law professorships came into being in these years.[30] The most notable development during this period was the founding of the Harvard Law School in 1817.[31]

### *C. The Judiciary's Inherent Power Over the Profession*

With the uniformity created by common and indigenous American legal education, the bar as an organized entity began to emerge, and with it came the mechanisms for admission, regulation, and removal. Roscoe Pound describes four periods in this development:

(1) the attempt to get on without lawyers,
(2) the stage of irresponsible filling out of writs by court officials and pettifoggers,

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that underlies most of the rudimentary constitutional protections of the rights of guilty and innocent alike: "It is better . . . five guilty persons should escape unpunished, than one innocent person should die." P. SMITH, *supra* note 17, at 352. Smith's account of the entire episode is excellent. *Id.* at 331-63.

27. ST. JOHN CREVECOEUR, LETTERS FROM AN AMERICAN FARMER 196-97 (1904), *quoted in* L. FRIEDMAN, *supra* note 25 at 265-66. Yet Friedman notes the fascinating fact that as late as 1700 there were so few trained lawyers in New York that one party could on occasion retain them *all,* leaving his opponent without available counsel. *Id.* at 87.

28. The COMMENTARIES were originally lectures delivered by Blackstone who, in 1758, was the only lecturer on the common law at any university. A. SUTHERLAND, THE LAW AT HARVARD 20-27 (1967).

29. *Id.* at 26-27.

30. *Id.* at 27-32.

31. *Id.* at 59.

(3) the era of admitted practitioners in permanent judicial organizations, and
(4) the era of trained lawyers.[32]

Note that Pound refers to permanent *judicial* organizations. This emphasis is important because the notion of exclusive judicial power to regulate the profession was an early development of great and continuing importance. In 1824 Justice Marshall wrote that the power to suspend and disbar is "incidental to all courts, and is necessary for the preservation of decorum, and for the respectability of the profession."[33] This dictum did not settle the matter, however, and as late as 1864 some courts perceived the right to practice law as statutory and the power to regulate as legislative rather than judicial.[34] But in 1866, in *Ex parte Garland,*[35] a divided Supreme Court struck down a statute purporting to regulate admission to federal court as an unconstitutional invasion of the judicial sphere by Congress. Since that time it has been all but unanimously agreed that lawyer regulation is an inherently judicial function.[36]

This notion of the inherently judicial nature of lawyer regulation is important to keep in mind as the attitudes, criteria, and machinery with which the function is performed are examined.

### *D. The Development of Codes of Ethics and Disciplinary Rules in America*

The original Canons of Professional Ethics[37] were not promulgated by the American Bar Association until 1908 after some years of study,[38] inspired principally by a 1905 Harvard address

32. R. POUND, *supra* note 24, at 135.

33. *Ex parte* Burr, 22 U.S. (9 Wheat.) 529 (1824).

34. *See, e.g., Ex parte* Yale, 24 Cal. 242 (1864).

35. 71 U.S. (4 Wall.) 333 (1866).

36. Beardsley, *The Judicial Claim to Inherent Power Over the Bar,* 19 A.B.A.J. 509 (1933); Note, *The Inherent Power of the Judiciary to Regulate the Practiced Law: A Proposed Delineation,* 60 MINN. L. REV. 783 (1976). Texas seems to be the only exception among courts that have spoken on the issue. *See* Scott v. State, 86 Tex. 321, 24 S.W. 789 (1894).

37. ABA CANONS OF PROFESSIONAL ETHICS (1908). There were 32 canons, which were based substantially on the Code of Ethics adopted in 1887 by the Alabama State Bar Association, the latter drawing heavily on Judge Sharswood's book PROFESSIONAL ETHICS (1854).

38. An ABA Grievance Committee was established in 1878, but did virtually nothing. *See* 27 ABA Rep. 446 (1904). A special committee to study canons of ethics was formed in 1905, 29 ABA REP. 1906 (1904) and in 1913 the Standing Committee on Professional Ethics was established, 38 ABA REP. 140, 147 (1913).

by President Theodore Roosevelt in which he accused corporate lawyers of defeating regulation of their clients.[39] The ABA, heeding the criticism, managed to include a plethora of congratulation for the profession in the same breath in which it recognized the need for ethical guidance:

> Our profession is necessarily the keystone of the republican arch of government. Weaken this keystone by allowing it to be increasingly subject to the corroding and demoralizing influence of those who are controlled by graft, greed and gain, or other unworthy motive, and sooner or later the arch must fall.[40]

Ironically, as Professor Auerbach notes, the ABA promptly diverted the focus President Roosevelt had placed on corporate lawyers to their less-prominent colleagues:

> Although Roosevelt had denounced those who counseled the malefactors of wealth, and the cry of "commercialization" bracketed lawyers in the highest and lowest professional strata, the committee report was more selective. Indeed, once bar associations exerted control over the campaign for canons of ethics, corporate lawyers, who were disproportionately represented in their councils, shifted the onus to "ambulance chasers" and "shysters," who were disproportionately excluded.[41]

The Canons thereafter adopted remained the principal ethical guidelines until the adoption in 1969 of the greatly revised and expanded Code of Professional Responsibility.

In 1947 the ABA published *The Survey of the Legal Profession,* which found little uniformity in either adherence to or enforcement of ethical considerations.[42] Accordingly, a restatement of ethical standards and disciplinary procedures was commissioned and resulted in the publication in 1956 of the Model Disciplinary Rules. The Model Rules recognized explicitly the inherent power of the courts to regulate the profession and stated that "[t]he purpose of discipline of lawyers is the protection of the public, the profession and the administration of justice, and not the punishment of the person disciplined."[43] While the Model Rules were not binding or even widely adopted, they gave further

39. J. AUERBACH, *supra* note 13, at 40.

40. 29 ABA REP. 600-01 (1906).

41. J. AUERBACH, *supra* note 13, at 41.

42. Vanderbilt, *The Survey of the Legal Profession,* 31 JUDICATURE 7 (1947). *See generally,* O. PHILLIPS & P. MCCOY, CONDUCT OF JUDGES AND LAWYERS 1-6 (1952).

43. MODEL RULES OF COURT FOR DISCIPLINARY PROCEEDINGS, 81 ABA REP. 396 (1956) [hereinafter cited as MODEL RULES].

authority to the concept of professional self-regulation for the good of the public and the bar.

In 1967 the Clark Committee began its study of the disciplinary process and in 1970 reported that matters were in great disarray.[44] At the same time the Committee proposed a five-step process for disciplinary proceedings, which differed appreciably from the Model Rules, and included:

(1) Investigation and Screening;
(2) Probable Cause Hearing;
(3) Formal Hearing;
(4) Administrative Review; and
(5) Judicial Review.[45]

The Report led to review and modification of the disciplinary structures in almost every state.[46] The ABA had created a Standing Committee on Professional Discipline as well as a Center for Professional Discipline, and in 1974 these agencies published their Suggested Guidelines for Rules of Disciplinary Enforcement,[47] which adhered for the most part to the Model Rules, but eliminated the probable cause stage. The Guidelines also acknowledged the desirability of naming nonlawyers to disciplinary boards, retained the emphasis on self-regulation, and reaffirmed the inherently judicial nature of the proceedings.[48]

Although neither the Code of Professional Responsibility nor the Suggested Guidelines are automatically binding upon individual jurisdictions,[49] they are being widely and increasingly adopted, and even where they are not official in force, they may carry substantial weight. Disciplinary counsel, therefore, should be familiar with them and expect that in the absence of a different local procedure they will be likely to control. Indeed it might fairly be said that in addition to mastery of the jurisdiction's

44. CLARK REPORT, *supra* note 1, at 1.

45. *Id.* at xiv-xvi.

46. AMERICAN BAR ASSOCIATION, REPORT OF THE SPECIAL COMMITTEE ON NATIONAL COORDINATION OF DISCIPLINARY ENFORCEMENT (1972).

47. ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE AND CENTER FOR PROFESSIONAL DISCIPLINE, SUGGESTED GUIDELINES FOR RULES OF DISCIPLINARY ENFORCEMENT (rev. 1975) [hereinafter cited as SUGGESTED GUIDELINES]. See also SUGGESTED GUIDELINES (3d ed. 1977).

48. *Id.*

49. *Compare In re* Taylor, 66 Ill. 2d 567, 363 N.E.2d 845 (1977) (describes the *Code* as a "safe guide" though not legally binding) *with In re* Colorado Bar Ass'n, 137 Colo. 357, 325 P.2d 932 (1958) (states that discipline cannot be imposed merely for violation of the Canons even though they have been adopted in the jurisdiction).

ethical rules and procedures every lawyer acting in a disciplinary proceeding should have a working knowledge of the Code and the Guidelines.

### *E. Working with Present Code of Professional Responsibility*

The present Code comprises three sets of provisions. The nine Canons are described as "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers."[50] A group of Ethical Considerations follow each Canon; they are "aspirational" standards "towards which every member of the profession should strive."[51] Finally, and most importantly for present purposes, there are the Disciplinary Rules, which are "mandatory" statements of "the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."[52] Among the Disciplinary Rules we find these provisions, which illustrate the breadth of the Code's application:

> DR 1-102 . . .
> (A) A lawyer shall not:
> (1) Violate a Disciplinary Rule.
> . . . .
> (5) Engage in conduct that is prejudicial to the administration of justice.
> (6) Engage in any other conduct that adversely reflects upon his fitness to practice law.

The lofty aspirations underlying this general injunctions are suggested by the following language of the Supreme Court, which the ABA Committed cited in support of DR 1-102(A)(6);

> It is a fair characterization of the lawyer's responsibility in our society that he stands "as a shield," . . . in defense of right and to ward off wrong. From a profession charged with these responsibilities there must be exacted those qualities of truthspeaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as "moral character."[53]

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50. ABA CODE OF PROFESSIONAL RESPONSIBILITY, PRELIMINARY STATEMENT (1976) [hereinafter cited as ABA CODE].

51. *Id.*

52. *Id.*

53. ABA CODE, *Disciplinary Rule* [hereinafter D.R.] 1-102(A)(6) n.14 (quoting Schware v. Board of Bar Examiners, 353 U.S. 232, 247 (1957) (Frankfurter, J., concurring).

These well-phrased and salutary sentiments are, unfortunately, not a very useful guide to retrospective or prospective evaluation of specific instances of conduct. Despite the prolixity of the present Code, it has been criticized for this overgenerality, as well as for a misplaced emphasis in its priorities. Indeed there are principally three areas in which the Code is subject to legitimate criticism.

First, like its predecessor, the Canons of Professional Ethics, the Code is said to be excessively protective of the bar's self-interest in "outmoded laissez-faire precepts," at the expense of adequate incentives to the bar to make legal services more readily available to all.[54] The recent demise of the Code's restrictions upon lawyer advertising may presage a substantial change in this area.[55]

Second, a more important and abiding problem from the point of view of disciplinary procedure is the extreme breadth and vagueness of the Code in provisions such as those set forth above. Because the language is so broad, virtually any foible might be subjectively construed to be a violation of the Code or an *apparent* violation. Canon 9 enjoins that "[a] Lawyer Should Avoid Even the Appearance of Professional Impropriety."[56] Such generality could not survive, of course, in criminal legislation, particularly when free speech is implicated.[57] But in the realm of regulatory provisions a good deal more breadth is tolerated, as in the Supreme Court's approval of the military condemnation of "conduct unbecoming an officer and a gentleman."[58] The question is ultimately one of notice, that is, whether the person affected could reasonably foresee that his conduct was proscribed. If it clearly was, then he probably lacks standing to challenge the

54. J. AUERBACH, *supra* note 13, at 286.

55. J. LIEBERMAN, CRISIS AT THE BAR 87-106 (1978). Despite the melodramatic subtitle, *Lawyer's Unethical Ethics and What To Do About It*, Lieberman's book is a balanced critique of the subject.

The prohibitions placed on lawyer advertising by the organized bar were first challenged in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The subsequent cases of *In re* Primus 436 U.S. 412 (1978), and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), further clarified the limits of in-person solicitation, but further litigation can be expected before the outer boundaries of permissible solicitation are firmly established.

56. ABA CODE, CANON 9.

57. *E.g.*, Miller v. California, 413 U.S. 15 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting" words).

58. Parker v. Levy, 417 U.S. 733 (1974); *cf. In re* Bithoney, 486 F.2d 319, 324 (1st Cir. 1973) (even though the *Code* may be vague or general, there are still core areas of conduct that are clearly prohibited).

facial overbreadth of a rule.[59] Respondent's counsel, however, should be alert to this problem when the charges are under the broader disciplinary rules. The Supreme Court has held, albeit not on a question of vagueness, that a disciplinary respondent has a constitutional due process right to fair notice of the charges against him.[60] Particularly when the misconduct is *malum prohibitum* rather than *malum in se,* and the defense is that the respondent acted in good faith, it may be persuasive that the Code does not give adequate guidance. The opening wedge for the argument upon vagueness of a rule is ordinarily an affirmative answer to the question of whether "men of common intelligence must necessarily guess at its meaning,"[61] and that can validly be said of many of the Code's provisions.

Third, even when individual provisions of the Code are reasonably definite they may be in conflict with other provisions. Indeed Jethro Lieberman writes in his recent and lucid *Crisis at the Bar* that "the code remains confusing, ambiguous, and inconsistent."[62] For this and other reasons he concludes that the "pastiche of loquacious moralisms and obscure footnotes" should be "scrapped."[63] Monroe Freedman, an early and outspoken critic of the Code, sees three duties that frequently conflict with one another, a "trilemma" consisting of the duties (1) to ascertain all the facts from his client, (2) to keep his client's confidences, and (3) to be candid with the court.[64] The lawyer, says Freedman, "is required to know everything, to keep it in confidence, and to reveal it to the court."[65] One might add as well, to complicate the situation further, the injunction of Canon 7 that "[a] Lawyer Should Represent a Client Zealously Within the Bounds of the

59. *Compare* Gooding v. Wilson, 405 U.S. 518 (1972) (when free speech is likely to be chilled, a defendant may challenge overbroad legislation even though his conduct was clearly forbidden) *with* Broadrick v. Oklahoma, 413 U.S. 601 (1973) (one has no standing to challenge a statute if his conduct falls within the "hard core" of its proscriptions).

60. *In re* Ruffalo, 390 U.S. 544 (1968). *See also Ex parte* Robinson, 86 U.S. (19 Wall.) 505 (1873).

61. Broadrick v. Oklahoma, 413 U.S. 601, 607 (1973) (quoting Connaly v. General Construction Co., 269 U.S. 385, 391 (1926)).

62. J. LIEBERMAN, *supra* note 55, at 65.

63. *Id.* at 213.

64. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 28 (1975). This is an excellent and provocative book by an articulate champion of the view that a lawyer's *primary* duty is to his client and that this duty is an unbending one, particularly in criminal cases.

65. *Id.* See J. LIEBERMAN supra note 55, at 153-56 for a critique of Freedman's argument. And see *In re* A., 276 Or. 225, 554 P.2d 479 (1976), for an example of a conflict between the attorney-client privilege and the duty to disclose.

Law."[66] Especially in criminal cases it is often defense counsel's clear duty to obstruct the truth-finding process by asserting and protecting his client's fourth and fifth amendment rights to suppress illegally obtained but highly relevant and probative evidence.[67] Indeed, some courts that have traditionally required a showing that a "mockery of justice" resulted from ineffective assistance of counsel,[68] have shown a new willingness to reverse criminal convictions because of incompetent counsel when defense counsel did not "exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances."[69] Obviously keeping damaging evidence from the factfinder by assertion of constitutional rights and rules of evidence is one of the most rudimentary skills of the trial lawyer.

Another area of clear collision between conflicting duties is in advertising and solicitation, which, though until recently condemned in virtually all respects, might quite arguably be *required* by the duty "to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available."[70] This is one of the grounds on which the Supreme Court scuttled the advertising ban in *Bates v. State Bar of Arizona.*[71]

Other examples are readily envisioned. For the moment it is sufficient to emphasize that although in most disciplinary proceedings the Code will be implicated and ostensibly violated, counsel should consider whether the Code gives adequate notice of asserted proscription and whether violation of one provision can be justified by adherence to another. The value of the Code to the practicing lawyer has been likened with some justice and

66. ABA CODE, CANON 7; *cf.* Daniel v. Penrod Drilling Co., 393 F. Supp. 1056 (D. La. 1975) (while lawyers owe a duty to their clients to wage a vigorous struggle, they owe a primary duty to the administration of justice, and as officers of the court it is their duty not to dissimulate).

67. *See, e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

68. *E.g.,* McQueen v. Swenson, 498 F.2d 207, 214 (8th Cir. 1974).

69. United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976), *aff'd on second appeal,* 552 F.2d 230 (8th Cir. 1977); *accord,* McMann v. Richardson, 397 U.S. 759, 770 (1970).

70. ABA CODE, *Ethical Consideration* [hereinafter E.C.] 2-1. The decision in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), striking down minimum fee schedules as antitrust violations, had the potential effect of encouraging fee competition. Reduced fees and greater availability and *knowledge* of this availability, of counsel to nonprosperous prospective litigants follows from the encouragement of fee competition. *See generally* M. PIRSIG & K. KIRWIN, PROFESSIONAL RESPONSIBILITY: CASES AND MATERIALS 153-254 (1976).

71. 433 U.S. 350, 377 (1977).

hyperbole to the value of a valentine to a heart surgeon.[72] But I would not be understood to encourage disregard of the Code, any more than I counsel abject surrender to it. Some, perhaps even most of the aspirations embodied by the Code are not subject to debate since they envision an effective, zealous, and competent bar consisting of largely autonomous lawyers. In its particulars, and especially in combinations of its particulars, the Code is not always workable. If applied with the required flexibility and with a receptive sympathy for good faith and human fallibility, it is certainly a useful repository of our ethical history. The Code itself recognizes that not all situations can be foreseen, and that with each situation the lawyer must evaluate the competing demands in light of his role.[73]

Finally, the Code does not contain either disciplinary procedures, sanctions for violations, or standards for civil liability.[74] These important matters are left to individual jurisdictions and specific cases, and great diversity is the result. As to sanctions, the Code does note that the "severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances."[75] Broad as it is, this is probably as good a general description as any of the factors with which counsel must be concerned in the disciplinary process.

Effective work in the area of lawyer discipline presupposes, of course, knowledge of the Code of Professional Responsibility and other substantive law sources, as well as intimate familiarity with the procedural rules of the jurisdiction involved. This body of substantive and procedural law is immensely diverse,[76] and it is not the purpose of this article to examine either the standards of professional conduct or all details of the procedures by which they are enforced. Rather, for the most part, practical advice is

72. M. FREEDMAN, *supra* note 64, at vii.

73. ABA CODE, *Preamble* (incorporating by footnote the position expressed in PROFESSIONAL RESPONSIBILITY: REPORT OF THE JOINT CONFERENCE, 44 A.B.A.J. 1159, 1218 (1968)).

74. ABA CODE, *Preliminary Statement.*

75. *Id.* (citing Louisiana State Bar Ass'n v. Steiner, 204 La. 1073, 1092-93, 16 So. 2d 843, 850 (1944) (Higgins, J., concurring)); *accord, In re* Smith, 67 Cal. 2d 460, 461-62, 432 P.2d 231-32, 62 Cal. Rptr. 615-16 (1967); *see In re* Harrington, 134 Vt. 549, 367 A.2d 161-62 (1976).

76. Mr Justice Clark, who chaired the ABA Special Committee on Evaluation of Disciplinary Enforcement, found a great lack of uniformity, a "hodge-podge," in the states' disciplinary procedures. Clark, *Address to the Nebraska State Bar Association Annual Association Dinner, Oct. 19, 1967,* 47 NEB. L. REV. 359, 367 (1968).

offered that is designed to be helpful to the lawyer's lawyer who has already mastered the operative substantive law and procedural rules. Attention is first given in the following sections of this article to the broad considerations that the lawyer's advocate should keep in mind: the nature and purpose of disciplinary proceedings and the pertinent constitutional rights of the respondent. The balance of the article is then focused on the nuts and bolts of representing lawyers within the existing framework of the disciplinary system.

## II. THE NATURE OF DISCIPLINARY PROCEEDINGS

A disciplinary action against a lawyer is unlike any other form of litigation. It includes elements conscripted more or less arbitrarily from criminal law, civil practice, administrative proceedings, and even arbitration. It is unique, too, because it involves the legal profession at work upon itself; the bar, which is understood to include the bench, acts at once as accuser, accused, judge, jury, probation officer, and court of last resort.[77] The goal is the seemingly internecine one of preserving or "purifying" the bar by condemning and purging individual members;[78] yet the proceeding is, or should be, motivated as well by a genuine and effective concern to help the errant lawyer.[79] It contrives at once to be both narcissistic and masochistic, self-defensive and self-destructive, stoical and lugubrious. The familiar adversary system becomes confused in these circumstances and the confusion demands a rethinking of roles and a rearrangement of priorities. It is correct, but inadequate, to describe a disciplinary proceeding as sui generis.[80]

77. This combination of functions in a single body has been held not to violate due process. Mendicino v. Whitchurch, 565 P.2d 460 (Wyo. 1977). *See also* Withrow v. Larkin, 421 U.S. 35 (1975) (medical board may hold adversary hearing on doctor's suspension on charges arising from its own investigation). *But see In re* Schlesinger, 404 Pa. 584, 172 A.2d 835 (1961).

78. *See, e.g., In re* Makowski, 374 A.2d 458 (N.J. 1977). The courts have articulated the purposes for discipline in a great variety of ways, but common to most of them is the notion of protecting the judicial process by preserving the "purity" of the bar, a curiously moralistic notion which, of course, presupposes an inherent or predominant "purity" to be preserved. For a recent critique of the standards by which the bar has traditionally evaluated itself, *see* J. AUERBACH, *supra* note 13, at 14-39.

79. *See, e.g.,* Florida Bar v. Hirsch, 342 So. 2d 970 (Fla. 1977); Grievance Comm. v. Howe, 257 N.W.2d 420 (N.D. 1977); *In re* Alexander, 321 Pa. 125, 184 A. 77 (1936). The view taken by various courts of the proper purposes to be served by the disciplinary process is discussed in a separate section of this article.

80. *See, e.g., In re* Eucheles, 430 F.2d 347 (7th Cir. 1970); McComb v. Comm'n on Judicial Performance, 19 Cal. 3d 51, 564 P.2d 1, 138 Cal. Rptr. 459 81977); *In re* Sparrow,

One might expect that something as rudimentary as the process of self-regulation would long since have settled into a uniform mode of procedure with uniform criteria for discipline. But this is not the case. Procedures, unfortunately, are not homogenous, degrees of discipline are not consistent for similar kinds of misconduct, and even the constitutional desiderata of discipline and disbarment are not agreed upon.[81] The courts are often ambivalent in their perceptions of the very nature of the disciplinary function: "The handling of disciplinary matters is an unwelcome and unpleasant task for members of the Bench and Bar, but if any semblance of an ethical profession is to be maintained, the responsibility therefore is clear and inescapable."[82]

We find here a sense of the necessary evil, of the bar biting the bullet as it operates upon itself, not a sense of the mobilization of well-tested and well-oiled machinery. Despite the central and continuing importance of the matter to bench and bar, there is not even agreement on whether the disciplinary process is civil[83] or criminal,[84] quasi-civil[85] or quasi-criminal,[86] neither civil nor criminal,[87] or quasi-judicial.[88] The United States Supreme Court, which has rarely ventured into the area,[89] referred to the discipli-

338 Mo. 203, 90 S.W.2d 401 (1935); *In re* Ries, 131 N.J.L. 559, 37 A.2d 417 (1944).

81. For an excellent collection of data analyzing the present status of disciplinary procedures in the United States, see *Disbarment in the United States: Who Shall Do the Noisome Work?*, 12 COLUM J.L. & SOC. PROB. 1 (1975) [hereinafter cited as *Disbarment*].

82. Cleveland Bar Ass'n v. Fleck, 172 Ohio St. 467, 471-72, 178 N.E.2d 782, 785 (1961). *See also* Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487, 493 (where Justice (then Judge) Cardozo refers to the disciplinary process as "the noisome work").

83. *See In re* McCullough, 97 Utah 533, 537, 95 P.2d 13, 14-15 (1939). *See also* Hurst v. Bar Rules Comm., 202 Ark. 1101, 155 S.W.2d 697 (1941); *In re* Kettles, 365 Ill. 168, 6 N.E.2d 146 (1937); *In re* Stern, 299 Mass. 107, 12 N.E.2d 100 (1938); State Bar Ass'n v. Bachelor, 139 Neb. 253, 297 N.W. 138 (1941). *See generally Disbarment, supra* note 81, at 18-21.

84. *E.g.*, McCord v. State, 220 Ala. 466, 470-71, 126 So. 873, 877 (1930).

85. *E.g.*, Houtchens v. State, 63 S.W.2d 1011 (Tex. Crim. App. 1933).

86. *See, e.g.*, Goodrich v. Supreme Court, 511 F.2d 316 (8th Cir. 1975); Erdmann v. Stevens, 458 F.2d 1205 (2d Cir. 1972); Furman v. State Bar, 12 Cal. 2d 212, 83 P.2d 12 (1938). *See also* Lenihan v. Commonwealth, 165 Ky. 93, 102, 176 S.W. 948, 954 (1915); Sessner v. Commonwealth, 268 Ky. 127, 103 S.W.2d 647 (1937); *In re* Wall, 387 Mich. 154, 194 N.W.2d 835 (1972).

87. *See Ex parte* Montgomery, 244 Ala. 91, 12 So. 2d 314 (1943); Werner v. State Bar, 24 Cal. 2d 611, 150 P.2d 892 (1944); Grievance Comm. v. Sinn, 128 Conn. 419, 23 A.2d 516 (1942); *In re* Rerat, 224 Minn. 124, 28 N.W.2d 168 (1947); State v. Brown, 53 Wyo. 42, 77 P.2d 626 (1938).

88. *E.g.*, State *ex rel.* Florida Bar v. Dawson, 111 So. 2d 427, 431 (Fla. 1959).

89. Review of a disciplinary action by the United States Supreme Court is available only if the respondent has raised a constitutional question. See notes 179-81 *infra* and accompanying text.

nary proceeding nearly a century ago in *Ex parte Wall*[90] as "in its nature civil" and "not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them;"[91] yet the Court in 1968 in *In re Ruffalo*[92] called disbarment "a punishment or penalty imposed on the lawyer" to protect the public, and described the action as "adversary proceedings of a quasi-criminal nature."[93] Neither the characterization of the proceedings in *Wall* nor the one in *Ruffalo* has been adopted or applied with consistency by the lower courts.[94] This article will not attempt to resolve the uncertainty on this question, important though it is. When, however, the concern is with the respondent's *procedural rights,* the criminal or quasi-criminal label will supposedly command greater protections than are available in civil actions. But when the concern is with the *disposition* of the matter, such a characterization may justify punitive sanctions not available in civil or remedial proceedings. Respondent's counsel is probably best advised not to dwell upon the civil-criminal distinction as such, but to emphasize throughout the proceedings that the grave consequences of disbarment require the courts to extend careful protection to the respondent's right to *due process,* remembering that there is no universal answer to the crucial question: "What process is due?"[95] If *Ruffalo* stands for nothing more, it at least

90. 107 U.S. 265 (1882).

91. 107 U.S. at 288.

92. 390 U.S. 544 (1968).

93. 390 U.S. at 550-51.

94. *E.g.,* Polk v. State Bar, 480 F.2d 998 (5th Cir. 1973) (where the court states that if it were to decide the question of categorization it would characterize the action as quasi-criminal); *In re* Echeles, 430 F.2d 347 (7th Cir. 1970) (disbarments are neither civil nor criminal, but are special proceedings); Yokozeki v. State Bar, 11 Cal. 3d 436, 521 P.2d 858, 113 Cal. Rptr. 602 (1974) (neither civil nor criminal); State v. Pastorino, 53 Wis. 2d 412, 193 N.W.2d 1 (1972) (disciplinary proceedings are civil and not criminal). In addition, *In re* Kelly, 23 N.Y.2d 368, 296 N.Y.S.2d 932 (1968), and Black v. State Bar, 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288 (1972), directly addressed the precedent set by *Ruffalo* and found it "most unlikely" that *Ruffalo* meant to equate disciplinary proceedings and criminal cases.

95. *See* K. Kirwin, Constitutional, Statutory and Judicial Controls on the Practice of Law II (1976). Professor Kirwin's concise guide was published in conjunction with a seminar on lawyer discipline sponsored by the Hamline University School of Law, Advanced Legal Education, St. Paul Minnesota, but deserves wider circulation. This guide can be obtained from either of these organization:

Carol A. Noteboom, Director
Advanced Legal Education
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, Minnesota 55104
Telephone (612) 641-2357

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A Division of the Minnesota State Bar Association
40 North Milton
St. Paul, Minnesota 55104
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represents recent and authoritative recognition that when there is doubt whether a right to privilege is available in a disciplinary matter, the respondent should have the benefit of that doubt.[96]

## III. THE PURPOSE OF DISCIPLINARY PROCEEDINGS

Notwithstanding Mr. Justice Douglas' language in *Ruffalo,* few courts have been willing to describe the disciplinary process as criminal or quasi-criminal. The rationale for this rejection is ordinarily that the purpose of the process is *not* to punish (again, despite *Ruffalo*), but to protect the public, the profession, and the administration of justice from persons unqualified.[97] It has been called, in what seems to betray a certain self-righteousness and cathartic vision characteristic of many disciplinary opinions, a means for "purification" of the bar.[98] Deterrence of future misconduct by the respondent and others is an often-recognized purpose,[99] and courts occasionally, but too rarely, recognize an obligation to the accused lawyer, a duty to "reclaim" the errant.[100]

96. The Supreme Court held that Mr. Ruffalo had been denied procedural due process because in the state disbarment proceeding he had no notice that his employment of a certain person would be considered a disbarment offense until after both he and that person had testified at length on all material facts pertaining to that phase of the case. 390 U.S. at 550.

97. The courts are inconsistent on this point and there is no consensus of agreement on the proper purpose of disciplinary proceedings. *E.g., In re* Spicer, 126 F.2d 288 (6th Cir. 1942) (preservation of the courts); *In re* MacDonald, 56 Ariz. 120, 105 P.2d 1114 (1940) (protection of the public); Dudney v. State Bar, 8 Cal. 2d 555, 66 P.2d 1199 (1937) (protection of public, profession, and courts); *In re* Felton, 60 Idaho 540, 94 P.2d 166 (1939) (purpose is to exact justice and purge the profession); *In re* Melnick, 383 Ill. 200, 48 N.E.2d 935 (1943) (maintain integrity of the profession and dignity of the court); Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 318 A.2d 811, 814 (1974) ("Disciplinary procedures have been established . . . as a catharsis for the profession and a prophylacticfor the public."); *In re* Kennan, 313 Mass. 186, 47 N.E.2d 12 (1943) (to maintain purity and dignity of the court); *In re* Welansky, 319 Mass. 205, 64 N.E.2d 202 (1946) (security and advancement of public justice); Wright v. Sowards, 134 Neb. 159, 278 N.W. 148 (1938) (to determine whether attorney is fit to practice); *In re* Ries, 131 N.J.L. 559, 37 A.2d 417 (1944) (to compel attorney to deal fairly and honestly with clients); Campbell v. Third Dist. Comm. of Va. State Bar, 179 Va. 244, 18 S.E.2d 883 (Va. 1942) (to give effect to attorney's oath).

98. *E.g., In re* Makowski, 73 N.J. 265, 271, 374 A.2d 458, 461 (1977).

99. *Id.*

100. Florida Bar v. Hirsch, 342 So. 2d 970, 971 (Fla. 1977). Few opinions discuss the bar's obligation *to* its own members to assist them in practicing ethically and professionally not by ignoring or minimizing misconduct, but by fashioning remedies when possible to eliminate the cause of the misconduct without depriving the respondent of his livelihood and self-respect. In Selling v. Radford, 243 U.S. 46 (1917), the Court indeed expressed sympathy for the *disciplinary authority,* stating "we unselfishly understand their sense of pain" at having to do their duty. And while courts occasionally recognize an obligation to be fair to respondents, or as the *Selling* Court put it, "the duty which rests

Finally, the courts will be concerned not only with actual protection of the bar, public, and respondent, but with the *appearance* of effective and fair regulation.[101]

This preoccupation with appearances is troublesome. Widespread sentiment to the contrary notwithstanding, something is singularly inappropriate in the spectacle of the legal profession (whose proper business is reaching proper results in *individual cases*) sacrificing its members to mollify a suspicious and cynical public. The profession always has been and always will be viewed antagonistically by a certain segment of society simply because of its inescapable intellectual elitism, its relative wealth, and its apparently disproportionate power. Yet none of these characteristics is evil; nor does dishonesty or dishonor necessarily accompany them. Those who believe all or virtually all lawyers are scoundrels will not be persuaded otherwise by any number of purges. Indeed, publicized discipline certainly tends to *confirm* the suspicions of the bar's detractors, not to disarm them. This, too, is inescapable, and I do not say that it would justify a failure of diligent regulation. The point is that there is no persuasive evidence that conspicuous discipline serves any salutary abstract purpose or has a demonstrable effect beyond the consequences to the individual respondent in the individual case. Even if it did, it is unfair, unproductive, and unconstitutional to determine either the desirability or the degree of discipline by reference to the uncommitted and undetected wrongs of others. The deterrent effect of discipline as of criminal sentencing, upon future wrongdoers, is largely a myth (though we may admit of some exceptions), and no discipline should be imposed or enhanced *solely* for that purpose.

The truly legitimate aims of discipline are, first, the protec-

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upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do," 243 U.S. at 51, still no opinion has been found that speaks of a duty in the disciplinary authority to protect and assist accused members of the bar. The result is unfortunately, but inevitably, that the bar sees disciplinary authority as a potential enemy, much perhaps as most citizens view the Internal Revenue Service. Justice Cardozo recognized this possibility in Karlin v. Culkin, 248 N.Y. 465, 162 N.E. 487, 493 (1928):

> In discharging a function so responsible and delicate, the courts will refrain, we may be sure, from a surveillance of the profession that would be merely odious or arbitrary. They will act considerately and cautiously, mindful at all times of the dignity of the bar and of the resentment certain to be engendered by any tyrannous intervention.

101. *E.g.*, Cleveland Bar Ass'n v. Fleck, 172 Ohio St. 467, 471-72, 178 N.E.2d 782, 785 (1961), *modified, In re* Fleck, 29 Ohio St. 2d 82, 278 N.E.2d 669 (1972).

tion of clients in particular and the administration of justice in general from lawyers who are intellectually, physically, or morally unqualified to perform the difficult and important functions that the license to practice law proclaims them qualified to perform; second, repair and restitution to the degree possible of any damage, financial or otherwise, resulting from the respondent's misconduct; and, third, rehabilitation of the respondent when it is feasible. Deterrence by example is not a proper ingredient of the disciplinary formula; to the extent it is a natural consequence of discipline imposed for other reasons, of course, it neither can nor shall be avoided, but that is quite a different matter.

All of these factors are important in formulating an approach to the disciplinary process, for they dictate in large part not only the procedural rights to which the respondent is entitled, but also the decision on whether discipline is required and, if it is, the appropriate form of discipline. Whatever the stated purpose of the process, and whether the proceeding is called civil, criminal, or otherwise, respondent's counsel should strive to extract the greatest procedural safeguards and the least damaging form of discipline by emphasizing the importance of the right to practice. The grave consequences of disbarment or suspension, whether it is called punishment or purgation, should be asserted to impress the disciplinary body with the need for procedural fairness and the minimal discipline consistent with the legitimate concerns of the disciplinary authority. As the Supreme Court observed over a century ago:

> Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the Bar should, therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired.[102]

102. Bradley v. Fisher, 89 U.S. (13 Wall.) 335, 355 (1872). For a discussion of an out-of-state attorney's right to appear pro hoc vice, see Leis v. Flynt, 99 S. Ct. 698 (1979).

## IV. THE CONSTITUTIONAL AND OTHER MINIMUM RIGHTS OF RESPONDENTS

It has already been noted that disciplinary procedures will be dictated in part by the court's characterization of the proceeding as criminal, civil, or something in between. The applicability of constitutional protections, particularly the right to due process, also depends upon how the courts characterize the practice of law. Here, too, we have no real consensus. Although it seems never to have been held that there is an absolute right to practice law, the courts generally see it as more than just a mere privilege. It is not a mere reward for good behavior,[103] "not a matter of grace, but of right for one *who is qualified* by his learning and his moral character."[104] It has been called a "qualified right,"[105] a "matter of license and high privilege,"[106] "in the nature of a franchise, to the enjoyment of which one is admitted only upon proof of fitness and qualification, which must be maintained,"[107] a "privilege burdened with conditions."[108] However characterized, the ability to practice law, once attained, is at least a property right that cannot be removed without due process: "The issue is not, of course, *whether* lawyers are entitled to due process of law in matters of this kind, but, rather, *what* process is constitutionally due them in such circumstances."[109]

Lawyers are often called "officers of the court,"[110] but this "special and muddy"[111] appellation has seldom been used as the

103. *In re* Milne, 134 Vt. 416, 365 A.2d 133 (1976).

104. Baird v. State Bar of Ariz., 401 U.S. 1, 8 (1971) (plurality opinion) (emphasis added); *cf. In re* Ronwin 113 Ariz. 357, 555 P.2d 315 (1976) (holding that the practice of law is a right, not a privilege, conditioned only on mental physical, and moral qualifications).

105. Henington v. State Bd. of Bar Examiners, 60 N.M. 393, 398, 291 P.2d 1108, 1112 (1956) (admission case); *accord,* Nebraska State Bar Ass'n v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957). *See also* Charlton v. FTC, 543 F.2d 903, 906 (D.C. Cir. 1976) (a right that cannot be "lightly" or "capriciously" taken away).

106. *In re* Smith, 220 Minn. 197, 199, 19 N.W.2d 324, 325 (1945).

107. *Id.*

108. *In re* Rouss, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1971); *accord,* Baker v. Kreisker, 236 Ind. 617, 142 N.E.2d 432 (1957); Mississippi State Bar Ass'n v. Wade, 250 Miss. 625, 167 So. 2d 648 (1964); *In re* Downs, 363 S.W.2d 679 (Mo. 1963).

109. Cohen v. Hurley, 366 U.S. 117, 129 (1961) (emphasis in original). The *Cohen* court concluded that the process due in a disciplinary hearing did not include the right against self-incrimination and that the attorney could be disciplined for asserting that right. *Cohen* was overruled in this respect by Spevack v. Klein, 385 U.S. 511 (1967).

110. *In re* Griffiths, 413 U.S. 717, 728-29 (1973); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 378 (1867).

111. O. MELLINKOFF, LAWYERS AND THE SYSTEM OF JUSTICE 600-01 (1976).

touchstone for handling of disciplinary matters. Though the status of "officer of the court" may arguably carry with it certain duties and rights, the Supreme Court has clearly distinguished the lawyer from other officers such as marshalls, bailiffs, clerks, and judges, essentially on the ground that the lawyer is an independent operator, not retained by or otherwise an agent or employee of the court.[112] Therefore, though the phrase is common and may have consequences, it is not part of the necessary vocabulary of the disciplinary process, which would indeed probably benefit by its banishment. Its most common and not altogether inaccurate implication is probably that the lawyer by virtue of his position enjoys, or labors under, a "special status in society"[113] and as a result will be held to higher standards of competency and integrity than a nonlawyer.[114]

From this situation emerges mostly confusion. For our purposes it is important only to note that the practice of law simultaneously vests the lawyer with certain significant but not clearly delineated rights and places him under certain equally elusive obligations. It is in the respondent's interest, of course, to emphasize the former during disciplinary proceedings and to counter the argument that he may be shorn of his elevated status for conduct that would be unexceptionable in a nonlawyer. Though violation of fiduciary duties arising from membership in the bar will normally and rightly have serious consequences, the mere status of being a lawyer should not subject one to unreasonable scrutiny or sanctions.

We have a lawyer named Wall to thank for the judicial acceptance of relatively summary disciplinary procedures.[115] As is so often the case, an extreme factual situation resulted in a precedent bringing hardship to future litigants. Wall participated in

112. Cammer v. United States, 350 U.S. 399, 405 (1956) (holding that lawyers are not officers of the court for purposes of the contempt statute in question). *See also In re* Griffiths, 413 U.S. 717, 728-29 (1973) (in holding that aliens could not per se be excluded from the legal profession, the court noted that lawyers are not "officials of the government" by virtue of their membership in the bar).

113. Cohen v. Hurley, 366 U.S. 117, 130 (1961), *overruled on other grounds*, Spevack v. Klein, 385 U.S. 511 (1967).

114. *See, e.g.*, Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 355 (1872); Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 318 A.2d 811 (1974) (in disbarring the former Vice President, the court quoted with approval this pronouncement by G. Sharswood, whose early book PROFESSIONAL ETHICS (1844) was an important source of the original canons: "No man can ever be a truly great lawyer, who is not in every sense of the word, a good man." 318 A.2d at 814.

115. *Ex parte* Wall, 107 U.S. 265 (1882).

a lynching in full view of the federal courthouse and the judge, who the next day summarily disbarred him[116] (whether to his surprise is not recorded). From that egregious episode we have the general rule that due process and summary disciplinary measures are not necessarily incompatible. Some elementary protections are, however, constitutionally required, and the rules of most jurisdictions embody some if not all of the elements generally thought to constitute due process.

### *A. Notice and Hearing*

Even before the *Wall* decision the Supreme Court had held in *Ex parte Garland*[117] that a respondent lawyer has a right to notice of the charges against him. This holding was reaffirmed in *Bradley v. Fisher*[118] and *Ex parte Robinson,*[119] but the latter decision anticipated "cases . . . of such gross and outrageous conduct"[120] (such as *Wall*) when summary discipline may be justified. In the recent and important *Ruffalo* decision, however, the Court reaffirmed the right to specific notice of the charges and struck down discipline imposed for conduct revealed by the respondent's testimony on other charges that were not proved.[121] This is an extremely important point for respondent's counsel to know, particularly since in this respect too, the inferior courts have been willing rather cavalierly to disregard *Ruffalo.*[122]

Even in *Wall* the respondent was given an opportunity to be heard (of which he did not avail himself),[123] and this right has never, in modern times at least, been questioned.[124] It is really part and parcel of the right to notice, since notice is of no value if it does not carry with it a right to respond. It has been said:

> [T]he charges of professional misconduct, though informal, should be sufficiently clear and specific, in the light of the circumstances of each case, to afford the respondent an oppor-

116. *Id.*

117. 71 U.S. (4 Wall.) 333 (1867).

118. 80 U.S. (13 Wall.) 335 (1872).

119. 86 U.S. (19 Wall.) 505 (1873).

120. *Id.* at 512.

121. See note 96 *supra.*

122. *Disbarment, supra* note 81, at 24-25; *see, e.g.,* State v. Alvey, 215 Kan. 460, 466, 524 P.2d 747, 752 (1974) (finding it sufficient that the "basic factual situation" was alleged).

123. 107 U.S. at 269-70.

124. *See* Willner v. Committee on Character & Fitness, 373 U.S. 96 (1963); Burkett v. Chandler, 505 F.2d 217 (10th Cir. 1974), *cert. denied,* 423 U.S. 876 (1975).

> tunity to anticipate, prepare, and present his defense. . . . He is entitled to a fair and impartial hearing and to a reasonable opportunity to meet the charges brought against him.[125]

At least one court has upheld discipline imposed without the respondent's presence at the hearing, but even there he had full notice, had been granted several continuances, and was represented by counsel who consented to proceed without the respondent, who was ill.[126] In many jurisdictions a respondent who has been convicted of a crime is not permitted to introduce evidence of innocence or to attack his conviction collaterally at disciplinary hearings,[127] but even in such cases he may ordinarily offer in mitigation at least "circumstances not inconsistent with the essential elements of the crime."[128] When felony convictions result automatically and unavoidably in disbarment, notably in New York,[129] even this may be denied.[130] There is no independent constitutional right to appeal from a disciplinary decision.[131] In general, however, it can be said that the respondent has an absolute due process right to know the charges and to be heard in response to them. This right supposedly goes not only to evidence of his innocence of the charges, but evidence and argument bearing upon the purposes of discipline, for example, whether he is morally fit and competent to practice or whether the public or profession is endangered by him.

### *B. The Privilege Against Self-Incrimination*

In *Cohen v. Hurley*[132] the Supreme Court upheld disbarment based upon a lawyer's assertion of his fifth amendment privilege

125. *In re* Rerat, 224 Minn. 124, 129, 28 N.W.2d 168, 172-73 (1947).

126. *In re* Gudmundson, 556 P.2d 212 (Utah 1976).

127. *E.g.*, Louisiana State Bar Ass'n v. Loridans, 338 So. 2d 1338 (La. 1976).

128. *Id.* at 1344; *accord,* Turco v. Monroe County Bar Ass'n, 554 F.2d 515, 518 n.5 (2d Cir. 1977); *In re* Rothrock, 16 Cal. 2d 449, 106 P.2d 907 (1940); *In re* Andros, 64 Ill. 2d 419, 356 N.E.2d 153 (1976). *See also* Attorney General v. Laska, 101 Colo. 221, 72 P.2d 693 (1937) (conviction in a different jurisdiction).

129. N.Y. JUD. LAW (McKinney 1968). *But cf. In re* Greenberg v. Committee on Prof. Standards, 58 A.D.2d 965, 397 N.Y.S.2d 430 (1977) (conviction for a felony under federal law (mail fraud) that was not a felony under New York law did not result in disbarment).

130. Rules providing for automatic disbarment following the conviction of a felony have been successfully challenged. In the case of *In re* Jones, 506 F.2d 527 (8th Cir. 1974), the Court of Appeals ruled that the District Court rule, which provided that anyone convicted of a felony "shall ipso facto be disbarred," was a denial of due process and that the attorney must be given a hearing to present evidence of mitigating circumstances.

131. Mildner v. Gulotta, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd,* 425 U.S. 901. *See* notes 175-80 and accompanying text *infra.*

132. 366 U.S. 117 (1961).

in a judicial inquiry.[133] But in *Spevack v. Klein*[134] the *Cohen* decision was explicitly overruled and the Court held that the privilege "should not be diluted by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for exerting it."[135] Though *Spevack* has caused strong reaction, including a move to amend the fifth amendment,[136] for the moment at least the principle is secure. It does not *necessarily* follow, however, that adverse inferences, as opposed to automatic discipline, from the failure to testify are forbidden[137] as they would be in a criminal case.[138] At the same time, moreover, the respondent's cooperation with disciplinary authorities is frequently cited to his credit in mitigation,[139] and by implication at least a failure to cooperate would seem to count against him.[140] Thus respondent's counsel must carefully weigh the value of the cooperation against the dangers of self-incrimination in deciding upon his approach to each case. Note that testimony given under a grant of immunity in a criminal case *may* be available for use in disciplinary proceedings without violation of the privilege.[141]

### C. *The Right To Confrontation*

Jurisdictions vary greatly in their evaluations of the existence and extent of the right to confrontation in disciplinary proceedings, and the Supreme Court has not directly addressed the subject.[142] Apparently only Louisiana[143] and Kentucky[144] have

133. Justice Harlan for the majority based the decision upon the lawyer's duty of "full, honest and loyal co-operation" in disciplinary proceedings. *Id.* at 126.

134. 385 U.S. 511 (1967).

135. *Id.* at 514.

136. *Disbarment, supra* note 81, at 26-27.

137. *Cf.* Baxter v. Palmigiano, 425 U.S. 308 (1976) (case contesting several points of procedure in prison inmate's disciplinary hearings and the court held that permitting adverse inference to be drawn from an inmate's silence at his disciplinary proceeding is not an invalid practice).

138. Griffin v. California, 380 U.S. 609 (1965).

139. *See, e.g., In re* Rerat, 224 Minn. 124, 130-31, 28 N.W.2d 168, 173-74 (1947); *In re* Quigley, 206 Minn. 20, 287 N.W.2d 105 (1939).

140. *See, e.g., In re* Peterson, 260 Minn. 339, 345, 110 N.W.2d 9, 13 (1961) (holding tht "the furnishing of pertinent evidentiary facts is a duty which the respondent owes to the court, as well as to himself, to aid in effecting a full and fair investigation of the charges of professional misconduct.").

141. *See In re* Epstein, 37 A.D.2d 333, 325 N.Y.S.2d 657 (1971); *cf.* Gardner v. Broderick, 392 U.S. 273 (1968) (discharge of public employees).

142. *Disbarment, supra* note 81, at 27-30. *But cf.* Willner v. Committee on Character & Fitness, 373 U.S. 96, 103 (1963) (regarding admission to the bar, "procedural due process often requires confrontation and cross-examination").

143. Louisiana State Bar Ass'n v. Levy, 292 So. 2d 492, 494 (La. 1974).

144. Lenihan v. Commonwealth, 165 Ky. 93, 176 S.W. 948 (1915).

expressly recognized the right; both California[145] and New York[146] have rejected it despite the assertion in an early New York case that when a respondent denies the charges he is entitled to a trial,

> and on that trial the accused is not to be buried under affidavits and swamped with hearsay, but is entitled to confront the witnesses, to subject them to cross-examination, and to invoke the protection of wise and settled rules of evidence. In adopting this conclusion we only secure to the members of the bar the common rights and ordinary privileges of the citizen.[147]

Respondent's counsel should, of course, assert the right since it is ordinarily in his client's interest to confront and cross-examine his accuser unless the facts are stipulated or testimony is likely to be more damaging than another form of proof such as by affidavit.

### *D. The Right to Trial by Jury*

Another unfortunate consequence of lawyer Wall's misdeed is the Supreme Court's conclusion in that opinion that there is no constitutional right to a jury trial in disciplinary proceedings.[148] Only Texas[149] and Georgia[150] provide for jury trials, and absent either specific state constitutional provision, statute, rule, or a holding that disciplinary proceedings are criminal in nature, there seems little likelihood that other jurisdictions will recognize such a right. The Clark Committee's conclusion that jury trials serve "only to delay and weaken effective disciplinary treatment"[151] seems to miss the point. Trial by jury is not an economical or prompt way of resolving *any* kind of dispute, civil or criminal; its crucial importance is its fairness, always an incalculably more important concern. If mere monetary disputes, including legal malpractice lawsuits, entitle litigants to a jury trial, the extreme potential trauma of disbarment should deserve that right. But the courts, often so ready to preserve the right to jury trial in other areas, find it curiously dispensible when *they,* the

145. McGrath v. State Bar, 21 Cal. 2d 737, 740, 135 P.2d 1, 3 (1943).

146. *In re* Young, 284 A.D. 406, 131 N.Y.S.2d 499 (1954).

147. *In re* Eldridge, 82 N.Y. 161, 168 (1880).

148. *Ex parte* Wall, 107 U.S. 265, 288 (1883).

149. TEX. REV. CIV. STAT. ANN. art. 320a-1, § 5 (1973), *discussed in* Potts, *Trial by Jury in Disbarment Proceedings,* 11 TEX. L. REV. 28, 51 (1932).

150. GA. CODE ANN. § 9-703 (1973); *Rules and Regulations for Organization of the State Bar of Georgia* 4-208 (1974).

151. CLARK REPORT, *supra* note 1, at 136-37.

judiciary, are the accusers in disciplinary and contempt proceedings. Mr. Justice Black, dissenting from denial of the right to jury trial for direct contempts used this language, which would seem to apply with equal force to disciplinary proceedings:

> It is high time, in my judgment, to wipe out root and branch the judge-invented and judge-maintained notion that judges can try criminal contempt cases without a jury. It will be a fine day for the constitutional liberty of individuals in the country when that at last is done.[152]

At least in the area of contempt, a few thoughtful and courageous courts have refused to rely upon the minimal federal constitutional requirements recognized by the Supreme Court and have extended the right to jury trial under state constitutions. The Alaska Court, for example, said these wise words, which should apply to disciplinary proceedings as well:

> While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law.[153]

### *E. The Right To Counsel*

Although many jurisdictions' rules provide that the respondent may be represented by counsel, no case has been found that holds that this is either a federal or state constitutional right. A determination that the proceeding is criminal, as *Ruffalo* seems to establish, would, of course, invoke the sixth amendment right to counsel. But, as we have seen, the courts have been peculiarly indifferent to the *Ruffalo* decision,[154] and no confidence can be placed in the probability of a federal constitutional right to counsel being discovered here.

152. United States v. Barnett, 376 U.S. 681, 724 (1964).

153. Baker v. City of Fairbanks, 471 P.d 386, 401-02 (Alas. 1970) (footnotes omitted). *See also* Peterson v. Peterson, 278 Minn. 275, 153 N.W.2d 825 (1967) (jury trial for constructive criminal contempts).

154. See note 94 and accompanying text *supra*.

The observations in the previous section on application of state constitutions apply here with equal force, although it is unlikely that the right to counsel would today be directly denied to any respondent.

### *F. The Right to an Impartial Tribunal*

It has been held that there is no due process deprivation by virtue of the judicary performing the combined functions of accuser, prosecutor, fact-finder, dispenser of sanctions, and rule-maker in disciplinary matters.[155] Here, as in the law of contempt, the bench tends to regard itself as above the influence of personal animosity. Henry Cecil, the English judge and author, nicely illustrated the absurdity of this notion in the retelling of an incident when he found it necessary to hold a man in contempt for conduct committed in his presence: "The accused denies that he did it, but I prefer my own evidence on the matter. I have known myself for many years as a most reliable witness."[156]

Ordinarily, of course, the wronged party will not be part of the disciplinary body, and the few courts that have faced the issue have recognized that any judge, or other official for that matter, holding personal or professional animosity toward a respondent lawyer, should disqualify himself from sitting in any disciplinary proceeding against that lawyer.[157] This may well extend to the situation in which a member of the disciplinary board or others in his law firm were or are adversary counsel on cases in which the respondent was or is involved.[158]

In any event, the fifth and fourteenth amendments do require a fair and impartial tribunal as an essential element of due process,[159] and respondent's counsel should not hesitate to assert this right when he has reason to doubt its existence in disciplinary matters.

### *G. The Presumption of Innocence*

As might be expected from the uncertainty about the nature of disciplinary proceedings, there is no uniform policy governing the application of the presumption of innocence. Although it has

155. See cases in note 77 *supra.*

156. H. CECIL, THE ENGLISH JUDGE, 98 (1972).

157. Snyder's Case, 301 Pa. 276, 152 A. 33 (1930).

158. *In re* Heirich, 10 Ill. 2d 357, 140 N.E.2d 825, *cert. denied,* 355 U.S. 805 (1957).

159. *E.g.,* Hasty v. Crouse, 308 F. Supp. 590 (D. Kan. 1968); United States v. Valentine, 288 F. Supp. 957 (D. Puerto Rico 1968).

sometimes been said the respondent enjoys such a presumption,[160] it has also been held that unless the respondent explains his allegedly improper conduct adequately he will be presumed unable to do so.[161] It is generally assumed, if not explicitly provided, that the burden of proof is on bar counsel.[162] Because of the serious consequences of disbarment coupled with the likelihood of malicious accusations by disgruntled clients, it seems reasonable that the respondent should be presumed innocent at least until such time as a prima facie case is made against him and, that the presumption is part of what the *Ruffalo* court contemplated as part of the criminal nature of a disciplinary proceeding.[163]

In reinstatement proceedings, however, it is uniformly held that the lawyer has the burden of showing a restored good moral character.[164]

### *H. The Burden of Proof*

The burden of proof to justify discipline is described as variously as the nature of the proceeding: a "fair preponderance,"[165] a "clear undoubted preponderance,"[166] a "higher degree of proof" than a preponderance,[167] "such proof as clearly and satisfactorily establishes guilt,"[168] "clear and convincing" evidence,[169] proof to a "reasonable certainty,"[170] evidence that is "clear and free from doubt,"[171] "cogent and compelling" evidence,[172] and a "strong and

160. Dodd v. Board of Comm'rs, 350 So. 2d 700 (Ala. 1977); Nebraska State Bar Ass'n v. Fisher, 170 Neb. 483, 103 N.W.2d 325 (1960); *In re* Reily, 75 Okla. 192, 183 P. 728 (1919). *See generally* Annot., 7 A.L.R. 93 (1920).

161. Colorado Bar Ass'n v. Webster, 28 Colo. 223, 64 P. 207 (1901); *In re* Shufer, 12 A.D.2d 208, 209 N.Y.S.2d 545 (1961).

162. *E.g., In re* Duncan, 541 S.W.2d 564 (Mo. 1976); *In re* Sears, 71 N.J. 175, 364 A.2d 777 (1976); *In re* Rook, 276 Or. 695, 556 P.2d 1351 (1976).

163. *Cf. In re* Winship, 397 U.S. 358 (1970) (holding that charges against juveniles must be proved beyond a reasonable doubt); *In re* Gault, 387 U.S. 1 (1967) (recognizing other constitutional rights in juvenile delinquency proceedings).

164. *In re* Dawson, 131 So. 2d 472 (Fla. 1961); *In re* Stump, 272 Ky. 593, 114 S.W.2d 1094 (1938); *In re* Trombley, 398 Mich. 377, 247 N.W.2d 873 (1976); Nebraska State Bar Ass'n v. Butterfield, 172 Neb. 645, 111 N.W.2d 543 (1961).

165. *In re* Mayberry, 295 Mass. 155, 167, 3 N.E.2d 248, 258 (1936).

166. *In re* Hertz, 139 Minn. 504, 511, 166 N.W. 397, 400 (1918); *In re* Sherin, 27 S.D. 232, 130 N.W. 761, 762 (1911).

167. Copren v. State Bar, 64 Nev. 364, 183 P.2d 833, 840 (1947).

168. San Francisco Bar Ass'n v. Sullivan, 185 Cal. 621, 624, 198 P. 7, 8 (1921).

169. *In re* Otterness, 181 Minn. 254, 255, 232 N.W. 318, 319 (1930).

170. *In re* Reily, 75 Okla. 192, 194, 183 P. 728, 730 (1919).

171. Miller v. Harvey, 41 Ill. 277, 278 (1866). Note that the *Miller* court required such proof of *motive* as well as misconduct.

172. *In re* Peterson, 260 Minn. 339, 345, 110 N.W.2d 9, 13 (1961).

convincing" showing.[173] Here, as with the presumption of innocence, the *Ruffalo* court's characterization of the process as criminal would justify, indeed require, proof beyond a reasonable doubt. But, the courts have shown no willingness to apply that standard. Realistically, the following description by the Minnesota court is probably as good as can presently be expected, but the respondent should be entitled to no less:

> While it is not necessary to establish a charge against an attorney at law which will result in his disbarment beyond a reasonable doubt, yet such a charge is so grave, and the consequences of a conviction so serious, that something more than a preponderance of the evidence—the rule in civil actions—is required. The rule in such a case is that, to justify a conviction, the evidence must be full, clear and convincing.[174]

### *I. The Right to Review: Collateral Challenges; Appeal by Complainant*

Since there is no federal constitutional right to appeal even a criminal conviction,[175] we cannot expect to find such a right to review of disciplinary sanctions.[176] It appears, however, that all American jurisdictions provide by statute or rule for judicial review of disbarment and discipline;[177] so, there is no immediate need to find constitutional assurance. The difficulty is not so much the lack of review, but the intramural nature of it—each court is the ultimate authority over admission and removal of lawyers to practice before it.[178]

Lawyers disbarred or refused readmittance by state courts may obtain review of constitutional defects in the proceedings collaterally in federal court,[179] at least when the respondent's con-

173. In re Palarine, 220 Minn. 257, 273, 19 N.W.2d 439, 446 (1945).

174. State Bd. of Examiners v. Dodge, 93 Minn. 160, 171-72, 100 N.W. 684, 689 (1904).

175. *See, e.g.*, Coppedge v. United States, 369 U.S. 438 (1962); Cobbledick v. United States, 309 U.S. 323 (1940).

176. Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974).

177. See *Disbarment, supra* note 81, at 67. Frequently the highest court's function is not so much to *review* discipline imposed as to *impose* discipline on the basis of the recommendation of the primary or lower disciplinary body.

178. In several jurisdictions the court's review is de novo, which at least gives the respondent the right to argue the merits without presumptions against him. *See, e.g.*, Committee on Professional Ethics v. Roberts, 246 N.W.2d 259 (Iowa 1976); Office Disciplinary Counsel v. Walker, 469 Pa. 432, 366 A.2d 563 (1976).

179. *E.g.*, Javits v. Stevens, 382 F. Supp. 131 (S.D.N.Y. 1974); Jones v. Hulse, 267 F. Supp. 37 (E.D. Mo. 1967). Federal intervention may be sought under 42 U.S.C. § 1983 (1976) (federal equitable intervention rights by state action); see 28 U.S.C. § 1343(3)

stitutional claims were not fully and fairly litigated in the state proceedings.[180]

But relief is rare, and the increasing reluctance of federal courts to intervene even on constitutional questions litigated in state criminal cases does not make the outlook for federal remedies promising.[181]

About half of the states permit review to be sought by either the respondent or the disciplinary authority.[182] In Minnesota a recent provision allows a *complainant* who is dissatisfied with the disciplinary result to take his complaint to the attorney general, who may then petition to reopen the proceeding for further or different discipline.[183] Clearly this practice, if frequently employed, could cause a great deal of mischief for disciplinary boards and respondents alike and is not to be encouraged; since it is doubtless at odds with the notion of exclusive judicial control of the bar, no court needs either to adopt or acquiesce in such a procedure.

### *J. The Outlook*

The prevailing uncertainty about the very nature and purposes of disciplinary proceedings permits no clear conclusion concerning the all-important rights and procedures available. Courts will frequently be caught saying unhelpfully, and injudiciously,

(1976) for jurisdiction. Due process is denied when the evidence does not rationally support the disciplinary action. *E.g.*, Konigsberg v. State Bar, 366 U.S. 36 (1961); Schware v. Board of Law Examiners, 353 U.S. 232 (1957). *See also* Peterson v. Sheran, No. 5-76 Civ. 73 (D. Minn., filed Feb. 13, 1978) (an opinion by Judge Miles Lord recognizing the propriety or relief under § 1983).

180. *E.g.*, Goodrich v. Supreme Court of the State of South Dakota, 511 F.2d 316 (8th Cir. 1975).

181. *Cf.* Stone v. Powell, 428 U.S. 465 (1976) (indicating that the federal courts need not consider even constitutional claims of criminal defendants who had fair hearings in the state courts).

182. *Disbarment, supra* note 81, at 66-67 (indicating tht 20 states permit the prosecution to appeal, though a substantial number of jurisdictions specifically exclude this procedure).

183. MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 6(c). The rule also requires notice to the complainant of this right, and although the procedure apparently has not yet been used in Minnesota, it could be a source of considerable grief for respondents, disciplinary bodies, and the attorney general if litigious clients begin to exploit it. The rule was first enacted as statute that doubtless was an unconstitutional invasion of the judiciary's exclusive domain, (*see, e.g.*, Sharwood v. Hatfield, 296 Minn. 416, 210 N.W.2d 275 (1973), and the discussion in Part I(C) of this article), but that defect was cured by the Minnesota Supreme Court's adoption of the rule, supposedly as a gesture of comity to the legislature.

that "technicalities" need not be observed,[184] that there is no "fixed formula" for resolution of these matters,[185] that each case must be treated on its own facts,[186] and, of course, that perennial resort for the rationalization of fuzzy thinking and inconsistency—that disciplinary proceedings are sui generis.[187]

There is no need for this Micawberism, nor any justification for the supercilious disregard of *Ruffalo*'s relatively clear and comparatively workable description of a quasi-criminal process. Given the acknowledged importance of discipline to the profession, its individual members, and the public, and considering the ostensible and potential unfairness of the self-regulating function, it is not unreasonable to expect doubts to be resolved in favor of long-established rights, privileges, immunities and procedures: the presumption of innocence, the rights to trial by jury, to counsel, and to confrontation. If only these rights were accorded, neither the bench, the bar, the public, the profession's harshest critics, nor the individual respondent could persuasively complain that cases were not being fully and fairly litigated—at least as fully and fairly as we have yet learned to do.

Meanwhile, to return to the mundane reality, respondent's counsel must struggle as best he can in a constitutional wonderland where a petty criminal is vouchsafed the full panoply of constitutional protections, where the state and federal courts and juries can be mobilized to resolve a few dollars in dispute, but where a colleague threatened with ruin looks in vain for similar facilities. We turn now to consideration of some of the more practical aspects of working in this system.

## V. A Brief Overview of Typical Disciplinary Bodies and Procedures

### *A. The Disciplinary Authorities*

In virtually all jurisdictions the courts have pronounced the judiciary as the ultimate authority of lawyer discipline.[188] The

184. *E.g., In re* Rook, 276 Or. 695, 705, 556 P.2d 1351, 1357 (1976).

185. *E.g.,* Spindell v. State Bar, 13 Cal. 3d 253, 530 P.2d 168, 118 Cal. Rptr. 280 (1975).

186. *E.g., In re* Smith, 67 Cal. 2d 460, 432 P.2d 231, 62 Cal. Rptr. 615 (1967); *In re* Harrington, 367 A.2d 161 (Vt. 1976), (where the court noted that since each case is unique there is not much precedential value in disciplinary decisions).

187. *E.g., In re* Alonzo, 223 So. 2d 585 (Ala. 1969); McComb v. Committee on Judicial Performance, 19 Cal. 3d 1, 564 P.2d 1, 138 Cal. Rptr. 467 (1977).

188. See notes 32-36 and accompanying text *supra.*

Clark Committee supported this doctrine,[189] and the only perceptible departures from it are cases in which the courts defer to the legislature as a matter of comity.[190] Thus, the jurisdiction's highest court ordinarily makes and enforces both ethical standards and disciplinary rules and is the ultimate resort for their construction.[191] Disciplinary authorities in states with integrated bars may enjoy more independence of the judiciary, but it has been suggested this leaves an adverse impression upon the public, who may see self-regulation as the action of an "elite" and self-protective group in these circumstances.[192]

Great diversity is found among the states concerning whether disciplinary agencies and staff are appointed by the courts or the bar association, whether they are part-time or full-time, whether they are paid or volunteer, whether nonlawyers are represented, and, of course, whether a sufficient number of lawyers and support personnel are on the disciplinary staff.[193] At the time of the Clark Report, the disciplinary bodies in nearly all jurisdictions were found to be badly understaffed both in legal and investigative personnel, and funding was often grossly inadequate for effective enforcement.[194] Present experience seems to indicate that a salaried, full-time staff of professional lawyers and investigators tends to assure a desirable independence from undue pressures of the bench, the bar, and the public; and that a mixture of lawyers and nonlawyers on a voluntary disciplinary board at the adjudicative stage tends to promote both fairness and the appearance of fairness to both the bar and the public.[195] The

189. CLARK REPORT, *supra* note 1, at 10.

190. Courts will strike down statutes that are found incompatible with the inherently judicial function of lawyer regulation, *e.g.*, Wallace v. Wallace, 225 Ga. 102, 166 S.E.2d 718, *cert. denied*, 396 U.S. 939 (1969); Sharood v. Hatfield, 296 Minn. 416, 424-26, 210 N.W.2d 275, 280-81 (1973). In the absence of such a conflict courts will sometimes accept statutory provisions as a matter of comity and deference to a coordinate branch of government. *E.g.*, State v. Cannon, 196 Wis. 534, 221 N.W. 603 (1928). *See generally* Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783 (1976).

191. *See Disbarment, supra* note 81, at 31 n.218, for citation of all states' disciplinary rules. The same article also provides comparative tables of the elements of the process in the states. *Id.* at 38-39, 44-45, 52-53, 62-63, 68-69. This section of the present article is drawn primarily from these tables.

192. *See generally* D. MCKEAN, THE INTEGRATED BAR (1963). *See also* Lathrop v. Donohue, 367 U.S. 820 (1961) (holding that a state may constitutionally condition the right to practice law on membership in an integrated bar).

193. *Disbarment, supra* note 81, at 38-39; Steele & Nimmer, *Lawyers, Clients and Professional Regulation*, 1976 AM. B. RESEARCH J. 919, 924.

194. CLARK REPORT, *supra* note 1, at 19-20, 48-49.

195. *See generally* Steely & Nimmer, *supra* note 193, at 921-35.

Clark Committee found that since many disciplinary complaints are against sole practitioners and members of small firms, the frequent presence of only lawyers from large and prestigious firms on disciplinary boards should be balanced with representatives of small firms and solo lawyers.[196] This will tend both to assure understanding consideration of the problems of the small lawyer and to remove the appearance of a self-appointed elite sitting in judgment of inferiors.

Jerold Auerbach's recent and excellent study, *Unequal Justice,*[197] persuasively demonstrates the longstanding and quite inflexible class structure within the American bar. Although he is more concerned with social conscience and performance of the bar than with ethical rules and disciplinary procedures, all persons who are concerned with the disciplinary process should read the book since it challenges some of the most rudimentary assumptions made of the system. In the early nineteenth century Alexis de Tocqueville saw the entire bar as an American elite:

> In America there are no nobles or literary men, and the people is apt to mistrust the wealthy; lawyers consequently form the highest political class, and the most cultivated circle of society. . . . If I were asked where I place the American aristocracy, I should reply without hesitation, that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and bar.[198]

Auerbach, in turn, sees an elite *within* this elite:

> The maldistribution of professional power makes it necessary to focus on bar leaders, who have exerted enormous influence within the profession and, as spokesman to the public, outside it. At elite levels the bar . . . has *not* been heterogeneous in its composition or purpose. It has represented identifiable interests and values which have guided the pursuit of certain objectives at the expense of others.[199]

In an even more recent study, Jethro Lieberman addresses more directly the effect of this elitism upon questions of ethics and harshly concludes that the present system should be rejected altogether.[200] Lieberman's diatribe is provocative and offers a

196. CLARK REPORT, *supra* note 1, at 46.

197. J. AUERBACH, note 13 *supra.*

198. 2 A. DETOCQUEVILLE, DEMOCRACY IN AMERICA 109-10 (3d ed. Reeve Trans. 1838), *cited in* Steele & Nimmer, *supra* note 193, at 927 n.16.

199. J. AUERBACH, *supra* note 13, at 9-10.

200. J. LIEBERMAN, *supra* note 55, at 213.

perspective so different from that which informs the vast majority of judicial opinions on ethical questions that it, too, is recommended reading, especially for respondent's counsel. Of course, ordinarily it will not make good tactical sense for the respondent to attack the disciplinary authorities as supercilious prigs given to rodomontade, which most of them actually are not. But it is important for respondent's counsel to be aware of the nature of the creators and enforcers of ethical rules so that he can present the respondent's plight in terms that are comprehensible and sympathetic. A partner in a large law firm, or any nonlawyer, perhaps will not be able to appreciate the problems of a sole practitioner who for financial reasons has taken on rather more work than he can handle speedily, whose presence is demanded in two or three courts at once, and who has no staff of partners, eager associates, clerks, paralegal personnel, or others to whom he may delegate tasks. Yet many lawyers face these difficulties with regularity, and sole practitioners and small law firms should not be made to suffer merely because of their size.[201] In an age of rampant growth and pedantic specialization we should encourage individualism in a profession that, in its adversary aspects at least pits contestants one on one and requires absolute independence of action and judgment.

### *B. Disciplinary Procedures*

All states, all federal district courts and courts of appeals and the United States Supreme Court have their own disciplinary rules; none appear to be identical to any of the others.[202] It is not feasible, therefore, to discuss *the* disciplinary system. Most have enough elements in common, however, so that some general observations may safely be made.

Procedures in virtually all jurisdictions may be broken into three phases: (1) the investigative and complaint (or accusatory) phase, (2) the hearing or trial phase, and (3) the review or appeal phase.[203] A majority of states requires complaints to be in writing,

201. See M. MAYER, THE LAWYERS 13-26, 57-70 (1967), for an interesting discussion of the difficulties of becoming established in the practice of law.

202. *Disbarment, supra* note 81, at 44-45, 52-53, 62-63, 68-69.

203. The SUGGESTED GUIDELINES, note 47 *supra,* which many states follow, actually envisioned a four-stage procedure consisting of investigation, hearing, administrative review, and judicial review. It appears, however, that the system is best if broken into three categories. Many further sub-stages, of course, can be discerned. These would consist of the following: (1) Complaint by aggrieved party to local ethics committee, (2) assignment of the complaint to a member for investigation, (3) notification of respondent, (4) response

some require the complaint be either signed or verified, and a few will accept telephoned complaints.[204] Most disciplinary bodies provide assistance or forms, or both, to complainants. All but a handful notify the complainant of the action taken, but few make the complainant a party or give a copy of the respondent's reply to the complaint.[205] The disciplinary machinery may be activated by a complaint from an aggrieved client,[206] from another lawyer,[207] from the disciplinary body itself,[208] or from the court.[209]

Receipt of the complaint is followed by investigation, during which evidence is collected under oath or otherwise. In most states the proceeding remains confidential at the investigative stage, and in almost all states the respondent is given the right to be heard.[210] The closest parallel to the investigative and accusatory process is the grand jury investigation.[211] The United States Supreme Court has approved this analogy[212] over the

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from respondent, (5) hearing before member, panel, or full local committee, (6) reference to state or other higher disciplinary body, (7) formal complaint, (8) formal answer, (9) private hearing before disciplinary body, (10) recommendation of discipline to state's highest court, (11) reference to referee or judicial officer for public hearing, (12) hearing, (13) report and recommendation of referee or judicial officer to the court, (14) review (on the record or de novo) before the court, (15) judgment of the court imposing discipline, (16) further proceedings by request of complainant,(17) challenge to result by respondent in federal court or by certiorari in U.S. Supreme Court. All of these stages, for example, are available under Minnesota procedure, though in few cases are all stages employed. MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 1-23.

204. *Disbarment, supra* note 81, at 44-45. The Clark Report strongly disapproved the requirement of verification because the drafters believed that potential complaints would be intimidated and that their "fears and doubts" about liability for errors in the complaint would dissuade them from proceeding. CLARK REPORT, *supra* note 1, at 72. Two states, Alabama and South Dakota, require complainants to post a bond and pay costs if discipline is not imposed. *See Disbarment, supra* note 81, at 47.

205. *Disbarment, supra* note 81, at 44-45.

206. *E.g.*, State v. Peck, 88 Conn. 447, 91 A. 274 (1914).

207. *E.g.*, Fairfield County Bar v. Taylor, 60 Conn. 11, 22 A. 441 (1891).

208. *E.g.*, Cleveland Bar Ass'n v. Fleck, 172 Ohio St. 467, 178 N.E.2d 782, *cert. denied*, 369 U.S. 861 (1961), *rehearing denied*, 370 U.S. 914 (1962); MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 8(b) (enabling disciplinary counsel "[a]t any time, with or without a complaint" to "make such investigation as he deems appropriate as to the conduct of any lawyer or lawyers").

209. *E.g.*, Lenihan v. Commonwealth, 165 Ky. 93, 176 S.W. 948 (1915).

210. About half the states have time limits ranging from two days to four weeks between receipt of the complaint and initiation of the investigation, from twenty days to a year between complaint and completion of the investigation, and from twenty days to a year between complaint and referral for further action. Most states make subpoena available at this stage, and witnesses testify under oath subject to penalty for perjury. *Disbarment, supra* note 81, at 52-53.

211. People *ex rel.* Karlin v. Culkin, 248 N.Y. 465, 497, 162 N.E. 487, 492 (1928).

212. Anonymous Nos. 6 & 7 v. Baker, 360 U.S. 287 (1959).

objections of four justices who saw a danger of return of the grand jury.[213]

At the hearing or trial phase there is also much diversity on whether one or two hearing stages are available,[214] whether rules of procedure[215] or evidence are enforced,[216] and whether ex parte proceedings or defaults are permitted.[217] A majority of the states follow the rules of civil procedure and provide for confidentiality at the hearing stage.[218] In all states the initial burden of proof is on the disciplinary body,[219] but as previously noted there is no uniform definition of the degree of proof required.[220] In many jurisdictions, once discipline has been recommended or imposed the burden is upon the respondent to show that it is erroneous or unlawful at the review stage.[221]

Nine jurisdictions permit amendment of the charges after commencement of the hearing,[222] despite the Supreme Court's condemnation of this practice in *Ruffalo*.[223] The hearing board or referee in about two-thirds of the states can impose discipline, such as a reprimand or warning, but the respondent can request

213. *Id.* at 299 (Black, J., dissenting).

214. Slightly less than half the states have two hearing stages, and about as many have one. The others provide another hearing as an option. *Disbarment, supra* note 81, at 62-63.

215. In twenty-eight states rules of civil procedure apply. Half a dozen states apply rules of "equity" or "chancery". *Id.*

216. Nineteen states specifically allow otherwise inadmissible evidence to be received in disciplinary matters. *Id. See, e.g.*, Berke v. Chattanooga Bar Ass'n, 58 Tenn. App. 636, 436 S.W.2d 296 (1968) (noting *inter alia* that where the disciplinary charge is based on a prior lawsuit the full record of that proceeding is admissible). *But cf.* Paradiso v. Board of Comm'rs of Ala. State Bar, 225 So. 2d 855 (Ala. 1969) (holding depositions admissible); State Bar of Mich. v. Pillon, 383 Mich. 735, 179 N.W.2d 20 (1970) (upholding rejection of evidence of similar actions by other lawyers); *In re* Moyer, 77 N.M. 253, 421 P.2d 781 (1966) (holding polygraph test inadmisible).

217. *Disbarment, supra* note 81, at 62-63.

218. *Id.* In Minnesota, for example, the hearing before the disciplinary body is confidential. If, however, that body directs the filing of a disciplinary petition in the supreme court, the petition and all further proceedings become public. *See* MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 20.

219. *E.g.*, Smith v. Board of Comm'rs of Ala. State Bar, 284 Ala. 420, 225 So. 2d 829 (1969); Louisiana State Bar Ass'n v. Brown, 291 So. 2d 385 (La. 1976); *In re* Feltman, 51 N.J. 27, 237 A.2d 4733 (1968).

220. See notes 165-74 and accompanying text *supra.*

221. *E.g.*, Taylor v. State Bar, 11 Cal. 3d 424, 521 P.2d 470, 113 Cal. Rptr. 478 (1974); *In re* Wright, 131 Vt. 473, 310 A.2d 1 (1973) (holding that once a prima facie case is established the burden shifts to the respondent).

222. *Disbarment, supra* note 81 at 62-63, 65-66.

223. See note 96 *supra.* The charges against Mr. Ruffalo were amended to include conduct that was revealed by his own testimony given in defense of other charges that were not proved.

further review if the disposition is not acceptable;[224] otherwise the disposition is left to the state's highest court.

Almost all states provide for judicial review of the disciplinary action and a smaller number also allow administrative review of the proceedings.[225] Somewhat less than half the states permit both sides to appeal the disciplinary board's decision.[226] In Minnesota, at least, a complainant dissatisfied with the sanction ultimately imposed may reactivate the proceedings through application to the Attorney General.[227] As noted earlier, collateral review in federal court may be available to respondents who believe their constitutional rights have been infringed.[228]

### C. *The Ideal Structure and a Word on Confidentiality and Anonymity*

If a "typical" and desirable disciplinary structure is hypothesized from the disparate provisions of the states, it would probably consist of (1) an independent full-time legal and investigative staff, (2) a provision for informal and unverified initial complaints,[229] (3) a confidential and informal investigation at which the respondent has the right to be heard, (4) a right to specific notice of the formal charges, (5) an adversary hearing, before a board composed of lawyers from diverse practices and a cross-section of nonlawyers, at which the rules of procedure and evidence apply but not strictly or pendantically,[230] (6) and a de novo judicial review of the entire proceeding.

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224. *Disbarment, supra* note 81, at 66. In Minnesota a lawyer given a warning by the Director of the Lawyers Board of Professional Responsibility may, if he wishes, demand that the charges be presented to a panel of the Board. MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 8(c)(2)(ii).

225. *Disbarment, supra* note 81, at 68-69.

226. *Id.*

227. MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 6(c). This provision began as a statute that the Minnesota Supreme Court accepted as a matter of comity. MINN. STAT. § 481.15(3) (1977); see note 183 and accompanying text *supra.*

228. *See* cases cited in notes 179-81 *supra.*

229. Many would also suggest immunity for complainants, despite the serious questions of fairness and public desirability that are raised by absolute immunity. *E.g.*, Stone v. Rosen, 348 So. 2d 387 (Fla. Dist. Ct. App. 1977) ("absolute" privilege); Sinnett v. Albert, 188 Neb. 176, 195 N.W.2d 506 (1972) (immunity from libel action); Taft v. Ketchum, 18 N.J. 280, 113 A.2d 671 (1955) (complainants are immune from malicious prosecution action).

230. The best view is that all rules of criminal procedure and evidence should apply in view of the seriousness of the action and the suspect nature of the combined functions of the disciplinary body. Though *In re* Ruffalo, 390 U.S. 544 (1968) seems to require this, it nevertheless clearly remains a minority position. See notes 83-94 and accompanying text *supra.*

Two provisions that would be important for fairness to respondents should be added. First, the adversary hearing and all procedure prior to the hearing should be confidential to protect respondents from the devastation of unproved accusations, with public judicial review available at respondent's request.[231] Second, disciplinary proceedings should be captioned anonymously, such as by number, to save respondents the perpetual ignominy of having their names forever imbedded in the law reports, a continuing disgrace visited upon no other profession, not even upon criminal convicts who do not appeal.[232] The legitimate interest in having the public informed of the respondent's proved transgressions and the effectiveness of self-regulation will be satisfied by making the review proceeding and the disciplinary board's records of final discipline public; no legitimate further interest is served by having the respondent's name attached to a reported opinion since the precedential value of the opinion in no way depends upon this.

Anonymity in the reports would also doubtless remove an appreciable factor deterring lawyers from voluntarily disclosing and cooperating in the investigation of their own problems. This is especially true in cases of alcoholism. An important obstacle to the recognition and resolution of this tragic problem would be removed by adopting the anonymity principle of alcoholics Anonymous. Minnesota has adopted an excellent rule designed to cover such situations. The rule provides for a stay of all proceedings at the stage of confidentiality for a specified period with the possibility of dismissal upon a showing of compliance with reasonable conditions.[233]

It is important that disciplinary authorities and procedures not only be fair, but also that they convey an impression of fairness to the bar. This would ensure a minimum of adversariness

231. *But cf.* Sadler v. Oregon State Bar, 275 Or. 279, 550 P.2d 1218 (1976) (applying public records law to allow inspection of disciplinary records).

232. Interestingly, in Minnesota, as in most jurisdictions, lawyers' names are used in the captions of disciplinary proceedings, but disciplinary actions against judges are styled by number. MINN. R. OF BOARD ON JUDICIAL STANDARDS E(1). See *In re* Nordstrom, 264 N.W.2d 629 (Minn. 1978) for an example of an opinion that could well have omitted the respondent's name.

233. MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 9(d). The rule does not refer to alcoholism or any other condition as prerequisite to application of the stay and thus is flexible enough to cover diverse situations. In Minnesota there is also an independent organization called Lawyers Concerned for Lawyers, which assists troubled lawyers in coming to terms with problems such as alcoholism.

and would encourage cooperation of respondents by alleviating their legitimate fears of the disastrous consequences of public discipline.

### Factors in the Disciplinary Equation

Just as procedures and rights are uncertain and flexible in disciplinary actions, the necessity for, and degrees of, discipline are not usually prescribed with any definition. With a few exceptions in a few jurisdictions[234] it can be said that (1) no particular form of misconduct requires any particular form of discipline,[235] and that (2) there are no absolute defenses to or ways to be certain of avoiding discipline for any kind of misconduct.[236] Therefore, dispositions of disciplinary complaints are virtually as various as the fact giving rise to them. Enormous and largely uncontrolled discretion suffuses the entire process. The uncertainty is frustrating and perilous to the extent that it precludes accurate prediction of consequences, but it is also advantageous in that it may enable the respondent to achieve better results by an intelligent and conscientious defense tailored precisely to the facts of the case.

Because of the lack of prescribed sanctions, discussion of specific defenses to, or dispositions of, particular forms of misconduct is impossible. Identification can be made, however, of the forms of discipline ordinarily available, the categories of conduct usually giving rise to them, and the considerations that may occasionally dictate, and more often aggravate or mitigate, the disciplinary measures imposed. The task of respondent's counsel, of course, is first to exonerate the accused lawyer of the charges. If this is not possible, however, counsel should strive to obtain the least damaging form of discipline consistent with the evidence.[237]

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234. *E.g.*, the provision for mandatory disbarment in New York for conviction of a felony. N.Y. JUD. LAW § 90(4) (presently codified in McKinney 1968), *discussed in* Barash v. Ass'n of the Bar of the City of New York, 20 N.Y. 2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967) (application for reinstatement after reversal of felony conviction).

235. *E.g., In re* Dedman, 17 Cal. 3d 229, 550 P.2d 1040, 130 Cal. Rptr. 504 (1976) (since there are no rigid standards on the appropriate penalty to be imposed, similar offenses may receive different degrees of punishment); Spindell v. State Bar, 13 Cal. 3d 253, 530 P.2d 168, 118 Cal. Rptr. 480 (1974) (there is no "fixed formula" in disciplinary matters); *In re* Member of the Bar, 226 A.2d 705 (Del. 1967) (notes the "great latitude" available to the court).

236. Even statutes of limitations specifically enacted to limit disbarment actions have been held ineffective because the legislature has no power in the inherently judicial area of lawyer discipline. *E.g., In re* Tracy, 197 Minn. 35, 266 N.W. 88 (1936). In most jurisdictions even resignation is not a reliable avenue to avoid discipline for it will not be automatically accepted. *E.g.*, State *ex rel.* Florida Bar v. Englander, 118 So. 2d 625 (Fla. 1960). Former President Nixon's attempt to resign was rejected apparently because of his failure to admit wrongdoing. *See In re* Nixon, 53 A.D. 850, 385 N.Y.S.2d 373 (1978).

237. Compare the general principle that exercises of the contempt power will be limited to "the least possible power adequate to the end proposed." Anderson v. Dunn,

The burden of proof and the processes by which it may be enforced have been discussed previously. Since factual determinations are made in disciplinary proceedings, as they are in other forms of litigation, by the presentation, impeachment, and explanation of relevant evidence, there is no need to review familiar principles of evidence, cross-examination, and order of proof.

Remembering that rules of procedure and evidence tend not to be strictly enforced in disciplinary proceedings, the following analysis assumes that counsel understands the application of these rules in his particular jurisdiction. The balance of this article will be concerned with a variety of factors that individually and in various combinations bear upon the evaluation of *proved* misconduct or incapacity, and the determination of what, if any, disciplinary or corrective measures should be imposed.

## I. WORKING WITH THE STATED PURPOSES OF LAWYER DISCIPLINE

The purposes most often said to justify disciplinary proceedings have been touched upon in broad terms earlier in this article. Before the specific forms, bases, and criteria of discipline are discussed, however, it may be useful to enumerate the interests involved while considering the appropriateness of possible dispositions in given cases.

### *A. Protection of the Public*

Protection of the public is the most generally recognized purpose of discipline; a lawyer who is physically, mentally, or morally unfit to handle clients' affairs honestly and competently must either be removed from the bar or have his deficiency corrected. The Supreme Court has stated:

> The power of disbarment is necessary for the protection of the public in order to strip a man of the implied representation by courts that a man who is allowed to hold himself out to practice before them is in "good standing" to do so.[238]

Note the focus even here upon *appearance.* The concern is with removing the bar's imprimatur from the errant lawyer, rather than merely to remove the lawyer from the position where he can deal as such with the public.

19 U.S. (6 Wheat.) 204 (1821), *cited in* Crammer v. United States, 350 U.S. 399, 404 (1955).

238. Theard v. United States, 354 U.S. 278 (1957).

### B. *Protection of the Bar and the Administration of Justice*

To the extent this purpose goes beyond protecting the public and particular clients of the respondent, this concern may include the rights of adversary parties and counsel, of judges and court personnel, and the functioning of the judicial process in all respects.[239] It is difficult to quarrel with this proposition because it is so broad and seems so salutary. It is well to remember, however, that other remedies are ordinarily available for misdeeds in this area: contempt for disrespect toward or disobedience of a court,[240] criminal prosecution for obstruction of justice,[241] and a malpractice action for damage to a client.[242] Thus the disciplinary authority should be reminded that its action is not the *exclusive* protection against such abuses and should indeed be invoked only when other remedies are unavilable or inadequate. Note, too, that *protective* concerns are naturally *prospective,* that is, neither the public, the bar, nor the administration of justice can be spared what has already occurred. Thus if it is shown that the respondent is not likely to *repeat* the misconduct there is no need to protect anyone from him. Here again, of course, the concern with *appearance* is likely to creep in.

### C. *The Appearance of Propriety*

Appearance is often invoked as a reason for discipline. Especially when the misconduct was not related to legal business or did not result in actual injury, appearance is often the unstated primary concern. Although, as previously noted, *mere* appearance is an invalid concern in such proceedings, in truth the bench and bar are extremely self-conscious about their image and it would be a serious mistake for respondent's counsel to ignore or

239. *E.g., In re* Streater, 262 Minn. 538, 543, 115 N.W.2d 729, 733 (1962) ("The purpose of disciplining an attorney is not to punish him, but to guard the administration of justice and to protect the courts, the profession, and the public").

240. *E.g.,* United v. Barnett, 376 U.S. 681 (1964). The law of contempt is itself complex and inconsistent and cannot be reviewed here. Note that it has been held that the judiciary's inherent power to punish for contempt and to impose discipline are not coextensive. Duke v. Committee on Grievances, 82 F.2d 870 (D.C. Cir. 1936). *See also* Cammer v. United States, 350 U.S. 399, 403-04 (1955) (an attorney is not an "officer of the court" for purposes of contempt legislation); *In re* Mixson, 258 S.C. 408, 189 S.E.2d 12 (1972) (civil contempt does not per se require disciplinary action).

241. Obstruction of justice may include crimes as diverse as bribery, perjury, embracery, tampering with witnesses, interference with law enforcement officers or judicial personnel, and concealment or destruction of evidence. *See generally* R. PERKINS, CRIMINAL LAW 494-500 (1969).

242. *See generally* R. MALLEN & V. LEVIT, LEGAL MALPRACTICE (1977).

underestimate this concern. Though a convicted murderer, for example, might be the best and most honest of advocates, most courts would find him unfit not because of any inability to practice law, but because such a serious conviction is thought to be incompatible with the pervasive high standards to which it is thought lawyers should aspire.[243] Constantly lurking just off-stage in disciplinary proceedings is a sententious voice asking: What will the public think?

In a revealing passage the Maryland court spoke as follows in arriving at its decision to disbar former Vice President Agnew:

> A court has the duty, since attorneys are its officers, to insist upon the maintenance of the integrity of the bar and to prevent the transgressions of an individual lawyer from bringing *its image* into disrepute. Disciplinary procedures have been established for this purpose, not for punishment, but rather as a *catharsis* for the profession and a *prophylactic* for the public.[244]

The rather medical diction is curious. "Catharsis" is a discharge of pent-up emotions, strictly speaking, of destructive or socially unacceptable emotions, through exposure to emotion-stimulating psychotherapy, works of art, or other events.[245] And the primary definition of "prophylactic" is protection from disease.[246] This is evidence of a tendency to see unethical lawyers as aberrant because of some unspecified but impliedly contagious disease of body or mind and to see the benefits of removal in terms of excision and purgation, as if the bar breathes a collective sigh of relief when the malignancy is removed, the infected member amputated.

This approach should not be scorned. It is perhaps a healthy one, particularly if in each case it leads to exploration for the least radical cure and encourages retention of the healed or healing.

### *D. Protection and Reparation of the Respondent's Clients and Others*

The disciplinary process usually begins with the complaint of an injured client. Two of its most immediate goals are to prevent any further damage to that client, or other present clients,

243. *E.g.*, *In re* Thompson, 296 Minn. 466, 209 N.W.2d 412 (1973) (murder); *In re* LaDuca, 62 N.J. 133, 299 A.2d 405 (1973) (extortion).

244. Maryland State Bar v. Agnew, 271 Md. 543, 318 A.2d 811, 814 (1974) (emphasis added).

245. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 233 (unabridged ed. 1973).

246. *Id.* at 1153.

and to repay any losses or remedy any injuries already suffered by clients.[247] If nonclients, such as creditors, have been wronged, their satisfaction may also be more or less directly involved. Accordingly, counsel should determine what damage, financial or otherwise, has been done and establish a plan to repay; and any available immediate steps to prevent further or continuing injury should of course be taken. It must be remembered, however, that reparation, restitution, or satisfaction of the complainant is not in itself a defense,[248] and a client's approval of misconduct is not a bar to discipline.[249]

### *E. The Deterrence of Future Misconduct by Respondent and Others*

Beyond the facts of the individual case, the disciplinary process has an eye to the future conduct of the respondent or others facing similar situations.[250] Each case thus has potentially an exemplary and precedential effect. Particularly when the alleged misconduct is ambiguous, the ethical implications unsettled, or similar offenses have traditionally not been punished, respondent's counsel should strive for a *prospective* ruling, avoiding sanctions to respondent, but warning and guiding him and others for the future.[251] Such a prospective ruling will, if promulgated to the bar, have the same deterrent effect whatever discipline is imposed on the immediate respondent, and this will avoid the two-fold unfairness of (1) punishing a lawyer for conduct not previously punished, and (2) punishing a lawyer in part for the uncommitted future transgressions of others.

### *F. The Rights and Welfare of the Respondent*

Whether we call the license to practice law a right or privilege, he who acquires it has undergone a lengthy and expensive education, has probably invested most of his resources in it, and

247. *See, e.g., In re* Makowski, 73 N.J. 265, 374 A.2d 458 (1977).

248. *E.g.,* Smiley v. Board of Comm'rs of Ala. State Bar, 286 Ala. 742, 238 So. 2d 716 (1970) (restitution under pressure no defense); *In re* Campbell, 108 Ariz. 200, 495 P.2d 131 (1972) (complainant's satisfaction no defense).

249. *In re* Thompson, 30 Ill. 2d 506, 198 N.E.2d 337 (1963).

250. *E.g., In re* Bunker, 297 Minn. 47, 199 N.W.2d 628 (1972) (where the court placed respondent on probation, but declared that any future failure of lawyers to file tax returns will lead to suspension or disbarment); *In re* Makowski, 73 N.J. 265, 374 A.2d 458 (1977) (prevention of reoccurrences noted as one of the ultimate objectives of disciplinary measures).

251. *E.g., In re* Bunker, 297 Minn. 47, 199 N.W.2d 628 (1972).

probably depends entirely upon it for his livelihood and the support of his family. It should not therefore be readily curtailed or taken from him.[252] Particularly since most courts disavow the criminal label or analogy in the disciplinary process, it should be viewed as a *remedial* rather than punitive undertaking. In all but the most egregious cases the likelihood that the respondent can continue or resume the practice of law, consistent with the other interests involved, should be given central importance,[253] particularly in an age when the courts and commentators show, quite rightly, such great concern for the rehabilitation, as opposed to the punishment, of even criminal defendants.[254] Over a century ago, the Supreme Court observed:

> Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, . . . . To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired.[255]

Removing him will doubtless have a satisfying cathartic effect and will reinforce the belief that lawyers are capable of cleaning their own house, but it will also visit disastrous consequences not only on the respondent, but his family, friends, associates, and creditors.

### *G. Fairness and the Appearance of Fairness to the Bar*

For self-regulation to be effective the bar must participate and cooperate in it.[256] Yet, lawyers should not live, or have to live, in fear of an avenging and malevolent supervisory force. If individual respondents or the bar in general fear, despise, or distrust

252. *See* Spevack v. Klein, 385 U.S. 511, 516 (1967) ("The threat of disbarment and loss of professional standing, professional reputation, and of livelihood" are recognized as "powerful forms of compulsion").

253. *In re* Reed, 207 La. 1011, 22 So. 2d 552 (1945).

254. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, SENTENCING ALTERNATIVES AND PROCEDURES (Approved Draft 1968); PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, APPELLATE REVIEW OF SENTENCES (Approved Draft 1968).

255. Bradley v. Fisher, 80 U.S. (1 Wall.) 335, 355 (1870).

256. Both EC 1-4 and DR 1-103 require lawyers to disclose unprivileged knowledge or evidence of ethical violations; *see Report of the Special Committee on Disciplinary Procedures*, 80 A.B.A. REP. 463, 470 (1955) ("It is the obligation of the organized Bar and the individual lawyer to give unstinted cooperation and assistance . . . with respect to discipline and in purging the profession of the unworthy").

the disciplinary authority, the necessary cooperation will fail and some lawyers at least will inescapably become craven, dissembling, or subversive. The adversary process involved in most legal endeavors not only permits but requires advocacy of extreme positions, and the disciplinary process should never be permitted to be abused or to chill proper zeal.[257] Despite the lofty duties and privileges of lawyers, they should not be held to a superhuman or homogeneous standard of performance. The profession is not served by excessive accusation of its members. Each disciplinary action may demonstrate the bar's ability to police itself, but it also declares the failure of one of its members.

### *H. Punishment*

As noted, most courts disavow any penal purpose in discipline despite the language of the *Ruffalo* decision calling it a "punishment or penalty."[258] It is difficult, however, to read a decision such as that in the Agnew case without detecting a mood of outright retribution, and indeed the "catharsis" of which that court speaks presupposes the infliction of a penalty or tragedy upon another. It would be wrong to advocate the use of discipline deliberately to impose pains or penalties, but at the same time there is an unhealthy hypocrisy in the disavowal of a penal intention when the penal effect of the sanction is obvious. This is especially distasteful when it is used to justify denial of procedural rights to a respondent. The bar should either admit retributive intentions or withhold discipline when no purpose *except* retribution is served by it.

## II. THE FORMS OF DISCIPLINARY DISPOSITIONS

Although imposition of discipline is chronologically the last stage in the proceedings, it is important for respondent and his counsel to know from the outset what disposition can be realistically sought and expected. Therefore, it may be helpful to set forth and describe briefly the kinds of dispositions ordinarily available, so that the purposes and criteria of discipline may thereafter be discussed with an awareness of their tendency to

257. *E.g., In re* Wehrman, 327 S.W.2d 743, 744 (Ky. 1959) (discipline must not be used as an avenue to personal, religious, or political reprisal); M. FREEDMAN, *supra* note 64, at vii (where the author notes that disciplinary measures were undertaken against him for merely giving a speech advocating zeal in difficult positions on behalf of criminal clients).

258. See note 97 *supra* and accompanying text.

justify or exclude a given disposition. Keep in mind that different jurisdictions provide for different forms of disposition and that the following are compiled from various sources.

*1. Acquittal or Dismissal.*—A charge not proved, of course, should be dismissed, or the respondent acquitted.[259] As in a civil or criminal lawsuit, a failure of proof is not necessarily the same as exoneration, and since even a dismissed charge will remain on file, counsel should, when possible, attempt to have the record show that the charge itself was unfounded or untrue so that it will carry little or no weight in any later disciplinary proceedings.[260]

*2. Private warning.*—A warning usually implies that respondent did not knowingly engage in misconduct, but was careless or insensitive to his ethical obligations, or came dangerously close to, or gave the appearance of, violating a disciplinary rule, perhaps in ambiguous circumstances.[261] The warning has no immediate consequences, but in its nature will weigh rather heavily against the respondent if he is later charged with a similar violation since it serves as clear notice of the rule in question.[262] It follows that a private warning usually issues only on the first offense; and it would be sensible and fair to expect that all first offenses not involving moral turpitude should result only in private warnings.

*3. Public warning.*—A warning made public will have an adverse impact upon the respondent's practice to the extent it is disseminated to present or potential clients, adverse counsel, and judges. From the disciplinary agency's point of view, a public disposition has the virtue of notifying the public both of an action against a specific lawyer and of the existence and functioning of

259. *E.g., In re* Heirich, 10 Ill. 2d 357, 140 N.E.2d 825, *cert. denied*, 355 U.S. 805 (1957); *In re* Rerat, 232 Minn. 1, 44 N.W.2d 273 (1950).

260. In most jurisdictions previous proceedings may be considered even though no discipline resulted. *E.g.*, MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 19(b);

> (1) Conduct previously considered. Proceedings under these rules may be based upon conduct considered in previous lawyer disciplinary proceedings of any jurisdiction, even if it was determined in the previous proceedings that discipline was not warranted or that the proceedings should be discontinued after the lawyer's compliance with conditions.

261. In Minnesota private warnings can be given either by the district ethics committee or by the Lawyers Professional Responsibility Board; thereafter the filing of a petition in the Supreme Court makes the proceeding public. See MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 7(b)(2), 9(e)(2), 12(a).

262. *E.g., In re* McCallum, 391 Ill. 400, 64 N.E.2d 310 (1946) (continued soliciting after previous censure resulted in disbarment); *In re* Moller, 248 A.D. 877, 290 N.Y.S. 257 (1936) (lawyer previously censured for neglecting clients' affairs was suspended for three years).

the agency itself. Against this must be balanced the potentially serious impact upon the not-very-culpable respondent.

*4. Private Reprimand.*—A reprimand or censure implies a finding of actual but not very serious misconduct, ordinarily a lapse of judgment or a mishandling of a legal matter with little or no injury, and no dishonesty or deceit. Although it is a more severe disposition, a *private* reprimand may do less actual damage to the respondent's practice than a *public* warning and may be a desirable and negotiable result.

*5. Public reprimand.*—A reprimand made public, of course, is more serious than any of the foregoing, but it still will have no direct effect upon the respondent's ability to continue practicing.

*6. Probation.*—A respondent may be placed on probation either publicly or privately, depending upon the jurisdiction and the problems involved. Warnings and reprimands are in effect forms of probation since they imply relatively more severe measures in the event of recurrence,[263] but formal probation usually carries additional conditions for violation of which the respondent will be suspended or disbarred. The conditions can be as diverse as the imaginations of counsel and the disciplinary board and can be tailored to fit the situation. Some common examples consist of the following:

(a) *Treatment* for physical or mental illness or chemical dependency.[264] This may include in-patient treatment and a follow-up program such as Alcoholics Anonymous.[265] A number of courts have decided not to disbar lawyers pending rehabilitation from mental illnesses.[266] But other courts have expressed the fear that too ready a recognition of personality disorders as a defense might lead to abuse of the notion.[267]

(b) *Supervision* of the respondent's practice by another lawyer, who may report periodically upon respondent's handling of his problems, such as bookkeeping and calendar procedures,

263. Note 262 *supra.*

264. *E.g., In re* Christ, 258 Or. 88, 481 P.2d 74 (1971) (probation was imposed on condition that the accused continue his course of psychiatric treatment).

265. *Cf. In re* Constantine, 249 Minn. 599, 81 N.W.2d 711 (1957); *In re* Rice, 241 Minn. 386, 63 N.W.2d 41 (1954). Both cases concerned disbarments, but both opinions recognized the possibility of readmission upon proof of recovery from alcoholism. *See also In re* Neumeister, 180 Minn. 146, 230 N.W. 487 (1930) (suspension rather than disbarment was ordered upon a felony conviction resulting from the lawyer's alcoholism).

266. *E.g.,* Glenn v. State Bar, 14 Cal. 2d 318, 94 P.2d 43 (1939); *In re* McDonald, 28 A.D. 1141, 284 N.Y.S.2d 574 (1967). *see generally* Annot., 96 A.L.R.2d 749 (1964).

267. *E.g., State v. Ledvina, 71 Wis. 2d 195, 237 N.W.2d 683 (1976). See generally* Annot., 96 A.L.R.2d 749 (1964).

office and financial management, drinking, and gambling.[268] The respondent's disciplinary counsel should *not* act as probation supervision because of the obvious potential conflicts of interest.

(c) *Assistance* of other lawyers if the respondent has either too heavy a workload or is involved in cases he lacks the training or experience to handle.[269] This, like supervision, is often desirable since a large percentage of disciplinary complaints are against sole practitioners or members of small firms who lack support personnel or back-up lawyers.

(d). *Restitution* of any amounts owing in taxes, or to creditors or clients.[270] Very often disciplinary matters involve financial disputes or respondents who have financial problems. Whether the charge is misappropriation of clients' funds, inability to satisfy judgments, or failure to pay taxes, a program of repayment must be worked out. Unrealistic commitments should not be made in the heat of disciplinary actions, however. The respondent's own needs and those of his family must be built into the restitution program; an over-taking of his financial resources will only lead to new difficulties.

(e) *Education,* when respondent has shown incompetence in a given field of practice or ignorance of his ethical responsibilities.[271] With the trend toward proliferation of programs of voluntary or mandatory continuing legal education,[272] it is often quite possible and desirable to require respondents to renew or sharpen deficient skills through attendance at seminars.

(f) *Volunteer work,* in providing legal services to the disadvantaged, for example, might be considered. This has the twofold advantage of penalizing the respondent but not at the same time wasting or dulling his legal abilities. It may also give the

268. *Cf.* Bradpiece v. State Bar, 10 Cal. 3d 742, 518 P.2d 337, 111 Cal. Rptr. 905 (1974) (consideration given to the establishment of orderly office procedures and supervision of the respondent by other members of the firm in morifying the sanction imposed).

269. DR 6-101(A)(1) provides that a lawyer should not handle a matter he is not competent to handle "without associating with him a lawyer who is competent to handle it." *See generally* Annot., 96 A.L.R.2d 823 (1964).

270. *E.g., In re* Lothrop, 257 A.D. 297, 13 N.Y.S.2d 206 (1939).

271. *E.g.,* Segretti v. State Bar, 15 Cal. 3d 878, 544 P.2d 929, 126 Cal. Rptr. 793 (1976). The California Supreme Court said that in the future all lawyers suspended or placed on probation would be required to pass California's recently implemented Professional Responsibility Examination.

272. Heindenreich, *Questions and Answers Concerning Mandatory Continuing Legal Education,* 32 BENCH & B. MINN. 11 (1974); Parker, *Periodic Recertification of Lawyers: A Comparative Study of Programs for Maintaining Professional Competence,* 54 MICH. ST. B.J. 768 (1975); Wolkin, *A Better Way to Keep Lawyers Competent,* 61 A.B.A.J. 1064 (1975).

respondent a new awareness of his obligations to the public and serve the public both in fact and in appearance.

(g) *Other* conditions of probation may be designed to meet specific cases. Since no precise conditions or dispositions are prescribed in most jurisdictions, counsel can be quite creative in this area, working with bar counsel to design a disposition accommodating all of the interests involved in disciplinary actions.

7. *Suspension.*—A lawyer will be suspended when it appears he is incapable physically or mentally of serving his clients properly, or when his misconduct is so serious that, though disbarment is not required, a relatively severe penalty seems necessary. This usually means the respondent may not practice law or hold himself out as practicing at all during the period of suspension. His name might have to be removed from the office door and stationery. He is for all practical purposes not a licensed lawyer during suspension.[273] The length of the suspension may vary greatly and be either specifically set forth or indefinite. Reinstatement may be either automatic at the expiration of a set period or upon fulfillment of specific conditions, or may require application by the respondent and place upon him a burden of showing his renewed fitness to practice.[274]

Some jurisdictions commonly impose periods of suspension, but stay the execution of the suspending order and place the respondent on probation with the understanding that violation of the conditions of probation will result more or less automatically in activation of the period of suspension.[275] A period of actual suspension is often followed by probation for an additional time.

8. *Disbarment.*—Removal from the roll of licensed attorneys is, of course, the most severe form of discipline, and is imposed when the welfare of clients and the integrity of the profession are inconsistent with the respondent's continued presence. It usually results only from very serious misconduct involving moral turpitude,[276] and a rather heavy burden is on a disbarred lawyer

273. A suspended or disbarred lawyer, of course, not being a member of the bar, is subject to proceedings for unauthorized practice of law if he continues to practice.

274. *E.g., In re* Christianson, 253 N.W.2d 410 (N.D. 1977).

275. *E.g.,* Segretti v. State Bar, 15 Cal. 3d 544 P.2d, 929, 126 Cal. Rptr. 793 (1976). Segretti, the dirty tricks specialist of the 1972 Nixon campaign, was suspended for five years. The execution of the suspension was stayed, however, and he was placed on probation for five years. The conditions of probation included two years of actual suspension and the passing of the ethics examination mentioned in note 271 *supra* before returning to practice at the end of the two year period.

276. As has been noted, disbarment should be imposed only in extreme cases and as

to show his fitness upon application for readmission.[277] Except in jurisdictions where felony convictions require disbarment, there are no specific prerequisites to the extreme sanction, nor does any offense per se preclude eventual readmission.

*9. Resignation.*—Most jurisdictions have provisions allowing for the discretionary acceptance of the resignation of an accused lawyer, but ordinarily there is no *right* to resign to avoid discipline.[278] Acceptance of a resignation while charges are pending usually requires admission of the wrongdoing in question,[279] and it has been held that resignation while charges are pending is "tantamount" to admission.[280]

*10. Retirement.*—For most practical purposes retirement is the equivalent of resignation, except that its connotations are somewhat less favorable. The latter suggests the giving up or yielding of office under pressure, while retirement more often suggests a voluntary withdrawal. The availability of retirement will, of course, depend upon the rules of the particular jurisdiction.

*11. Reinstatement.*—As mentioned before, reinstatement will often turn upon either compliance with conditions of probation or suspension, or a showing of rehabilitation.[281] The burdens of going forward and persuasion are upon the lawyer in reinstatement proceedings, and the burden has been said to be a heavy one.[282] In the very interesting decision ordering Alger Hiss reinstated,[283] the Massachusetts Supreme Judicial Court, reviewing the questions involved in reinstatement situations, made two very significant departures from what seems to have been prevail-

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a last resort. *See* Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); *In re* Reed, 207 La. 1011, 22 So. 2d 552 (1945) (the least severe form of discipline appropriate should be imposed).

277. *E.g., In re* Christianson, 253 N.W.2d 410 (N.D. 1977).

278. *E.g.*, Peterson v. State Bar, 21 Cal. 2d 866, 136 P.2d 561 (1943); State *ex rel.* Florida Bar v. Englander, 118 So. 2d 625 (Fla. 1960); *In re* Wrabek, 113 P.2d 526 (Wash. 1941). See *Disbarment supra* note 81, at 67-71.

279. Former President Nixon's attempt to resign from the New York Bar was rejected for failure to contain an admission of culpability. *In re* Nixon, 53 A.D.2d 850, 385 N.Y.S.2d 373 (1978). See Note, 26 Mo. L. REV. 90 (1961) for a general discussion of rules governing resignation.

280. Ferer v. State Bar Ass'n, 53 A.D.2d 39, 386 N.Y.S.2d 133 (1976). The CLARK REPORT, note 1 *supra,* recognized the danger that permitting resignation may improperly facilitate later admission, and prescribed a procedure to ensure against this. *Id.* at 102-03, 105.

281. *In re* Christianson, 253 N.W.2d 410 (N.D. 1977).

282. *In re* Hiss, 368 Mass. 447, 333 N.E.2d 428 (1975); *In re Trombley*, 398 Mich. 377, 247 N.W.2d 873 (1976).

283. *In re* Hiss, 368 Mass. 447, 333 N.E.2d 428 (1975).

ing law before that decision. First, rejecting the argument that a perjury conviction was so serious a matter that it should per se forever bar readmission, the court said:

> [W]e cannot now say that any offense is so grave that a disbarred attorney is automatically precluded from attempting to demonstrate through ample and adequate proofs, drawn from conduct and social interactions, that he has achieved a "present fitness" . . . [citation omitted] to serve as an attorney and has led a sufficiently exemplary life to inspire public confidence once again, in spite of his previous actions.[284]

Second, the court also rejected the argument that one disbarred for conviction of a crime cannot be readmitted without a showing of "repentance," which requires an admission of guilt. The court stated:

> Though we deem prior judgments dispositive of all factual issues and deny attorneys subject to disciplinary proceedings the right to relitigate issues of guilt, we recognize that a convicted person may on sincere reasoning believe himself to be innocent. . . .
>
> Simple fairness and fundamental justice demand that the person who believes he is innocent though convicted should not be required to confess guilt to a criminal *act* he honestly believes he did not commit. For him, a rule requiring admission of guilty and repentance creates a cruel quandary: he may stand mute and lose his opportunity; or he may cast aside his hard-retained scruples and, paradoxically, commit what he regards as perjury to prove his worthiness to practice law . . . .
>
> . . . .
>
> Honest men would suffer permanent disbarment under such a rule. Others, less sure of their moral positions, would be tempted to commit perjury by admitting to a nonexistent offense (or to an offense they believe is nonexistent) to secure reinstatement. So regarded, this rule, intended to maintain the integrity of the bar, would encourage corruption in these latter petitioners for reinstatement and, again paradoxically, might permit reinstatement of those least fit to serve.[285]

The result of a position such as the court took in *Hiss* is that reinstatement turns not upon the basis for the disbarment, but

284. *Id.* at 452, 333 N.E.2d at 433 (emphasis added) (citation omitted). The court reviews the various authorities holding that disbarment for certain offenses is or is not necessarily permanent. *Id.* at 452-53 n.9, 333 N.E.2d at 433.

285. *Id.* at 457-59, 333 N.E.2d at 436-37.

upon the applicant's *present* fitness to practice law. It is an opinion to be studied, and applauded, for its accurate focus upon the truly legitimate concerns of lawyer discipline, its unself-righteous recognition of the fallibility of the system, and its resistence to the temptation of catering to the mere appearance of the bar.

*12. Interim Suspension.*—In some jurisdictions a lawyer under disciplinary charges may be suspended from practice pending the result of the proceedings when he appears to pose a threat to clients or the public if allowed to continue practicing.[286] It has been held, however, that an immediate, ex parte suspension, even upon conviction of a serious felony, violates the due process clause.[287]

*13. Removal from Judicial Office.*—Some collateral questions beyond the scope of this article include (1) the jurisdiction of a lawyers' disciplinary body to impose sanctions upon a sitting judge, and (2) the effect of disbarment upon a lawyer's right to hold judicial office.[288] Since most jurisdictions require judges to be "learned in the law" and disbarred lawyers have been held not to be,[289] the practical effect of disbarment is to disqualify the respondent from present or future judicial office.[290] Many difficult and interesting questions remain unanswered in this area.[291]

*14. Summary.*—The sanctions set out above are the most

286. See MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 16 (which permits interim suspension when it "appears" that the respondent's continued practice "may result in risk of injury to the public").

287. *E.g.*, Florida Bar v. Fussell, 179 So. 2d 852 (Fla. Dist. Ct. App. 1965), *aff'd*, 189 So. 2d 881 (Fla. 1966); Louisiana State Bar Ass'n v. Ehmig, 277 So. 2d 137 (La. 1973).

288. *E.g., In re* Gillard, 260 N.W.2d 562 (Minn. 1977). In *Gillard* the Lawyers Professional Responsibility Board instituted proceedings against a sitting judge for conduct that occurred prior to his appointment to the bench. The trial court stayed the proceedings and referred the matter to the Board on Judicial Standards because disbarment would result in removal from office without an adequate opportunity for the defendant to be heard on the question of his fitness to remain a judge.

289. Peterson v. Knutson, 305 Minn. 53, 233 N.W.2d 716 (1975); State v. Mofort, 93 Wash. 4, 159 P. 889 (1916); State v. Pierce, 191 Wis. 1, 209 N.W. 693 (1926).

290. *In re* Candidacy of Daly, 294 Minn. 351, 200 N.W.2d 913, *cert. denied sub nom.*, Daly v. McCarthy, 409 U.S. 1041 (1972).

291. The inter-relationship between disbarment, judicial misconduct, and qualifications for judicial office are complex and not well settled. *E.g., In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941) (disciplinary proceedings against a judge for misconduct while in practice affected only his status as a lawyer); *In re* Troy, 306 N.E.2d 203 (Mass. 1973) (disbarment resulted from a judge's removal from the bench); *In re* Williams, 113 S.W.2d 353 (Mo. 1938), *opinion quashed sub nom.*, State *ex rel.* Clark v. Shain, 343 Mo. 542, 122 S.W.2d 882 (1938), *conformed on remand*, 233 Mo. App. 1174, 128 S.W.2d 1098 (1939) (disbarment proceedings were brought against a lawyer for prior misconduct while a judge); Weston v. Board of Governors, 177 Okla. 467, 61 P.2d 228 (1936) (concerning a lawyer's present fitness to practice based on his acts while a judge).

common disciplinary dispositions, but it must be reemphasized that rarely is any specific sanction required for any given form of conduct. Respondent's counsel should estimate as early and as accurately as possible what disposition will best serve the competing interests of aggrieved clients, potential future clients, the bar, the public, and the respondent, and tailor his approach to the case with a view to demonstrating the justification and desirability of the most lenient result consistent with those interests.

## III. MATTERS OF AGGRAVATION, MITIGATION, AND DEFENSE

### *A. Of Principle and Pragmatism*

The relatively unstructured nature of the machinery for lawyer discipline invites application of myriad considerations in arriving at the proper disposition. Some of these have been touched upon above, but it may be helpful now to enumerate the most common factors that respondent's counsel should recognize and evaluate as he prepares the strategy and tactics of his response to the disciplinary charges. Often several of these factors will be involved in a single case, and counsel should be alert to notice the possible interplay between them.

For respondent's counsel the goal is always to achieve the disposition least damaging to the respondent. Sometimes that can be done by acquittal or vindication, but more often it is accomplished by negotiating or arguing for a compromise that satisfies numerous and diverse interests. Because lawyers tend to be intelligent, strong willed, independent minded, and proud, it may be difficult for the respondent to accept that he must make concessions or admissions. But without doubt one of counsel's most important and valuable services is to make an informed prediction of a reasonably probable range of results and explain to the respondent the reasons why the focus from the outset should be upon a tolerable compromise rather than upon undertaking a fiercely adversary and recalcitrant approach. The vague, all-encompassing, and often conflicting dictates of ethical consideration; the uncertainty of procedural rights; the relative informality of disciplinary proceedings, especially at the all-important early stages; the great variety of available dispositions; and the numerous and intricately interrelated collateral considerations involved—all of these must be perceived and evaluated by counsel, and explained to the respondent, before an intelligent approach to the case can be formulated. But the approach *must* be formulated, and this must be done as early as possible. It is very

often of great importance to the respondent to resolve the matter short of a public, adversarial hearing, which, as is so often true of the plaintiff in a defamation action, is likely to damage him substantially even if he emerges ultimately victorious.[292]

Of course, this should not be interpreted as encouraging surrender of principles or convictions to mere expediency or extortion. Some cases are groundless and simply must be fought at every step. But most disciplinary complaints have *some* substance, even if founded on nothing firmer than a client's misunderstanding or a harried lawyer's failure to hold conscientiously enough the hand of an unreasonably demanding client. Resent it though he may, the respondent must understand that he is on trial not solely as an individual lawyer for an individual deed of what is often at worst an ambiguous texture, but as a representative of the profession itself. By virtue of his very membership in that profession, he is held to a higher standard of conduct than laymen[293] and is in some danger of being sacrificed by his colleagues at the altar of appearance.

This does not necessarily make any more philosophical sense or coincide any more closely with absolute standards of justice, than to treat a criminal defendant more, or less, leniently because he represents a race that has suffered, or sinned, more than another. It is as much sheer presumptuousness as anything that leads the bar to treat its members as a privileged elite[294] and, therefore, to make them answerable for foibles that would go unnoticed, or at least unpunished, in others, even in other more or less lofty professions. It does not necessarily make sense, but it is a fact of the lawyer's life. A respondent needs and hires legal counsel, not a philosopher, and while thoughtfulness and even a touch of righteous indignation will not necessarily disserve the lawyer's lawyer, he needs a more than normal share of pragmatism seasoned with a dash of deference and pinch of diffidence to be effective.

If we leave aside the complaints that are so baseless or trivial that no discipline can follow, and those that are so grave that anything but disbarment is unthinkable, we find that in the great

292. Although any defamation action takes its toll on the plaintiff, the story of Alger Hiss provides a particularly vivid example. Having sued Whitaker Chambers of a libel, he himself was later indicted and convicted of perjury, jailed, and disbarred. A. WEINSTEIN, PERJURY (1978).

293. *E.g., In re* Tracy, 197 Minn. 35, 266 N.W.88 (1936).

294. See AUERBACH, note 13 *supra;* J. LIEBERMAN, note 55 *supra.*

majority of cases in which counsel can assist a respondent the task is to understand the various interests involved—the victim's, the complainant's, the bar's, the public's, the respondent's—and to sponsor a disposition acceptable to all though perhaps not perfectly satisfactory to any.

In the following section it is assumed that the alleged misconduct is admitted or can certainly be proved. This is not to suggest that charges cannot be defended on the merits, as of course they often can and should be. But defense on the facts, on the question of guilt or innocence, is essentially the same as in other proceedings, and there is no point in attempting to add to the voluminous literature on how to litigate factual issues whether in civil, criminal, or administrative proceedings.

### *B. The Character of the Misconduct or Other Grounds for Discipline*

Since there are usually no specifically prescribed sanctions for any given form of misconduct, disposition will turn upon the relative importance of a variety of considerations, the most common and important of which are set out below. Note, however, that different jurisdictions may give different weights to similar factors, and even the same jurisdiction may change approaches at different times. Moreover, significant and generally applicable changes in ethical criteria occur from time to time, of late most notably in the area of advertising and solicitation.[295] Stare decisis is said to play a relatively unimportant role in discipline,[296] but nevertheless some uniformity in dispositions is desirable,[297] and respondent's counsel should be familiar with the spectrum of sanctions imposed for any given violation.

*1. Violations of the Code.*—Most disciplinary cases involve violation of some provision of the Code of Professional Responsibility as adopted or otherwise recognized in the jurisdiction in question. The Code is generally said not to be the equivalent of a criminal code, the provisions of which must be construed in favor of lenity.[298] The problems encountered in the application of the

295. See cases cited and discussed in note 55 *supra.*

296. *E.g., In re* Harrington, 134 Vt. 549, 367 A.2d 161 (1976).

297. *E.g., In re* Andros, 64 Ill. 2d 419, 356 N.E.2d 513 (1976).

298. This is consistent with the refusal to characterize the disciplinary proceeding as criminal. Some courts, however, have held that disbarment statutes are "penal" and, therefore, must be strictly construed. Thomas v. State *ex rel.* Stepney, 58 Ala. 365, 368 (1877); Wayland v. City of Chicago, 369 Ill. 43, 47, 15 N.E.2d 516, 518 (1938); *In re* Baluss,

present Code of Professional Responsibility have been discussed earlier in this article.[299] Basically those problems involve conflicting dictates of different provisions of the Code. Certain provisions of the Code are so vague and broad that virtually any foible may be construed to fall within their proscriptions.[300] Yet, most examples of misconduct will fit more or less reasonably under one of the Canons or Disciplinary Rules that can be assumed to have given reasonable notice to the respondent of what is expected of him.[301] Even a clear violation of the Code, however, does not tell one much about the appropriate sanction, and, as has been noted, the Code itself contains no sanctions. But the Code is explicitly designed "as a basis of a disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules."[302] Once a violation of the Code is found, other factors are used to determine the appropriate disciplinary measure, if any, to be imposed.

*2. Conduct Violating Criminal Statutes.*—It is clearly not a prerequisite to discipline that the respondent have violated a criminal law or have been convicted of a crime.[303] Conversely, a criminal conviction, whether misdemeanor or felony, will not, with some exceptions, result automatically in disbarment or discipline,[304] although cases are probably few in which some form of discipline does not result from felony convictions.[305] Neither acquittal of a criminal charge,[306] the running of the statute of limita-

28 Mich. 507, 508 (1874); *In re* Donegan, 282 N.Y. 285, 282, 26 N.E.2d 260, 263 (1940); *In re* Chappell, 12 Ohio Op. 499, 502, 33 N.E.2d 393, 397 (1938).

299. See notes 50-73 and accompanying text *supra.*

300. *E.g.*, DR 1-102, discussed in note 53 and accompanying text *supra.*

301. *E.g.*, *In re* Daly, 291 Minn. 488, 490-91, 189 N.W.2d 176, 179 (1971).

302. ABA CODE, *Preliminary Statement.*

303. *E.g.*, Williford v. State, 56 Ga. App. 840, 847, 194 S.E. 384, 388 (1937); *In re* Alschuler, 388 Ill. 492, 502, 58 N.E.2d 563, 567 (1945); *In re* Needham, 364 Ill. 65, 70, 4 N.E.2d 19, 21 (1936); State Bar of Mich. v. Hartford, 282 Mich. 124, 128, 275 N.W. 791, 792 (1937).

304. *E.g.*, Theard v. United States, 354 U.S. 278 (1957) (disbarment from state court does not automatically result in disbarment from federal courts); *In re* Neumeister, 180 Minn. 146, 230 N.W. 487 (1930) (embezzlement conviction resulted in 18 months suspension, but not disbarment).

305. No reported decisions have been found in which discipline of some kind was not imposed after a final felony conviction.

306. *E.g.*, Zitny v. State Bar, 64 Cal. 2d 787, 415 P.2d 521, 51 Cal. Rptr. 825 (1966); Iowa State Bar Ass'n v. Kraschel, 260 Iowa 187, 148 N.W.2d 621 (1967); Ohio State Bar Ass'n v. Weaver, 40 Ohio St. 2d 97, 322 N.E.2d 665 (1975). *But cf.* KeeWong v. State Bar, 15 Cal. 3d 528, 542 P.2d 642, 125 Cal. Rptr. 482 (1975) (noting that the disciplinary body will give serious consideration to the fact of acquittal).

tions,[307] grant of immunity from prosecution,[308] or a pardon or commutation[309] forecloses disciplinary action based upon the underlying conduct.

Most jurisdictions consider a final criminal conviction as conclusive evidence for disciplinary purposes of the occurrence of the conduct in question.[310] The respondent may not retry the issue of guilt, but ordinarily may introduce evidence in mitigation or explanation of the offense.[311] Also, for disciplinary purposes, a plea of *nolo contendere* is generally treated as a guilty plea and the resulting disposition as a conviction.[312]

If the disciplinary charges involve criminal conduct for which the respondent has not been prosecuted, counsel must make an informed decision whether the respondent should run the risk that his reply to the charges will incriminate him or whether he should invoke his privilege against self-incrimination. As previously noted, imposition of discipline may not be based solely upon assertion of the privilege.[313] But, the respondent who asserts that privilege will not be able to argue that his cooperation with the disciplinary authorities should mitigate the discipline.

A conviction for either a felony or a misdemeanor may be ground for discipline, though some jurisdictions require that a misdemeanor conviction involve moral turpitude.[314]

Of course, if a proved crime involves moral turpitude, disbar-

307. *E.g.*, Schmid v. Stae, 121 Ga. App. 700, 175 S.E.2d 87 (1970); *In re* Sarbone, 63 N.J. 94, 304 A.2d 734 (1973).

308. *E.g.*, *In re* Schwarz, 51 Ill. 2d 334, 382 N.E.2d 689 (1972).

309. *E.g.*, *In re* Beck, 246 Ind. 141, 342 N.E.2d 611 (1976); *In re* Prisock, 244 Miss. 417, 143 So. 2d 434 (1962). *See also* Branch v. State, 120 Fla. 666, 162 So. 48 (1935) (holding tht a disbarred lawyer is not automatically readmitted upon being pardoned); Annot., 59 A.L.R.3d 466, 469 (1974).

310. *E.g.*, *In re* Alkow, 64 Cal. 2d 838, 415 P.2d 800, 51 Cal. Rptr. 912 (1966); *In re* Funo, 52 Ill. 2d 307, 288 N.E.2d 9 (1972); *In re* Carrol, 406 S.W.2d 845 (Ky. 1966); Florida Bar v. Jenkins, 254 So. 2d 785 (Fla. 1971). *Compare In re* Sauer, 390 Mich. 449, 213 N.W.2d 102 (1973) (disciplinary action may be taken on a conviction even though the conviction is on appeal) *with In re* Ming, 469 F.2d 1352 (7th Cir. 1970) (a conviction is not final until direct appeals are exhausted).

311. *E.g.*, *In re* Andros, 64 Ill. 2d 459, 356 N.E.2d 513 (1976); Louisiana State Bar Ass'n v. Loridans, 338 So. 2d 1338 (La. 1976).

312. *E.g.*, *In re* Snook, 94 Idaho 904, 499 P.2d 1260 (1972); Louisiana State Bar Ass'n v. Edwards, 322 So. 2d 123 (La. 1975); Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 318 A.2d 811 (1974); *In re* Queenan, 62 N.J. 579, 287 A.2d 3 (1973).

313. Spevack v. Klein, 385 U.S. 511 (1967) (holding that assertion of the privilege in itself cannot be penalized with discipline).

314. *E.g.*, *In re* Snook, 94 Idaho 904, 499 P.2d 1260 (1972); Kentucky State Bar Ass'n v. Taylor, 516 S.W.2d 871 (Ken. 1974) (misdemeanor must be serious and involve dishonesty or stealing).

ment or other severe discipline is probable,[315] but definitions and severity of criminal conduct vary greatly from one jurisdiction to another.

Counsel should, therefore, examine the criminal conduct involved with a view toward demonstrating why, even if proved, it does not show the respondent's unfitness to practice law, or at least not a permanent unfitness.

If a lawyer is to serve a jail or prison term, it will probably be in his interest to reach a disposition of any disciplinary matter before execution of the sentence so that any period of disbarment or suspension will run concurrently with his incarceration, when he cannot practice law anyway.

*3. Conduct Involving Moral Turpitude.*—The courts have almost universally held that any action involving "moral turpitude" will justify discipline, irrespective of whether the conduct violates a specific statute or provision of the Code.[316] Agreement is not so widespread, however, on what moral turpitude *is,* or what conduct shows it. Respondent's counsel should be prepared to argue that moral turpitude indicates very serious transgressions indeed, and the label should not lightly be attached to relatively innocuous acts, even criminal acts. Moral turpitude has been defined as an act of "baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."[317] Theft, deceit, and other forms of dishonesty, especially when they violate a lawyer's fiduciary duties to a client, are generally found to involve moral turpitude, even if little or no actual damage occurs.[318] Serious crimes, even unrelated to the practice of law, without injury to

315. DR 1-102(A)(3) forbids lawyers to engage in "illegal conduct involving moral turpitude."

316. *E.g.,* Grievance Comm. of Hartford County Bar v. Broder, 112 Conn. 263, 152 A. 292 (1930).

317. *In re* McNeese, 346 Mo. 425, 142 S.W.2d 33 (1940); Tradue & General Ins. Co. v. Russell, 99 S.W.2d 1079, 1084 (Tex. Ct. App. 1936); *cf.* Wallis v. State Bar, 21 Cal. 2d 322, 131 P.2d 531 (1943) (anything contrary to justice, honesty, modesty, or good morals). Cases such as these illustrate the considerable variation in the definitions of moral turpitude. Courts that use a broad and loose standard, like that in the *Wallis* decision, should be encouraged to apply a more accurate and fair definition similar to the one set forth in the text.

318. *E.g.,* Stephens v. State Bar, 19 Cal. 2d 580, 122 P.2d 549 (1942) (recognizing dishonesty and moral turpitude as separate but equally serious offenses). *But cf. In re* Doe, 95 F.2d 386 (2d Cir. 1938) (apparently limiting disbarable conduct to such egregious professional conduct as subornation or perjury, bribery of jurors, forgery, and embezzlement of client funds).

any client, and without elements of deceit, are usually found to demonstrate moral turpitude.[319] The condition, however, is not necessarily a permanent one, and rehabilitation may be shown to avoid discipline or to support reinstatement.[320] Moreover, it has been observed that the concept of moral turpitude depends upon the state of public morals and thus may vary according to the times.[321]

In some situations it may be unavoidable and even productive to concede moral turpitude at the time of the offense, when the conduct is so evil that to argue the point would render the entire defense unworthy of belief and the only goal is to prevent permanent disbarment by emphasizing contrition and laying the groundwork for future reinstatement on the grounds of rehabilitation. In practice, the question of moral turpitude becomes most important in the marginal cases and ambiguous situations—for example, petty theft, drunk driving, failure to file tax returns overzealous representation, and commingling of funds without misappropriation.[322] Defining the phrase as synonymous with

319. *E.g., In re* Rothrock, 16 Cal. 2d 449, 106 P.2d 907 (1940). *But cf. In re* Burch, 73 Ohio App. 97, 54 N.E.2d 803 (1944) (moral turpitude does not necessarily exist merely because a crime has been committed).

320. *E.g.,* Wetllin v. State Bar of Cal., 24 Cal. 2d 862 151 P.2d 255 (1944) (noting that the courts are interested in the "regeneration" of disbarred lawyers); *In re* Smith, 220 Minn. 197, 19 N.W.2d 324 (1945).

321. *E.g., In re* Hatch, 10 Cal. 2d 147, 73 P.2d 885 (1937). This is a most important principle of which respondent's counsel to be aware, since it may enable him to avoid damaging precedent or to avoid discipline that has become acceptable by usage or legislation.

322. The variety of conduct that courts have found to involve moral turpitude *vel non* are so numerous that an exhaustive review is beyond the scope of this article. A selection of interesting examples follows: Segretti v. State Bar, 15 Cal. 3d 878, 544 P.2d 928, 126 Cal. Rptr. 793 (1976) (deceitful activities on behalf of the reelection of the President of the United States, two years suspension and probation for three subsequent years); Paine v. State Bar of Cal., 14 Cal. 2d 150, 93 P.2d 103 (1939) (misleading probate court without damage, six months suspension); Johnson v. State Bar of Cal., 10 Cal. 2d 212, 73 P.2d 1191 (1937) (contempt, disbarred); *In re* Hatch, 10 Cal. 2d 147, 73 P.2d 885 (1937) (conviction for authorizing, directing, or aiding the unlawful sale of securities, suspension); Wood v. State Bar of Cal., 6 Cal. 2d 533, 58 P.2d 1280 (1936) (writing check on account with no funds, six month suspension); *In re* Ellis, 371 Ill. 113, 20 N.E.2d 96 (1939) (improper campaign contributions paid from corporate client's fee to tax official, two year suspension); *In re* Maley, 363 Ill. 149, 1 N.E.2d 495 (1936) (intoxication in court, six months suspension); *In re* McNeese, 346 Mo. 425, 142 S.W.2d 33 (1940) (sale of opium, disbarred); *In re* Faubion, 101 S.W.2d 103 (Mo. App. 1937) (prosecutor's sexual misconduct with defendant's wife influencing disposition of defendants case, three months suspension); *In re* Appel, 260 A.D. 925, 23 N.Y.S.2d 58 (1940) (false statement on marriage license application, one year suspension); *In re* Enright, 160 Or. 313, 85 P.2d 359 (1938) (driving while intoxicated, six months suspension); *In re* Pearce, 103 Utah 22, 136 P.2d 969 (1943) (conspiring to maintain houses of ill fame and gambling, disbarred); State Bd. of Law

depravity and vileness may avoid attachment of the damaging label.

If disbarment or lengthy suspension is unavoidable, counsel may be able to agree upon a stipulated disposition that excludes, at least, any explicit finding of moral turpitude, even though the presence or absence of the label will not be controlling at the time of application for reinstatement.

*4. Misconduct Unrelated to the Practice of Law.*— Discipline can be and often is imposed for conduct unrelated to the practice of law, and it is no defense that the transgression was not committed in the respondent's professional capacity.[323] As previously noted, not only are competency and honesty in professional activities required of members of the bar, but a "fair character" generally is expected as well. Despite some occasional exceptions, lawyers have historically thought of themselves as rather special ornaments of civilization, and the organized bar has been rather consistently jealous of that image.[324] The question ultimately comes down to the troublesome philosophical one: Can a bad man be a good lawyer?—or judge? The query seems largely irrelevant, but too intriguing and persistent to ignore. Can a bad man be a good surgeon?—or poet? Of course. Some of the best have been. If we concede that proved *dishonesty* disqualifies because of a lawyer's considerable fiduciary power over client's assets and his ability to taint the administration of justice in actual cases, and we eliminate proved liars and thieves and cheats, then it seems the bar ought to go no further, and, with perhaps a few exceptions, we serve neither the bar nor the public by eliminating members whose misbehavior is neither professional nor dishonest. "Moral turpitude" is after all a hopelessly vague and unmanageable criterion for evaluating fitness. No one knows what it means—or rather *everyone* knows what it means to him, and to everyone it means something different. So we ought not to disbar for nonprofessional conduct not involving dishonesty, reserving only extreme exceptions, such as Wall, who

Exam. v. Spriggs, 61 Wyo. 70, 155 P.2d 285 (1945) (writing pamphlet critical of supreme court, six months suspension).

323. *E.g.*, Supreme Court Comm. on Professional Conduct v. Jones, 286 Ark. 1106, 509 S.W.2d 294 (1974) (per curiam) (wilfully and knowingly attempting to evade payment of taxes); *In re* Bogart, 9 Cal. 3d 747, 511 P.2d 1167, 108 Cal. Rptr. 815 (1973) (conduct committed before lawyer was admitted to the bar); Florida Bar v. Hefty, 213 So. 2d 422 (Fla. 1968) (sexual misconduct with stepdaughter); *In re* Wilson, 247 Ind. 409, 216 N.E. 2d 555 (1966) (per curiam) (misconduct as city councilman).

324. *See generally* J. AUERBACH, note 13 *supra.*

committed murder all but literally on the courtroom steps.[325] We ought not, but we do and we shall.

This does not mean, however, that it is a matter of indifference whether the misconduct was committed in the respondent's capacity as a lawyer. If it was, it will more directly show his unfitness to practice law. Conversely, if the act was entirely apart from the respondent's practice, it will less logically point to the necessity of his removal from the profession. This is an area in which respondent's counsel faces a particular challenge; it is important to place the focus where it should always be—on the question of whether the respondent will be a capable and honorable *lawyer*, not whether for other reasons he may invite disapprobation upon himself and, therefore, upon the profession.[326]

*5. Violations of Fiduciary Duties.*—As might be expected, a lawyer's violation of the fiduciary duties he owes to clients will usually result in relatively severe discipline, even if it is not criminal or actually damaging.[327] It may be as serious as theft of a client's funds or as minor as delay in handling a matter. Since breach of a fiduciary duty reflects directly upon the respondent's fitness to practice law, it is a frequent ground of disbarment or lengthy suspension. Conflicts of interest might be classified under this heading since they, by definition, are harmful only as they defeat or dilute a lawyer's fiduciary duty to the client.[328] Here, too, should be included the charging of exorbitant fees,[329] since the lawyer who gouges the client does so by exploiting the client's relative ignorance of what is proper, when it is the lawyer's very expertise in such matters for which the client is contracting and relying upon the lawyer. Commingling,[330] misappropriation of,

325. Sydney J. Harris has said, "Bar associations are notoriously reluctant to disbar or even suspend a member unless he has murdered a judge downtown at high noon, in the presence of the entire Committee on Ethical Practices." *Quoted in* M. BLOOM, THE TROUBLE WITH LAWYERS 157 (1968).

326. The Supreme Court seems to have placed the emphasis on this focus in cases dealing with admission to practice. *See In re* Griffiths, 413 U.S. 717 (1973) (holding that otherwise qualified persons cannot be excluded from the profession because they are not citizens); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (reversing rejection if a bar applicant on the basis of previous Communist party membership).

327. *E.g., In re* Greer, 52 Ariz. 385, 81 P.2d 96 (1938); Heavey v. State Bar, 17 Cal. 3d 553, 551 P.2d 1238, 131 Cal. Rptr. 406 (1976).

328. *E.g., In re* Glover, 176 Minn. 519, 223 N.W. 921 (1929); *In re* Blatt, 42 N.J. 522, 201 A.2d 715 (1964).

329. *E.g.,* Nebraska State Bar v. Richards, 165 Neb. 80, 84 N.W.2d 136 (1957) (discipline may be imposed for charging excessive fees). DR 2-106 forbids "clearly excessive" fees and sets forth certain general criteria for making fee determinations.

330. DR 9-102 directs that the identity of client's funds and property shall be pre-

and failure to pay over client's funds also[331] fall into this area and cover a broad spectrum of discipline depending upon whether the conduct was merely inadvertent, outright fraudulent, or anything in between.[332]

*6. Injury to Clients and Others.*—A large percentage of the more serious disciplinary cases involve theft, misappropriation, commingling, and other mishandling of clients' funds to their detriment. To these cases we may add instances of neglect or incompetence that cost the clients all or part of the reasonable expectations of their lawsuits. Add for good measure those fairly frequent cases that involve, often only secondarily or tangentially, disgruntled creditors of the respondent, from court reporters to grocers, from miscellaneous recipients of rubber checks to the Internal Revenue Service. Very frequently a money settlement of some sort is involved in the disciplinary case, and from this flows a congeries of considerations. At the outset, remember that the absence of actual injury, monetary or otherwise, is in itself not a defense to discipline.[333] Also, repayment of moneys wrongfully taken,[334] even the client's complete satisfication, will *not* foreclose disciplinary proceedings.[335] A client cannot control disciplinary proceedings any more than the victim in criminal matters can dictate whether there will be a prosecution. Nevertheless, restitution can be a most important factor either in preventing or resolving a charge of unprofessional conduct, and the matter requires close scrutiny and great care.

Respondent's counsel should be certain to extract from the client his full financial picture, because it will probably be to his advantage to be able to offer full or partial restitution of any financial losses, whether to clients or others. But two important

served. Dishonest intent need not be shown to justify discipline for commingling. *In re* Bloom, 39 Ill. 2d 250, 234 N.E.2d 775 (1968).

331. *E.g., In re* Braun, 249 A.D. 324, 292 N.Y.S. 376 (1937); *In re* Forman, 321 Pa. 47, 184 A. 75 (1936). DR 9-102(B)(4) specifically requires prompt delivery to the client of his funds or other property.

332. Here carelessness or faulty bookkeeping will not excuse such an offense. *E.g., In re* Banner, 31 N.J. 24, 155 A.2d 81 (1959). Nor is good faith per se a defense. Silver v. State Bar, 13 Cal. 3d 134, 518 1157, 117 Cal. Rptr. 821 (1974).

333. *E.g.,* New York State Bar Ass'n v. Long, 352 N.Y.S. 2d 159 (1974); *In re* Hendrick, 229 A.D. 100, 241 N.Y.S. 50 (1930).

334. *E.g.,* Smiley v. Board of Comm'rs of Ala. State Bar, 286 Ala. 216, 238 So. 2d 716 (1970); Maggart v. State Bar, 7 Cal. 2d 945, 61 P.2d 451 (1937) (repayment under pressure entitles respondent to no leniency).

335. *E.g., In re* Campbell, 108 Ariz. 200, 495 P.2d 131 (1972); Narlian v. State Bar, 21 Cal. 2d 876, 136 P.2d 553 (1943).

dangers must be remembered. First, neither respondent nor his counsel should ordinarily make an ex parte approach to a "victim" who has threatened or made an ethics complaint with an offer of payment lest this be construed as an improper attempt to forestall prosecution—in a word, bribery. Still the respondent *does* owe the client money, and the client does deserve to be paid, and there is no inescapable reason that the disciplinary machinery need be activated to accomplish this. If the injured client has other counsel the approach should, of course, be through him. If he does not, respondent's counsel is well advised to obtain other legal advice and inform another member of his firm or independent counsel of his intention to repay the injured party, so that if this issue arises neither the respondent nor counsel is left with no defense except denial of wrongdoing. If the money was wrongfully taken, it would be improper to condition its return upon the client's agreement not to press a complaint. But these can be very difficult and ambiguous situations, and when the client-victim initiates the offer to withhold complaint on condition of repayment, the respondent need not refuse to enter such a bargain. The promise not to prosecute is doubtless unenforceable in any case.[336]

Second, a program of repayment should be realistic and not commit the respondent to impossible obligations that will continue the very problems that led to his wrongdoing and will virtually force him into future questionable conduct. Respondents' financial affairs are often extremely complicated, and one of counsel's most useful functions can be to make some order of the chaos and to resolve if possible *all* potential problems, ethical and financial, in a single proceeding.

*7. Conduct Showing Disrespect for Judges and the Courts.*—Since one of the purposes of Disciplinary Rules is to protect the administration of justice and the *appearance* of justice, discipline is often imposed for conduct that might be the equivalent of contempt of court, whether in the form of disrespectful remarks or writings,[337] or disregard for, or disobedience of,

336. *In re* Craven, 204 La. 486, 15 So. 2d 861 (1944) (misconduct of offices of the court cannot be settled privately to prevent official investigation); Louisville Bar Ass'n v. Hubbard, 282 Ky. 734, 134 S.W.2d 773 (1940).

337. *E.g.,* People *ex rel.* Chicago Bar Ass'n v. Standidge, 333 Ill. 361 164 N.E. 844 (1928) (suspension for accusing appellate judges of corruptly making false findings); *In re* Bevas 225 A.D. 427, 233 N.Y.. 439 (1929) (discipline for "scandalous utterances" about judge); State *ex rel.* Dabney v. Breckenridge, 126 Okla. 86, 258 P. 744 (1927) (suspension for false article critical of court); Gross' Case, 318 Pa.143, 177 A. 767 (1935) (disbarment for reading document in court impugning court's integrity). *But cf. In re* Minnis, 56 S. Ct. 504 (1936) (order to show cause discharged when lawyer apologized for filing offensive

court orders.[338] It is well settled, however, that the inherent power to punish for contempt and the inherent power to disbar are not coterminous. Neither the grounds nor the procedural requirements for one are necessarily the same as for the other.[339] In both, however, the lawyer's duty to represent a client zealously often collides with his duty to respect and to preserve respect for the courts, and conduct in this area gives rise to some of the more troublesome disciplinary cases.[340]

Under this head may be classified such matters as suborning perjury,[341] bribery,[342] abuse of process,[343] jury tampering,[344] assisting a client to defeat justice,[345] aiding the unauthorized practice of law, and any other conduct that taints the proper operation of the judicial process.

*8. Neglect.*—Neglect and delay in handling clients' affairs are frequent sources of discipline, although there is sharp disagreement concerning whether such matters are properly a concern of disciplinary authorities.[346] Often investigation of a case of neg-

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brief); *In re* Ades, 6 F. Supp. 467 (D. Md. 1934) (lawyers may not be punished for criticizing courts so long as the criticism is not false of malicious); *In re* Huppe, 92 Mont. 211, 11 P.2d 793 (1932) (suspension not proper for calling judge "arrogant jackass" in letter absent proof the lawyer intended the statement to be circulated).

338. *E.g.* Pettiford v. State, 235 Ga. 622, 221 S.E.2d 43 (1975) (failure to comply with court's order justifies disbarment); *In re* Daly, 284 Minn. 567, 171 N.W.2d 818 (1969) (deliberately advising someone to disobey an order of the state supreme court constitutes contempt and suspension is justified); *In re* Castellano, 46 A.D.2d 792, 361 N.Y.S.2d 23 (1974) (conviction of contempt justifies censure); Ohio State Bar Ass'n v. Illman, 45 Ohio St. 2d 159, 342 N.E.2d 688 (1976) (violation of court order forbidding attorney to practice law justifies disbarment).

339. There are important distinctions between the grounds and proceedings for contempt and those for discipline. *See, e.g.*, Cammer v. United States, 350 U.S. 399 (1955) (a lawyer is not an "officer of the court" as used in the contempt statute, 18 U.S.C. § 401(a)); *cf. In re* Hanson, 134 Kan. 165, 5 P.2d 1088 (1931).

340. *See, e.g.*, Loza v. State, 263 Ind. 124, 325 N.E.2d 173 (1975). See *M. Freedman, supra* note 64, at 9-24.

341. Use of false or perjured testimony is, of course, condemned. Geders v. United States, 425 U.S. 80 (1976); *In re* Troy, 505 F.2d 746 (1st Cir. 1974), *cert. denied*, 420 U.S. 982 (1975).

342. *But cf. In re* Chase, 51 A.D.2d 833, 379 N.Y.S.2d 551 (1976) (an offer to repay mishandled funds was found *not* to be professional misconduct).

343. *E.g., In re* Sarelas, 360 F. Supp. 794 (N.D. Ill. 1973), *aff'd*, 497 F.2d 926 (7th Cir. 1974).

344. *E.g., In re* Osborn, 376 F.2d 808 (6th Cir. 1967).

345. *E.g.*, Loza v. State, 263 Ind. 124, 325 N.E.2d 173 (1975); Smith v. State, 523 S.W.2d 1 (Tex. 1975).

346. *See* DR 6-101(A)(3) (addressing the issue of competency generally; Annot., 96 A.L.R. 2d 823 (1964). *See also* Committee on Professional Respondibility, *Committee Report: The Disposition of Cases of Professional Incompetence in the Grievance System,*

lect reveals other similar instances,[347] and other problems such as ill health, alcoholism or other chemical dependency, or financial difficulties that have caused the lawyer to take on more work than he can handle. Publication of news regarding a disciplinary proceeding against a named lawyer often can bring forth new complaints from other clients as well. Such cases may also involve merely poor communications between lawyer and client, though it is common, too, for the lawyer to misrepresent the status of a neglected case, which elevates mere neglect into deceit.[348]

Many neglect cases are quickly remedied after a communication from disciplinary authorities and result in no public or published action. But even private warnings or reprimands in this area can return to haunt the lawyer in later disciplinary proceedings.[349]

The wrongful withdrawal from employment without adequately protecting and preserving the client's rights and remedies may be seen as a form of neglect.[350] It is one that often involves fee disputes.[351]

Neglect is, of course, a common ground for civil malpractice litigation,[352] and because of the existence of this remedy, as well as the limited resources of disciplinary agencies, it is quite arguable that a civil action is the better forum for resolution of neglect allegations. At the same time, however, removal of neglect cases from the realm of discipline might encourage substantially more malpractice litigation and thus is not necessarily good for the individual lawyer or the profession.

*9. Incompetence: Lack of Physical or Mental Capacity.*—Closely related to the problems of neglect and delay is the question of a lawyer's competence, which may result from

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32 REC. ASS'N B. CITY N.Y. 130 (1977).

347. *E.g.*, Schullman v. State Bar, 16 Cal. 3d 631, 547 P.2d 447, 128 Cal. Rptr. 671 (1970); Ridley v. State Bar, 6 Cal. 3d 551, 493 P.2d 105, 99 Cal. Rptr. 873 (1972).

348. *E.g.*, *In re* Parise, 53 A.D.2d 272, 385 N.Y.S.2d 805 (1976).

349. *E.g.*, People v. James, 180 Colo. 133, 502 P.2d 1105 (1972).

350. EC 2-32:

> A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client . . . [and should give] due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed . . . .

*Id. See also* DR 2-110.

351. EC 2-32: "Further, he should refund to the client any compensation not earned during the employment."

352. See generally R. MALLEN & V. LEVIT, *supra* note 242 at § 82.

ignorance, ill health, or a combination of such factors. Each such case involves potential malpractice liability, and respondent's counsel must keep an eye on the civil consequences of what he does in the disciplinary action. At the same time, moral turpitude is ordinarily not involved,[353] and often strongly in favor of leniency conditioned upon resolution of the physical, mental, or intellectual defect. The dispositions of such cases are as various as the physical and mental illnesses to which men are prey, and respondent's counsel can often be most creative in fashioning programs for the disabled lawyer.

*10. Lack of Expertise.*—Lawyers are not only expected to be able to handle clients' affairs competently, but to know when they cannot, and to obtain assistance in those situations.[354] Given the extraordinary diversity of the law, the proliferating volume of statutes, regulations, and judicial opinions, and the trend toward greater and more narrow specialization, it is not surprising that more and more lawyers are truly capable of handling fewer and fewer matters with extreme expertise. Even a healthy, honest, and diligent lawyer may badly mishandle a case, and it is in this area, of course, that the disciplinary function interacts most intimately with problems of the malpractice action.[355] Arguably such matters should not concern disciplinary authorities at all, but be left to education and admissions bodies and civil litigation.

Some courts have construed a lawyer's youth[356] or inexperience[357] as a mitigating factor in such cases. And it has been held that a lawyer's mere ignorance of the law is not ground for discipline if he acted in good faith.[358]

*11. Advertising and Solicitation.*—The Code deals at length with advertising and solicitation,[359] but in the wake of the Supreme Court's recent and continuing expedition into this

353. *E.g., In re* Fahey, 8 Cal. 3d 842, 505 P.2d 1369, 106 Cal. Rptr. 313 (1973) (psychological problems may negate element of improper intent or moral turpitude).

354. DR 6-101(A): "A lawyer shall not: (1) handle a legal matter which he knows . . . he is not competent to handle, without associating with him a lawyer who is competent to handle it."

355. *See* R. MALLEN & V. LEVIT, *supra* note 242, at §§ 7-8.

356. *E.g.*, Hall v. State Bar, 12 Cal. 2d 462, 85 P.2d 870 (1939); *In re* Cummings, 201 La. 439, 9 So. 2d 614 (1942); *In re* Shenker, 162 Or. 681, 94 P.2d 724 (1939).

357. *E.g. In re* Sonderlick 265 A.D. 394 N.Y.S.2d 771 (1943), *aff'd*, 292 N.Y. 555, 54 N.E.2d 684 (1944).

358. Friday v. State Bar, 23 Cal. 2d 501, 144 P.2d 564 (1944).

359. ABA CODE, CANON 2. This Canon was revised by the American Bar Association in August 1977 after the U.S. Supreme Court decided Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

area,[360] it is not profitable to say very much about what the law now is. When such issues arise, however, respondent's counsel should examine carefully not only the protection of free speech, but the lawyer's duty to inform the public and to make legal services available as justification or mitigation of any alleged improper actions.[361] Professor Freedman has argued that advertising and solicitation should not only be eliminated as grounds for disbarment, but because of their benefits to certain potential litigants should be encouraged. The Code, he writes, "takes a schizophrenic position on solicitation and advertising."[362] Another, and perhaps better, view is that advertising and solicitation should be grounds for discipline only when there is either injury or violation of some other Disciplinary Rule or statute, or when the advertising or soliciting is demonstrably false or misleading, for only in these cases can sanctions have a beneficial effect.

### C. *Collateral Consideration*

It has been previously noted that the treatment of a given instance of conduct in the criminal courts usually has no automatic effect upon its use for disciplinary purposes, but that the disposition in the other forum will carry some and perhaps great weight with the disciplinary authority. Certain other collateral aspects and consequences of misconduct and discipline arise with some frequency and deserve brief mention.

*1. Conduct Remote in Time; Statutes of Limitations, Laches, and Staleness.*—It is no defense to a disciplinary charge that a statute of limitations prevents criminal prosecution for the same conduct,[363] and generally there are not statutes of limitations for ethical violations.[364] Likewise, there is no defense of laches.[365] At the same time, however, if the misconduct is very

360. See cases cited and discussed in note 55 *supra.*

361. *See In re* Primus, 436 U.S. 412 (1978); Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

362. Freedman, *Advertising and Soliciting: The Case for Ambulance Chasing,* in VERDICTS ON LAWYERS 100 (R. Nader & M. Green eds. 1976).

363. *E.g.,* United States v. Parks, 93 F. 414 (C.C.D. Colo. 1899); *In re* Bailey, 30 Ariz. 407, 248 P.29 (1926); *In re* Weed, 26 Mont. 507, 68 P. 1115 (1902); North Carolina State Bar v. Temple, 2 N.C. App. 91, 162 S.E.2d 649 (1968).

364. *E.g., In re* Bossov, 60 Ill. 2d 439, 328 N.E.2d 309 (1975) (statute of limitations held inapplicable to disciplinary proceedings); *In re* Tracy, 197 Minn. 35, 266 N.W. 88 (1936) (holding statute of limitations in disbarment proceedings an unconstitutional invasion by the legislature of the judiciary's exclusive power to regulate the profession).

365. *E.g.,* Bar Ass'n v. Posner, 275 Md. 250, 339 A.2d 657 (1975).

remote in time the *analogy* to statutes of limitations may be useful, and the argument that these should be no more a perpetual threat of discipline than of criminal prosecution.[366] Unfairness, amounting perhaps to a denial of due process, may arise in prosecuting a very old charge if the respondent's memory has faded, witnesses have died or moved, or documents have been lost or destroyed.[367] Delay in accusation may also reflect on the credibility of the complainant.[368]

If the alleged misconduct predated a change in the Canon Disciplinary Rules, or judicial construction of professional responsibility, imposition of discipline may be ex post facto.[369] Or the moral or legal "climate" may have changed so that what is today condemned was acceptable or at least not ordinarily prosecuted at the earlier time, or vice versa.[370] Moreover, if the misconduct was long ago it may be relatively easy to show rehabilitation by the time of the disciplinary proceedings, assuming the respondent's conduct has been exemplary in the meantime,[371] and especially if he corrected any damage that might have been done by his wrong.

*2. Conduct Adjudicated in Different Proceedings; Double Jeopardy, Res Judicata, Collateral Estoppel.*—Aside from the general rule that criminal convictions are conclusive in disciplinary proceedings of the facts underlying them because they were proved by the high standard beyond a reasonable doubt, there are no automatic consequences in disciplinary proceedings of adjudication of the same facts in other proceedings, or vice versa. As

366. *But cf.* Caldwell v. State Bar, 13 Cal. 3d 488, 531 P.2d 785, 119 Cal. Rptr. 217 (1975) (despite nine year delay and death of respondent's wife, the disciplinary action was not foreclosed); *In Re* Bossov, 60 Ill. 2d 439, 328 N.E.2d 309 (1975) (nine year delay was not found dispositive in view of length of record and respondent's numerous requests for continuances); *In re* Weinstein, 254 Or. 392, 459 P.2d 548 (1969) (twenty seven month delay after filing of charges against the accused was held not to be an unreasonable delay when protection of the public was of prime concern as in disciplinary proceedings).

367. Tennessee Bar Ass'n v. Berke, 48 Tenn. App. 140, 344 S.W.2d 567 (1960) (doctrine of laches held applicable when during a nine year delay, not attributable to the fault of respondent, the accused sustained a good reputation as a lawyer). *Compare In re* Ratner, 194 Kan. 362, 399 P.2d 865 (1965); *In re* Williams, 233 Mo. App. 1174, 128 S.W.2d 1048 (1939); and State v. Haggerty, 241 Wis. 486, 6 N.W.2d 203 (1942) (taking staleness of conduct into account) *with In re* Farris, 229 Or. 209, 367 P.2d 387 (1961) (holding that disbarment proceedings were not barred by the doctrine of laches).

368. Yokozeki v. State Bar, 11 Cal. 3d 436, 521 P.2d 858, 113 Cal. Rptr. 602 (1974).

369. Kelson v. State Bar, 17 Cal. 3d 1, 549 P.2d 861, 130 Cal. Rptr. 29 (1976).

370. The recent developments in advertising are an example. See *In re* Hatch, 10 Cal. 2d 147, 73 P.2d 885 (1937), for the proposition that the concept of moral turpitude changes with the state of public morals.

371. *E.g., In re* Kreamer, 14 Cal. 3d 524, 535 P.2d 728, 121 Cal. Rptr. 600 (1975).

Professor Wolfram points out elsewhere in this issue,[372] no case appears to have given res judicata effect to a disciplinary finding in a later civil lawsuit, and at least one court has observed that such an effect would undermine the right to jury trial.[373] It might be observed, however, that since the burden of proof in disciplinary matters is ordinarily clear and convincing evidence, or a similar standard higher than a mere preponderance, proof of a disciplinary charge could logically be accepted in a later civil action, though a failure of proof could not; and, conversely, the failure to prove an operative fact in a civil lawsuit with its lower burden of proof could be conclusive in a later disciplinary action.

If we accept the widespread pronouncement that discipline is neither criminal nor penal,[374] then the double jeopardy proscription of the Constitution will not bar discipline after a criminal conviction or a civil judgment.[375] If, however, we take the *Ruffalo* language seriously and agree that discipline is punitive and at least *quasi*-criminal,[376] then an argument for double jeopardy can be made. Apparently, no case has so held; and it may well be that pursuit of this argument will only weaken the disciplinary respondent's pursuit of the constitutional protection attached to a criminal proceeding, since it would follow that discipline could not follow a criminal conviction or vice versa.

It has been held that the record of a civil lawsuit in which the misconduct occurred is admissible in the disciplinary proceeding;[377] and a lawyer's testimony in another proceeding is generally admissible against him for disciplinary purposes,[378] but at least one court has held that evidence of a criminal acquittal on the same conduct is not admissible.[379]

*3. The Effects of Discipline in One Jurisdiction upon the Right to Practice Elsewhere.*—There is great divergence among

372. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C.L. REV. 281, 298 (1979).

373. Rachel v. Hill, 435 F.2d 59 (5th Cir. 1970).

374. See cases cited in notes 83-94 and accompanying text *supra*.

375. *E.g.*, Bluestein v. State Bar, 13 Cal. 3d 162, 529 P.2d 599, 118 Cal. Rptr. 175 (1974).

376. *In re* Ruffalo, 390 U.S. 544, 550-51 (1968). *Accord, In re* Jacques, 401 Mich. 516, 258 N.W.2d 443 (1977) (some but not all criminal protections are available).

377. *E.g., In re* Ebbs, 150 N.C. 44, 63 S.E. 190 (1908); *cf.* People *ex rel.* Chicago Bar Ass'n v. Amos, 246 Ill. 299, 92 N.E. 857 (1910) (record of the prior action is not in itself sufficient).

378. *E.g., In re* Ellis, 371 Ill. 113, 20 N.E.2d 96 (1939).

379. *In re* O'Brien, 95 Vt. 167, 113 A. 527 (1921). See generally Annot., 161 A.L.R. 907.

the jurisdictions concerning the effect they will give imposition of disbarment or discipline of members of their bars in other jurisdictions.[380] If a general rule is to be discerned, it is probably that the actions of another disciplinary authority will be given careful consideration but not automatically binding effect.[381] Some courts, however, have felt compelled to follow another jurisdiction's lead under the full faith and credit clause of the Constitution.[382]

The Supreme Court has held that state disciplinary rulings are not binding upon federal courts, which must make their own judgments. The Court has held, however, that as a general rule a federal court should depart from a state's action only when due process of the interests of justice require.[383] As with the neglected *Ruffalo* decision, the Supreme Court's words in this regard have not enjoyed universal deference in the lower courts.[384] At least one state court, however, has refused to discipline solely on the basis of a federal disbarment.[385]

Since many lawyers are admitted in at least one state and in federal court, respondent's counsel should search carefully for each jurisdiction's policy in this regard. The secondary effect of discipline may be of equal or even greater concern than the discipline imposed in the first jurisdiction to act.

### *D. The Character, Motivations, and Position of Respondent as They Relate to the Misconduct*

Both the gravity of the wrong and the nature of the discipline may be appreciably affected by the state of mind and intentions of the respondent, the reasons for his act or omission, as well as his general character, conduct, and reputation. For good or ill the following factors will often play a part.

*1. The Respondent's Prior Disciplinary Record.*—As in

380. *See* J. CLARK & C. WOLFRAM, PROFESSIONAL RESPONSIBILITY 108-15 (1976).

381. *E.g.*, Florida Bar v. Wilkes, 179 So. 2d 193 (Fla. 1965), *cert. denied sub nom.*, Wilkes v. Florida Bar, 390 U.S. 983 (1968).

382. *E.g.*, *In re* Leverson, 195 Minn. 42, 261 N.W. 480 (1935); Copren v. State Bar, 64 Nev. 364, 183 P.2d 833 (1947).

383. Theard v. United States, 354 U.S. 278 (1957).

384. *Compare In re* Abrams, 521 F.2d 1094 (3d Cir. 1962) and *In re* MacRay, 298 F. Supp. 170 (D. Alas. 1969) *with In re* Rhodes, 370 F.2d 411 (8th Cir. 1967) and *In re* Alker, 307 F.2d 880 (3d Cir. 1962).

385. *In re* Conley, 188 Minn. 575, 248 N.W. 41 (1933). *See generally* Note, *The Intrusion of Federal Immunity Protection Into State Disbarment Proceedings*, 7 LOY. CHI. L.J. 58 (1976).

criminal cases, the accused's previous record can and usually will be used against him at least for purposes of disposition, if not as evidence of culpability for the offense on trial.[386] Unlike the criminal jury trial, in disciplinary matters the fact-finding body is ordinarily the same as it was in any previous proceedings; though the personnel may change, the disciplinary body need only refer to its own records to learn respondent's record. Some jurisdictions specifically provide for the use of a previous record against respondent.[387] If the respondent has no record, this fact, of course, should be urged by respondent's counsel as a favorable factor.[388] If there is a previous record, a number of considerations may come into play.

If respondent is on probation at the time of the new offense, he will ordinarily be hard put to avoid suspension or worse. This is particularly true if the previous offense is similar to the new one, since he obviously has not learned the necessary lesson from the prior proceeding and probation has not been successful. It may be, however, that even this can be turned to advantage, or at least mitigated, if it can be demonstrated that the original probationary conditions are, in effect, at fault rather than respondent. When, for example, the offense is neglect of client's affairs and respondent is an alcoholic, but this condition was not diagnosed or not properly accounted for in the previous proceedings, it may persuasively be argued that a proper and well-supervised treatment program is more suitable than suspension or disbarment. Similarly, if the problem is financial, failure to pay taxes or to pay creditors who were the complainants in the previous proceeding, it may be that the original terms of payment or restitution were impossible or unrealistic and more suitable arrange-

386. *E.g.*, Selznick v. State Bar, 16 Cal. 3d 704, 547 P.2d 1388, 129 Cal. Rptr. 108 (1976).

387. *E.g.*, MINN. R. ON LAWYERS' PROFESSIONAL RESPONSIBILITY 19(b):

> (1) Conduct previously considered. Proceedings under these Rules may be based upon conduct considering in previous lawyer disciplinary proceedings that discipline was not warranted or that the proceedings should be discontinued after the lawyer's compliance with conditions.
>
> (2) Previous finding. A finding by a Panel or equivalent or by a court in the previous proceedings that a lawyer committed conduct warranting reprimand, probation, suspension, disbarment, or equivalent is, in proceedings under these Rules, prima facie evidence that he committed the conduct.
>
> (3) Previous discipline. The fact that the lawyer received reprimand, probation, suspension, disbarment, or equivalent in the previous proceedings is admissible in evidence in proceedings under these Rules.

388. *E.g.*, Toll v. State Bar, 12 Cal. 3d 824, 528 P.2d 35, 117 Cal. Rptr. 427 (1974); *In re* Weaks, 274 Ky. 194, 118 S.W.2d 525 (1938).

ments may be offered as an alternative. Obviously, it will help if the respondent or his counsel, rather than a complainant, brought the problem to the board.

If the previous offense (for example, neglect of cases) is entirely different from the new one (for instance, commingling of funds) there will not be such an obvious implication that the respondent committed the new wrong while on clear notice of its impropriety. But if the offenses are identical or similar, and serious, involving moral turpitude, counsel will be wise to prepare the respondent to accept a suspension as an alternative to disbarment, rather than striving unrealistically for continued probation. Urging continued probation may tend to show, or be construed by the disciplinary authority as showing, an insufficient realization of the seriousness of the misconduct, which in itself may call for sterner measures.

Quite often lawyers react inappropriately to their first encounter with disciplinary authorities and thus create unnecessary complications for later proceedings. Often the respondent does not retain counsel, admits wrongdoing without adequate explanation, accepts conditions or probation without sufficient study or objective evaluation of his ability to comply, and proceeds to violate those conditions because he has not addressed or solved the problem that led to the misconduct. Relatively minor derelictions are often the result of intractable character traits or persistent conditions, such as impecuniousness or alcoholism, both of which are mutually sustaining with *other* problems such as marital discord and overwork.[389] A probationary period during which these are not resolved is not a "good deal" for the respondent, but often an invitation to disaster. Respondent's counsel must, without being patronizing or officious, diagnose these problems and protect the respondent so far as possible from recurrence. If the respondent already has a record, then it may be possible to demonstrate that the repeated offenses were beyond his control, but will be arrested by a newly proposed and more efficacious probationary period. It is often a matter of saving the respondent, and at the same time his family, clients, and creditors, from himself.[390]

In summary, a prior record is an obstacle, but not an automatic basis for suspension or disbarment.

389. *E.g., In re* Nesselson, 35 Ill. 2d 454, 220 N.E.2d 409 (1966).
390. *See, e.g., In re* Boyle, 47 N.J. 58, 219 A.2d 329 (1966).

*2. The Respondent's Good Works, Distinguished Service, and Character.*—The converse of a bad prior record is, of course, a good record, and this may go beyond a mere lack of previous discipline. If the respondent has given unusual service in public office, to the bar or other organizations, to indigent clients, or otherwise, this should militate in his favor.[391] If his continued service depends on retention of his license to practice law, this is clearly a reason for avoiding suspension or disbarment. Even if his good works are totally unrelated to the law, however, for instance, to a church, or a charitable organization, this should be demonstrated as evidence of his good character. It may be that the time or money devoted to other laudable purposes, for example, to indigent clients, caused or contributed to the misconduct such as neglect of other files, which would clearly mitigate culpability.

No matter what the type of misconduct, counsel should explore with respondent any source of favorable character evidence and prepare to call witnesses or introduce letters or affidavits to this effect.[392] Two caveats, however, should be made. First, bar counsel's right to cross-examine may enable him to exclude hearsay evidence. Second, by putting the respondent's character in issue counsel may open the door to damaging matters otherwise inadmissible.[393]

*3. Illness: Physical or Mental.*—An illness of one sort or another very often lies behind, or among, the elements of misconduct, at least if "illness" is defined broadly to include such things as alcoholism and other chemical dependencies, neuroses as well as psychoses, senility, cancer, heart ailments, and other debilitating diseases that may *not* affect a lawyer's mental capacity for his tasks, but diminish his physical stamina.

Sickness as such is not a defense to a disciplinary charge,[394] though quite clearly its role may have several effects in the proceeding. It may negative the element of intent and thus militate

391. *E.g.*, Florida Bar v. Goodrich, 212 So. 2d 764 (Fla. 1968).

392. *E.g.*, *In re* Landon, 319 S.W.2d 553 (Mo. 1959).

393. *See* Michelson v. United States, 335 U.S. 469 (1948) (admissibility of rebuttal to character evidence in a criminal case).

394. *E.g.*, *In re* Duggan, 17 Cal. 3d 416, 551 P.2d 19, 130 Cal. Rptr. 715 (1976) (psychosis); Iowa State Bar v. Toomey, 236 N.W.2d 39 (Iowa 1975) (illness not affecting the mind); *In re* Chmelik, 203 Minn. 156, 280 N.W. 283 (1938) (lack of mental ability); Columbus Bar Ass'n v. Edwards, 11 Ohio St. 2d 171, 228 N.E.2d 626 (1967) (lack of mental ability); *In re* Walker, 254 N.W.2d 452 (S.D. 1977) (alcoholism).

against the existence of moral turpitude;[395] it may be quite remediable and thus foreclose the need for disciplinary sanctions, substituting instead medical supervision;[396] it may impose severe financial burdens on the lawyer that in turn may tempt him toward defalcation; it will almost certainly command a certain sympathy from the disciplinary authority,[397] provided it is a genuine illness and not crassly exploited for the very purpose of arousing sympathy.

Alcoholism is doubtless the most common medical affliction of lawyers, almost, as reputedly with poets, an occupational hazard. Respondent's counsel must be alert to detect its presence. Drunkenness will often not readily be admitted and will not automatically engender sympathy. It may indeed have the opposite effect on anyone uninitiated in the science and subtleties of alcoholism and may be seen as misconduct in itself. Courts and legislatures have recently begun to remove the criminal label from alcoholism and its effects,[398] and some jurisdictions at least have made accommodation for it in their disciplinary procedures. Minnesota, for example, has a provision for the stay of proceedings provided the lawyer complies with specified reasonable conditions.[399] While it does not explicitly mention alcoholism, this rule allows postponement of disciplinary proceedings until alcoholism can be diagnosed, treated, and perhaps arrested; and it may allow a continuation of or a return to practice without public humiliation.

Advanced age may be taken as a mitigating factor in appropriate cases,[400] and an occasional decision recognizes things such as personal and financial problems as mitigating.[401]

*4. The Respondent's Reliance Upon Legal Advice or Research; Ignorance, Mens Rea, and Good Faith.*—Occasionally misconduct will be alleged when the lawyer had foreseen the possible ethical problem and either researched the question himself or sought independent legal advice.[402] His perception and antici-

395. *E.g In re* Fahey, 8 Cal. 3d 842, 505 P.2d 1369, 106 Cal. Rptr. 313 (1973).

396. *E.g., In re* Sherman, 58 Wash. 2d 1, 363 P.2d 390 (1961). *Contra,* St. Pierre's Case, 113 N.H. 198, 304 A.2d 88 (1973) (addiction to drugs prescribed by physician).

397. *E.g., In re* Beaubian, 257 A.D. 962, 12 N.Y.S.2d 625 (1939).

398. *E.g.,* Powell v. Texas, 392 U.S. 651 (1968); State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1909); MINN. STAT. ANN. § 340.961 (West 1977).

399. MINN. R. ON PROFESSIONAL RESPONSIBILITY 9(d).

400. *E.g., In re* Williams, 202 La. 234, 11 So. 2d 540 (1942); *In re* Williams, 233 Mo. App. 1174, 128 S.W.2d 1098 (1939).

401. *See, e.g., In re* Kinslow, 24 A.D.2d 331, 266 N.Y.S.2d 190 (1966).

402. *E.g.* Sheffield v. State Bar, 22 Cal. 2d 627, 140 P.2d 376 (1943).

pation of the problem, and attempt to resolve it correctly, will usually be in his favor, especially if he acted according to the advice he received. This will not necessarily be an absolute defense, however,[403] and if the respondent acted *against* the advice he was given, it may militate against him.[404] If he did so in good faith this should not be held against him, at least if reasonable men could differ on the proper course of action.

In many cases the act will have been done in good faith, or at least in ignorance of the specific ethical prohibition allegedly violated. This, too (good faith more than ignorance, of course), should mitigate the offense, since if nothing else it should negate moral turpitude.[405] As in other areas, however, including criminal liability, a lawyer may not escape consequences if he deliberately closes his eyes to what he should reasonably know is improper.[406] All of these matters relate ultimately to the question of intent, mens rea, and as in most endeavors there is a reluctance to punish the merely misguided or even negligent act.[407] In such cases, a prospective ruling, a warning, or probation will often be especially appropriate dispositions. The same may be true when the misconduct has been customarily accepted in the legal community.[408]

*5. Conflicting Duties.*—It is not uncommon for adherence to one ethical obligation to require violation of another: the duty to disclose a fraud upon a court may require breach of the attorney-client privilege, and prohibited advertising may provide important information and legal services to those who otherwise lose their remedies.[409] In such situations one element of the ethical Code may become a defense to violation of another, particularly when an informed and conscientious decision was made by a respondent aware of the conflicting loyalties, especially when the choice resulted in no profit or benefit to the respondent himself. These situations require careful balancing of two or more impor-

403. *Id.;* Hall v. State Bar, 12 Cal. 2d 462, 85 P.2d 870 (1938) (inexperienced colleague).

404. *E.g.,* LaDuca, 62 N.J. 133, 299 A.2d 405 (1973).

405. *Contra,* Jackson v. State Bar, 15 Cal. 3d 372, 540 P.2d 25, 124 Cal. Rptr. 185 (1975) (ignorance of ethical duty no defense to its violation and does not negate moral turpitude).

406. *See, e.g., In re* Schneider, 22 A.D.2d 231, 254 N.Y.S.2d 836 (1964); *In re* Aronson, 18 A.D.2d 53, 238 N.Y.S.2d 333 (1963); *In re* Droker, 59 Wash. 2d 707, 370 P.2d 242 (1962).

407. *See, e.g., In re* Hughes, 186 Minn. 204, 242 N.W. 711 (1932).

408. *In re* Esquire, 267 A.D. 780, 45 N.Y.S.2d 472 (1944). *Contra, In re* Finley, 261 N.W.2d 841 (Minn. 1978); *In re* Wines, 370 S.W.2d 328 (Mo. 1963).

409. *See generally* M. FREEDMAN, note 64 *supra;* J. LIEBERMAN,NOTE 55 *supra.*

tant interests. An intelligent evaluation of the consequences of acting *other than* as the respondent did might persuasively show the subordinate importance of the allegedly violated rule. To do this effectively, of course, respondent's counsel will need a thorough knowledge of not only the Canons and Disciplinary Rules, and the Ethical Considerations and policies underlying them, but of considerations that may not be explicitly reflected in the Code at all.

Monroe Freedman has been the leading voice in what might be termed with, of course, no pejorative connotations attached, extreme adherence to one ethical duty at the expense of another. His *Lawyers' Ethics in an Adversary System* is provocative, persuasive, and arguably indispensible for lawyers confronted with such dilemmas. This manner of argument has recently been legitimatized to a considerable degree by the *Bates* decision,[410] which among other things vindicated the importance of providing legal services at the expense of the traditional prohibition against lawyer advertising. In this regard, too, it is notable that the respondents in *Bates* deliberately and knowingly violated the Code.[411] The opinion thus also represents, if tangentially, approval of conscientious violation of the Code in some circumstances. A violation, however, is not excused simply because a client or "victim" encourages, condones, or forgives it.[412]

*6. The Respondent's Profit or Loss from His Wrongdoing.*—For several reasons it may be important whether the respondent profited from his misconduct. Initially, profit or an expectation of gain will provide a motive that, though not an essential element of proof, will make the alleged misdeed more probable and perhaps less justifiable. Theft is, of course, the clearest and most common example. The need for and use of the gain will also be significant: a mere spendthrift or gambler who needs money to forestall lawsuits will deserve less sympathy, for example, than a pennyless lawyer whose child requires expensive medical treatment.[413]

410. Bates v. State Bar of Ariz., 433 U.S. 350 (1977). Also, it is noteworthy that a move to discipline Freedman for his views was begun, but came to naught. M. FREEDMAN, *supra* note 64, at viii.

411. 433 U.S. at 358.

412. Bryant v. State Bar, 21 Cal. 2d 285, 131 P.2d 523 (1943); People *ex rel.* Colorado Bar Ass'n v. Hillyer, 88 Colo. 428, 297 P. 1004 (1931); *In re* Cosgrove, 262 A.D. 887, 28 N.Y.S.2d 821 (1914); *cf.* Kentucky State Bar Ass'n v. Smith, 503 S.W.2d 482 (Ky. 1973) (action held unethical although condoned by judge).

413. *E.g.*, Egan v. State Bar, 10 Cal. 2d 458, 75 P.2d 67 (1938); *In re* Boyle, 47 N.J. 58, 219 A.2d 329 (1966).

On the other hand, it will ordinarily be greatly to the respondent's advantage if he did not profit or expect to profit, or if he actually lost, as a result of the misdeed. He may, for example, have neglected or mishandled files because he devoted inordinate amounts of time to bar functions or charitable or other commendable duties.[414] He, or more accurately both he and his client, may have been victimized by the superiority or sharp practice of adverse counsel. Or, as is so often the case, he may have been merely inept, indolent, disorganized, or ill, lacking any evil or self-serving motive.[415] These things may be serious enough in themselves to warrant discipline, but they are, or should be treated quite differently from and less severely than cupidity or deceit or any of the innumerable combinations of those two traits.

Finally, if the respondent was improperly enriched, that will doubtless have to be calculated into the disposition. Although injury to a client or others is damaging to the accused, it can be quite logically and persuasively argued that his ability to make restitution will be drastically curtailed by his removal from practice. Ironically, the larger the sum the more force this point has.[416] While this should not be taken to suggest that theft is an improper or improbable ground for disbarment, it is true that the victims of misappropriation deserve to be made whole by the respondent, and in most cases he will be best equipped to do this by pursuing his profession.[417]

*7. The Respondent's Voluntary Disclosure of the Misconduct: Voluntary Restitution or Other Remedial Measures.*—If the respondent came forward and voluntarily disclosed his violation before it was otherwise discovered or about to be discovered, this will ordinarily weigh appreciably in his favor,[418] since the very act of disclosure tends to demonstrate rehabilitation. Even absent voluntary disclosure to disciplinary authority, the respondent may have repaired any damage of his wrong, such as by repaying misappropriated funds, reimbursing exorbitant fees, or completing neglected business. There is danger, however, that remedial steps may be construed as attempts to conceal the mis-

414. *See, e.g., In re* Donovan, 108 N.H. 34, 226 A.2d 779 (1967).

415. *Id.*

416. The misappropriation of only small sums is not defense. *In re* Ruderman, 32 A.D.2d 504, 304 N.Y.S. 2d 417 (1969).

417. *See, e.g., In re* Wholey, 110 N.H. 449, 270 A.2d 609 (1970); *In re* Boyle 47 N.J. 58, 219 A.2d 329 (1966).

418. *E.g.,* Pickering v. State Bar, 24 Cal. 2d 141, 148 P.2d 1 (1944); Committee on Professional Ethics v. Sylvester, 221 N.W.2d 803 (Iowa 1974).

conduct amounting perhaps even to bribery, especially when the respondent has reason to believe his misdeed is about to be discovered.[419] The cure in such a case may be worse than the disease, and such steps should be undertaken with the greatest caution to avoid even the appearance of impropriety. At the same time, however, if someone has been damaged, restitution should not be avoided simply because of the possibility of misinterpretation. In this type of situation, it may be wise for respondent's counsel to seek advice, hypothetically if necessary, from disciplinary counsel or another lawyer. Failure to repay because the respondent feared the improper appearance might be created will, of course, probably not be received as a good excuse.

*8. The Problem of the Sole Practitioner.*—Two facts have for many years conspired to describe one of the more unpresentable aspects of lawyer discipline. First, charges of misconduct are most often brought against sole practitioners, members of small firms, or groups of loosely associated lawyers. Second, disciplinary committees and boards have historically been composed largely of more or less senior members of large and well-established firms.[420] At least the appearance of unfairness is presented here, suggesting a discriminatory elitism in disciplinary enforcement, although there are some quite good reasons why both of these conditions developed.

The sole practitioner is more likely to run afoul of several provisions of the Code simply by virtue of practicing alone. He does not have other lawyers immediately available to handle matters when he is too busy to attend to them, nor does he ordinarily have the breadth of expertise that a law firm has collectively. He often does not have the financial resources to remove temptation during hard times or to enable him to decline to take new cases when he is already overextended. He does not have the de facto supervision of partners and associates. In other words, he often has reasons for cutting corners on his work, or for being less than entirely straightforward in handling money, that do not affect members of law firms. Moreover, just as the solitary practice provides the motive for misconduct, it provides the opportunity, since no one oversees his handling of cases or money.

It has also been suggested—and no one can say whether it is

419. Generally, restitution after discovery of the misconduct is no defense. *E.g.*, Committee on Professional Ethics v. Sylvester, 221 N.W.2d 803 (Iowa 1974); State *ex rel.* Oklahoma Bar Ass'n v. Hatcher, 452 P.2d 150 (Okla. 1969).

420. *See generally* J. AUERBACH, *supra* note 13, at 43-52.

true—that members of large law firms err as often as sole practitioners, but because of their resources these firms are able to suppress the misconduct, by correcting the error, or paying the loss. Though this self-regulation may involve unethical conduct in itself, there is no way to tell how often it occurs, and it is probably irrelevant. It *is* of concern, however, in the context of the general truth that members of disciplinary boards generally come from large and distinguished law firms, for the appearance of unfairness to the sole practitioner is, or should be, important.

It is perhaps natural that members of prestigious firms should be nominated for duty on disciplinary boards, just as they are for judgeships and other positions of honor. They have established their credentials. Moreover, they have the *time* to do such work, because they have back-up personnel in the firm. There is, in other words, nothing improper per se in the widespread representation of large firms on disciplinary bodies. Yet this practice causes problems both of appearance and substance, and respondent's counsel should be alert to them.

First, the member of the large firm who always has subordinates to whom to delegate work and who has the financial stability of the firm behind him may not be able properly to appreciate the hectic professional life of the sole practitioner or the pressures working upon him. In the situation, for example, in which a respondent has neglected a file or two, it may be perhaps too easy for the senior member of a prosperous firm to say, "You shouldn't have taken the cases if you didn't have time to handle them." Or when commingling or even misappropriation of funds is the charge, the prosperous lawyer will tend not to comprehend the pressures that may have been at work on the sole practitioner.

For present purposes the point is this: respondent's counsel should remember that, although the status of being a sole practitioner does not excuse or justify unprofessional conduct, it may go far toward explaining in a sympathetic way why it occurred. Beyond that, it may suggest several aspects of the disposition. The suspension or disbarment of the sole practitioner deprives his clients of counsel, whereas a law firm could readily assign another lawyer to those files; supervision and assistance can be ordered as conditions of probation to minimize the likelihood of recurrence;[421] and the respondent's finances can be examined and overseen.

421. *E.g.*, Florida Bar Ass'n v. Thorpe, 337 So. 2d 392 (Fla. 1976).

Thus the sole practitioner may be made to appear rather more favorably than other lawyers and as entitled to a second chance. Important parts of counsel's role in these situations are, first, to make the respondent aware of and receptive to the need for supervision and other corrective measures and, second, to impress the disciplinary board with the fairness and workability of a probationary disposition designed to eliminate the causes of the misconduct.

*9. The Problem of the Judge.*—In most jurisdictions today a lawyer's becoming a judge does not preclude the lawyer-disciplinary authorities from proceeding against him, for conduct committed earlier before or after he became a judge.[422] Yet several important factors set these cases apart.

First, the enormous importance of an independent judiciary free from threat of harassment and intimidation, free to act courageously without fear of consequences, makes it essential that judges not be subject to easy accusation and conviction. The Supreme Court has quite recently recognized this in bestowing a virtually impregnable immunity from civil liability upon judges, even for malicious unwarranted actions.[423] This consideration in and of itself, apart from the merits of alleged misconduct, argues strongly against the discipline of any lawyer who is a sitting judge, except in the most extreme cases.[424]

Second, since lawyer discipline is an inherently judicial function, but judicial appointment and removal is ordinarily executive or legislative, problems of violating the separation of powers doctrine arise when the judiciary moves for discipline in this area.[425] Ironically, just as the judiciary may be accused of usurping executive or legislative power in removing a judge, it may be accused of self-protectiveness if its disposition of a complaint against a judge does not appear harsh enough, and this in turn may lead it to unfairly harsh results.

All in all it would seem best to reserve the authority to disci-

422. *E.g.*, Gordon v. Clinkscales, 215 Ga. 843, 114 S.E.2d 15 (1960); *In re* Holland, 377 Ill. 346, 36 N.E.2d 543 (1941); State *ex rel.* Nebraska State Bar Ass'n v. Conover, 166 Neb. 132, 88 N.W.2d 135 (1958); *In re* Pazlinghi, 39 N.J. 517, 189 A.2d 218 (1963). Disbarments often results more or less automatically in removal from the bench, since judges are ordinarily required to be lawyers. *E.g.*, *In re* Troy, 364 Mass. 15, 306 N.E.2d 203 (1973).

423. Stump v. Sparkman, 98 S. Ct. 1099 (1978).

424. *E.g.*, *In re* Troy, 364 Mass. 15, 306 N.E.2d 203 (1973) (extreme misconduct including perjury and carrying on an illegal business venture.

425. *Id.* The *Troy* court recognized an inherent power in the judiciary to regulate itself. 306 N.E.2d at 206-08.

pline judges to an agency altogether independent of the judicial branch, and to deny any authority over sitting judges to the lawyer-disciplinary authority. Only this way can the twin dangers of intimidation of judges and of the disrespect arising from apparent self-protection be avoided.[426]

### *E. The Respondent's Attitude and Behavior in the Disciplinary Proceedings*

More perhaps than in any other form of litigation the conduct of the respondent *in the proceeding itself* is often a factor contributing appreciably to the result in disciplinary proceedings. It is of surpassing importance that counsel explain this to the respondent and it be kept in mind in making each decision. Although general rules are not likely to be very accurate in disciplinary matters, it can be said that (1) very often a respondent will be rewarded for his cooperation, candor, and contrition, and (2) although less frequently, because of the implicit violation of the fifth amendment as construed in *Spevack v. Klein*,[427] he may be penalized for the absence of these qualities.

It certainly is fair to say that in every case, even those in which the merits of the factual allegations are directly and completely disrupted, respondent and his counsel should exhibit respect for the disciplinary authorities and cooperate with them to the extent that no corresponding disadvantage results. If *nothing* else favorable can be said for the respondent, it should at least be possible for the disciplinary body to note that he behaved professionally in the disciplinary process. Conversely, it is disastrously ironic for a respondent exonerated of the charged misconduct to be disciplined for his behavior in arriving at that result.

*1. Cooperation in the Disciplinary Process; Assertion of Technical Rights and Defenses.*—Lawyers accused of misconduct are usually angry or frightened, and are very often both. These understandable but unproductive reactions in turn very often lead to one or more immediate errors that complicate the whole course of the proceedings: an irate call, or what is worse, a letter, to the complaining client, or a suspiciously conciliatory call with perhaps a offer payment, owing or otherwise; an aggrieved call to the disciplinary authority, or a contrite and self-incriminating

426. *See generally* C. ASHMAN, THE FINEST JUDGES MONEY CAN BUY (1973); J. GOULDEN, THE BENCHWARMERS (1974); D. JACKSON, JUDGES 204-06, 392-95 (1974).

427. 385 U.S. 511 (1967).

one; or deposit of the complaint letter in the wastebasket with the hope that, like all bad things, it will go away.[428] As noted at the outset, one of counsel's most important functions is to explain the disciplinary process and law to the respondent to dispel, if possible, the fear and anger, and, above all, to place himself as a buffer between the respondent and the disciplinary authority. For—irrelevant as it may seem to a lawyer's mind—an important ingredient in the final disposition of the charge will be respondent's performance in the disciplinary proceeding itself. For this reason any respondent, any, at least charged with relatively serious misconduct, whether the charge is true or unfounded, is badly in need of informed and disinterested counsel.

This is not to say that the respondent should be advised to be obsequious or to kowtow to a disciplinary martinent, or that he should with alacrity cooperate in his own destruction; on the contrary, counsel can protect and effectively assert rights, which asserted by respondent himself would appear merely self-serving, and indeed rights of which respondent may be altogether unaware.

Moreover, there will be cases in which for reasons of self-incrimination or otherwise the respondent cannot wisely cooperate fully; but if the fifth amendment is to be asserted, or other procedures resisted or challenged, this should be done after careful evaluation of the consequences and explicitly on the advice of counsel. The respondent is in a peculiarly bad position, for example, to argue why the privilege against self-incrimination excuses a failure to answer if the assertion is challenged on the ground that the answer would not incriminate—he may well incriminate himself in the very process of refusing to do so.[429] Nor will description of the respondent's excellent character and achievements be very well received from his own mouth.

The cases show that cooperation with the disciplinary authority, which is defined to include at least respectfulness, punctuality, compliance with procedural rules, and, when possible, candid and full disclosures, often is counted in the respondent's favor.[430] Counsel, unlike the respondent himself, can achieve

428. A failure to respond to a disciplinary complaint is often construed as an admission of the charge. *E.g., In re* Hamm, 79 Wis. 2d 1, 255 N.W.2d 308 (1977).

429. *See* Hoffman v. United States, 341 U.S. 479 (1951) (holding that a party asserting the privilege against self-incrimination shall not be forced to defeat the privilege in justifying and demonstrating its applicability).

430. *E.g.*, Toll v. State Bar, 12 Cal. 3d 824, 528 P.2d 35, 117 Cal. Rptr. 427 (1974); *In re* Cummings, 201 La. 439, 9 So. 2d 614 (1942); Ferris v. Oneida County Bar Ass'n, 31

these objectives without corresponding disadvantages. It is obviously important for counsel to be fully informed of the underlying facts at once, since it is important to formulate at the outset an approach to the case—full disclosure, partial disclosure, or no disclosure. Most lawyers tend to think they can explain virtually anything to almost anyone's satisfaction, and often enough a respondent will explain himself out of one problem and into another.[431]

A careful reading of *Spevack v. Klein*,[432] and any progeny in the respondent's jurisdiction, is essential to an understanding of the competing interests and to making an informed decision on how to proceed. Confidentiality rules *may* in some jurisdictions prevent the use of incriminating statements, but this should not be relied upon absolutely. Disciplinary files, nominally confidential or not, may be vulnerable to leak or subpoena. In any event, the fifth amendment apparently does not prevent the use of unconstitutionally obtained statements for impeachment.[433]

In each case counsel should open communications at once with the disciplinary authority and explore areas of cooperation, from waiver of objections to foundation for exhibits to a stipulated disposition of the entire case. Even if agreement is not achieved the effort will ordinarily have been worthwhile. Often it will produce simplification of the case, discovery of relevant evidence, and other benefits collateral to the merits of the alleged misconduct.

2. *The Problem of Repentence.*—It has been long and widely held that repentance for his wrong is an important and even essential prerequisite to a respondent's right to continue or resume the practice of law—the first step, as it were, on the path to rehabilitation.[434] Like cooperation, it is certainly a factor worth establishing in appropriate cases. But, what of the responent who is actually innocent of the illegal or unethical conduct? Must he falsely, perjuriously, admit to an act he did not commit to establish his fitness to practice? No one would say so, of course, but that is at least occasionally the practical effect of a rule requiring

A.D.2d 283, 297 N.Y.S.2d 280 (1969).

431. This indeed was the case in *In re* Ruffalo, 390 U.S. 544 (1968), in which testimony during the disciplinary proceeding revealed the conduct upon which the discipline was ultimately based.

432. 385 U.S. 511 (1967).

433. *See* Harris v. United States, 401 U.S. 222 (1971).

434. *See generally In re* Hiss, 368 Mass. 447, 333 N.E.2d 429 (1975), abandoning the "repentance" requirement and reviewing cases on the subject in other jurisdiction.

repentance. The rule presupposes that no conviction of the innocent can occur, and from this it naturally follows that a protestation of innocence after conviction is itself wrong and false. Likewise, it follows as well that a respondent who testified to his innocence committed perjury.

The important and recent decision of the Massachusetts Court in *In re Hiss*[435] explored these and other problems of the repentance doctrine in an excellent opinion, holding that repentance, and thus an admission of guilt, was not a prerequisite to reinstatement of a lawyer disbarred following a perjury conviction. The *Hiss* case, however, is unusual in several respects, not the least of which was the enormous support for the petitioner from distinguished persons, and should certainly not be read as holding that repentance may never be considered as a factor in disciplinary matters.[436] Indeed many respondents are, or should be, contrite, and they are entitled to have that considered in their favor. The importance of the *Hiss* decision is simply that it removes repentance as an essential element and recognizes that occasionally a respondent may actually be wrongly convicted.

*3. Restitution.*—Many disciplinary cases involve misappropriation or other losses of money and property, and quite frequently income tax deficiencies are the reasons for proceedings. Obviously, repayment will be a consideration in the disciplinary disposition, and often the parties will be able to agree upon terms. Restitution is a common condition of probation or reinstatement.

A problem arises, however, when the question of restitution arises before a disciplinary charge is filed or disposition made. The misappropriating lawyer may simply have a change of heart and wish to repay the money, or the victim of the theft may threaten charges of unethical conduct unless repayment is made. In such cases several conflicting interests can come into play: self-incrimination, the appearance of bribery or improper influence on a potential complaint, for example, would militate against repayment; yet the victim *is* entitled to be made whole and the respondent is legally and morally bound to do so.

Clearly counsel can play an important role in these situations. It is important that the respondent sought legal advice in the first place and that any repayment undertaken was through counsel and with his advice. By the same token, if a decision is

435. *Id.*

436. *E.g.*, *In re* Brownstein, 253 A.D. 840, 1 N.Y.S.2d 725 (1938); *In re* Pennington, 73 Wash. 2d 601, 440 P.2d 175 (1968).

made not to make payment, upon the advice of counsel, this as well may be of importance if a disciplinary proceeding develops. That the respondent considered making repayment and sought legal advice upon the question will be in his favor. When the defalcation has been disclosed and money is actually owing, respondent's counsel should confer with disciplinary counsel about the desirability, propriety, and method or repayment pending, or by way of agreed disposition of, the disciplinary proceeding, so that the victim may as promptly as possible be made whole with no appearance of impropriety.

Difficult questions of the respondent's duty, if any, to report his own misconduct or of the propriety of responding to extortionate demands are beyond the scope of this article. But obviously when money is legitimately owing, the respondent and his counsel should be prepared to make a realistic offer to repay since this will all but inevitably be part of the disciplinary disposition. The respondent should also be prepared to refund fees paid in a case he mishandled.[437]

*4. Rehabilitation.*—If the respondent was suffering some physical, mental, or moral deficiency at the time of the misconduct, it will in most cases have to be remedied before he is allowed to continue or resume practicing law. It will rarely be possible to predict with accuracy the period of time or even the precise treatment necessary to effect rehabilitation. But since time is very much of the essence if the respondent's ability to earn his livelihood is suspended in the interim, it is obviously desirable that he begin that process and complete it at the earliest possible date. Counsel's role can often be very important in this area in several respects.

First, the respondent frequently will not have recognized the real problem or source of the problem. With a careful mixture of tact and ruthlessness counsel may, after a preliminary diagnosis, be able to help the respondent recognize the problem that he himself is a poor money manager, and his financial problems are not entirely the fault of his wife, his teenage children, and inflation; that he has more work than he can handle and simply must decline new cases for a time or obtain assistance; that alcohol, or some other illness, is responsible for a shortness of time or energy or money; that he is out of touch with current developments in the law; and that personal expenses cannot be paid out of a trust

437. *E.g.*, *In re* Seannell, 260 A.D. 442, 23 N.Y.S.2d 119 (1940).

account or client funds deposited in his own account, no matter how innocent the motive. This is merely a selection of some of the more frequent problems that respondents are unable or unwilling to recognize, but that are often readily soluble once recognized.

When the misconduct occurred long ago the problem may have been remedied before discovery and complaint. If so, rehabilitation may be complete before the disciplinary proceedings begin and this, of course, will be an important point against suspension or disbarment. If rehabilitation has not occurred, the passage of time will be against the respondent, and prompt initiation of the process is all the more important.

When the concern is with predicting the effect of disciplinary disposition the most important consideration is simply to show that rehabilitation has been completed or at least begun in a realistic and promising way. This will have enormous bearing on the disposition in all but the most serious and least serious cases.[438] To rehabilitate is defined:

> to restore to a condition of good health, ability to work or the like
> to restore to good operation or management . . .
> to re-establish the good reputation, rights, or standing of.[439]

Each of these definitions, of course, supposes a preexisting satisfactory condition to which the respondent has been restored, and that is usually the case. Any lawyer who is and always has been an unmitigated scoundrel will probably be permanently disbarred. In other words, there will usually be a point of reference in the respondent's past to which one can point as the benchmark for his fitness to practice. This approach will often appeal to the respondent because, in a great many routine cases at least, the ego of the lawyer in trouble has probably taken a rather severe recent beating, which has usually made him highly defensive or despondent. Allusion to that better time will tend both to restore some self-respect and provide an attainable target for which to aim. This is a very important and difficult aspect of disciplinary proceedings. If a lawyer has actually gone physically, mentally, or "morally" awry, and, therefore, genuinely needs correction, he must first be made to recognize it without aggravating the condition and increasing his defensiveness. And without humiliating him and undermining any desire to recover, he must then be

438. *E.g., In re* Graves, 347 Mo. 49, 146 S.W.2d 555 (1941).
439. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (unabridged 1973).

shown what he can and should do to re-establish his fitness to practice law and be persuaded to do it—preferably with enthusiasm. This done, or at least, begun respondent and counsel can approach the proceeding positively, offensively, deferentially in command, rather than abjectly.

All of this sounds extremely patronizing and superior, but it is not meant to be. It would be utterly nonsensical and presumptuous to suggest that through these methods a respondent's counsel can automatically turn his clients from quivering and craven losers into born again, two-fisted advocates. But the point is important, for the disciplinary body will base its decision substantially upon the degree to which it has been persuaded that it will be safe for all the myriad and elusive interests involved to allow the respondent to practice; to a great degree that persuasion must come from the respondent himself, his attitude toward the misconduct and the proceedings, and his efforts to remedy the problem; and the respondent's attitude will often depend greatly upon counsel's ability to communicate a relatively true and full picture of the considerations involved.

## IV. CALCULATING THE EQUATION: THE CHALLENGE OF ARRIVING AT A DISPOSITION ACCOMMODATING MYRIAD COMPETING INTERESTS

One might conclude from all this that it is possible—indeed one is tempted to try—to encode the factors involved, attach values to each of them, feed them into a properly programmed computer, and await the more or less accurate result:

| | | |
|---|---|---|
| Misappropriation | = | +5 |
| Client's funds | = | +2 |
| Over $2,000 | = | +3 |
| Alcoholism | = | +2 |
| Repaid in full | = | −2 |
| Respondent contrite | = | −1 |
| Respondent Member AA | = | −1 |
| No prior offenses | = | −1 |
| | | +7 |

Plus seven on the predesigned scale of values indicates a two-year suspension, stayed two years, with three months actual suspension, probation conditioned upon abstinence from alcohol and suitable financial supervision. Next case.

That, of course, is not how it is done or likely to be done, though there is a trend toward making criminal sentencing and

parole decisions according to similar calculi.[440] Nor is it suggested that such a system would be desirable in disciplinary matters. The *appearance* of uniformity achieved would doubtless mask an actual unfairness in most cases. It would seem infinitely preferable always to strive for the right decision on the merits of individual cases, rather than to be influenced, except when all else is equal, and it never is, by concern for the appearance of uniformity:

> To apply one general law to all particular cases, were to make all shoes by one last, or to cut one glove for all hands, which how unfit it would prove, every man can readily perceive.[441]

It is not, of course, that simple. It is an ancient argument as old as the notion of equity:

> Equity is a roguish thing: for law we have a measure, know what to trust to; equity is according to the conscience of him that is chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a foot, a chancellor's foot; what an uncertain measure would this be? One chancellor has a long foot, another a short foot, a third an indifferent foot, another a short foot, a third an indifferent foot: 'tis the same thing in the chancellor's conscience.[442]

These lofty concerns are mentioned only to underscore the belief that in the area of lawyer discipline more than in most legal endeavors one needs to be conscious both of the forest and the trees. Ultimately each case must be decided on its own merits—it is a truism, a cliché, but nonetheless true for that. Yet the "merits" consist of a great many discrete interests of radically varying importance, the application and evaluation of which individually will greatly influence the ultimate equitable calculation. To this end it is useful to detail at least some of the most important factors, to have in effect a checklist of concerns of which we should remind ourselves, so that we do not overlook or undervalue any significant interest.

Precedents do not provide very much help. In the end we

440. *See, e.g.*, Kortness v. United States, 514 F.2d 167 (8th Cir. 1975).

441. W. LAMBARDE, ARCHEION 69 (1635).

442. J. SELDEN, TABLE TALK: EQUITY, *quoted in* F. MCNAMARA, 2,000 FAMOUS LEGAL QUOTATIONS 198 (1960).

return to the purposes of discipline and ask simply how they will be served by a given disposition, or what disposition will serve them best, remembering that the appropriate discipline should be the *least* severe sanction that will serve.