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THE LAW OF DISBARMENT AND REINSTATEMENT IN MARYLAND

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Bernard Meyerson, at the age of twenty-two, was admitted to the bar of Maryland in 1936. In 1941 he and his father arranged an abortion for a young woman whom Meyerson had been seeing for five years. The midwife's surgical procedures were handled with something less than professional skill, and the patient's life, thereby jeopardized, was saved after a prolonged stay at Mercy Hospital. Upon discharge, she complained to the State's Attorney, whereupon the midwife, Meyerson, and his father were indicted for having conspired to cause an illegal abortion.

At the trial, the woman changed the tone of her testimony so as to exonerate Meyerson and blame the father and midwife. Nevertheless, all three were convicted. Following an unsuccessful appeal,[1] Meyerson served two months of a six-month term. After his conviction but before incarceration, he and the prosecuting witness were married.

Meyerson had been classified 4-F in the draft during World War II because of his criminal record and essential employment at a steel plant. Nonetheless, determined to get into the army, he appealed to the draft board, waived civil deferment, and finally achieved induction. He served with distinction on the Italian front, rose to the rank of staff sergeant, and received an honorable discharge. His military efficiency was rated "superior," his character "excellent." In December, 1944, the Governor of Maryland granted him a full pardon.

Having been disbarred shortly after his conviction, he filed a petition for reinstatement immediately upon his release from

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1. Meyerson v. State, 181 Md. 105, 28 A.2d 833 (1942).

military service.[2] Meyerson testified that his marriage had been a happy one and expressed moving contrition at the wrongs inflicted on his wife.[3] Several character witnesses also appeared on his behalf, including the Mayor of Baltimore and Mr. Paul Wolman, a former Assistant State's Attorney, National Commander of the Veterans of Foreign Wars, and President of the Jewish Big Brother League.[4]

The Supreme Bench denied reinstatement[5] and the Court of Appeals affirmed.[6] The three points on which the appellate decision rests were that (1) the crime of abortion and conspiracy to commit it could not be classified as among "the minor vices"; (2) the appellant had not sustained his burden of proving "fitness"; and (3) Mrs. Meyerson's testimony at the abortion conspiracy trial, only a few days before her marriage to the appellant, was "perjured."

In the light of present day attitudes towards abortion, the *Meyerson* result seems severe and can only be explained by the fact that the court was disturbed by Meyerson's failure to testify in his own behalf at his criminal trial,[7] by the change in the testimony of

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2. *See In re* Meyerson, 190 Md. 671, 59 A.2d 489 (1948). Meyerson had been convicted by the court, sitting without a jury, but the Supreme Bench was sharply divided on post-conviction motions and on disbarment. The motion for new trial was denied by an equally divided court as was also a motion for reargument. Of the judges who heard the disbarment case, six voted for disbarment, two for "a year's suspension," one for "a reasonable suspension" and one against disbarment without suggesting any other sanction. *Id.* at 681–83, 59 A.2d at 493–94. The syllabus of the Court of Appeals' opinion on Meyerson's reinstatement petition reported in the Maryland Reports inaccurately states that nine of ten judges at the disbarment proceeding had voted to disbar. *Id.* at 673.

3. Meyerson testified:

> I felt that I had done my wife a grave injustice, of course, I have been very sorry for it ever since, and I have tried my best to repent and make up for all the bad things she has suffered as the result thereof, and I am happy to say that I believe I have accomplished that; she is happy, she has two fine sons, and a very fine home, and I am also happy.

190 Md. at 685, 59 A.2d at 495.

4. Mr. Wolman testified:

> I base my opinion primarily on the fact that Mr. Meyerson's criminal acts were those of a more or less personal nature, rather than acts that would be committed while representing a client, or while representing a fiduciary agency, or even while representing the court, and therefore he had wronged himself rather than wronging a client who had placed trust and confidence in him.

Id.

5. The Supreme Bench was again divided. Of the eleven judges who heard the reinstatement case, only seven signed the order, including all four of those who had sat on the original disbarment case. No opinion was filed. *See id.* at 684, 59 A.2d at 494.

6. 190 Md. 671, 59 A.2d 489 (1948) (Markell, J.).

7. *Id.* at 687, 59 A.2d at 496. Meyerson's admission of guilt in his plea for reinstatement, coupled with his failure to testify in his defense at the criminal trial, drew odious inferences in Judge Markell's opinion: "He had a constitutional right to

the complaining witness, and by the unproven possibility that her future husband had a part in making it "perjured."[8] However that may be, in jurisprudential perspective the significance of *Meyerson* is that the Court of Appeals, in only the third case to reach it on the subject of disbarment and reinstatement and the first where substantial mitigating factors were present,[9] adopted an uncompromising stance which has been subsequently applied with varying degrees of consistency.

The object of this article is to analyze this field of Maryland law, first by brief historical review establishing the reasons for its relative novelty in a corpus of law that dates back to colonial times. Then the opinions will be classified according to offenses, defenses, and procedures, a technique designed to demonstrate both the harmony and disharmony therein.

I. HISTORICAL PERSPECTIVE

A. *Procedural history*

From time immemorial courts have asserted an inherent power to discipline attorneys who appear before them.[10] In Maryland until 1929, that power was vested exclusively in the circuit courts of the counties and the Supreme Bench of Baltimore City without any right of appeal whatsoever. After 1929, by act of the General Assembly the right of appeal rested only in the attorney aggrieved;[11] if he received a dismissal of the charges or a light sanction, the prosecuting bar association had no power to contest the issue at the appellate level. This history accounts for the fact that no disbarment cases appear

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refrain from testifying; but he has no constitutional right to practice law." *Query:* Would Judge Markell's court have ruled in Meyerson's favor had he pleaded guilty to the criminal charge?

8. *Id.*

9. The first case was *In re* Williams, 180 Md. 689, *reported in* 23 A.2d 7 (1941), and the second, Rheb v. Bar Ass'n, 186 Md. 200, 46 A.2d 289 (1946).

10. In H. DRINKER, LEGAL ETHICS 37 (1953), the leading authority on the subject quoted the following statement from *In re* Samuel Davies, 93 Pa. 116, 121–22 (1880):

> The court, by reason of the necessary and inherent power vested in it to control the conduct of its own affairs . . . and to maintain its own dignity, has a summary jurisdiction to deal with the alleged misconduct of an attorney. A proceeding for disbarment is simply the exercise of jurisdiction over an officer, an inquiry into his conduct not for the purpose of granting redress to a client or other person for wrong done, but only for the maintenance of the purity and dignity of the court by removing an unfit officer.

For an interesting review of the Maryland background, see Comment, *Discipline of Attorneys in Maryland,* 35 MD. L. REV. 236, 236–41 (1975).

11. 1929 Md. Laws, ch. 370, § 2. *See* Maryland State Bar Ass'n v. Boone, 255 Md. 420, 423–29, 258 A.2d 438, 440–43 (1969); *In re* Brack, 187 Md. 407, 50 A.2d 432 (1946); *In re* Williams, 180 Md. 689, *reported in* 23 A.2d 7, 11 (1941). *See also* State v.

in the Maryland Reports in the pre-1929 era, but why disbarred attorneys failed to exercise their rights of appeal until 1941[12] remains a mystery. By statutory amendment effective in 1937[13] an attorney denied reinstatement was first given the right of appeal. *Meyerson,* decided in 1948, was the first case in which that right was exercised.

Until 1929 the initiative to take disciplinary action was exclusively a court function. The statutory amendments then adopted additionally conferred the power to initiate disciplinary action on the state and local bar associations, on the various state's attorneys, and on any five volunteering members of the bar.[14]

Effective July 15, 1965 a new Subtitle BV was added to the Maryland Rules of Procedure, formalizing for the first time in those rules the procedures for disbarment cases.[15] Investigations and complaints by bar associations were covered by Rule BV2; under Rule BV3(a)[16] the bar associations, acting through executive councils, could initiate charges, as could any judge of any circuit court, the Supreme Bench of Baltimore City, the Court of Appeals, or, still, any five volunteering attorneys. These rules were consistent with the statutory provisions then regulating the discipline of lawyers and set forth in Article 10 of the Annotated Code of Maryland.

Revolutionary changes in the Rules of Procedure were made, however, on October 13, 1970, the most significant of which is found in the provision requiring charges thereafter to be filed, not with the nisi prius courts, but exclusively in the Court of Appeals.[17] That court would then refer the case to a three-judge panel of lower court judges which, in turn, would make findings of facts, conclusions of

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Johnston, 2 H. & McH. 160 (1786) (indicating that even in neo-colonial times no appeal would lie from orders of admission, discipline, or reinstatement of attorneys). In Character Committee v. Mandras, 233 Md. 285, 196 A.2d 630 (1964), the Court of Appeals entertained an appeal by a local character committee which had been overruled by the State Board of Law Examiners in approving an applicant for admission to the bar. However, the rules of court specifically provided for such a right of appeal.

12. State v. Johnston, 2 H. & McH. 160 (1786), is the only exception, but the result of the case was a dismissal of the appeal with no consideration of substantive law.

13. 1937 Md. Laws, ch. 370, added a new § 12 to Article 10 of the Maryland Code. It was later codified as MD. ANN. CODE art. 10, § 22 (Flack 1939).

14. 1929 Md. Laws, ch. 370, § 2 [creating eight new subsections in MD. ANN. CODE art. 10, § 10 (Bagby Supp. 1929)].

15. Added July 12, 1965, effective July 15, 1965.

16. These rules have been amended and recodified. *See* text at notes 21 to 25 *infra.*

17. MD. R.P. BV 3(b) (1971) now codified at MD. R.P. BV 9(b) (Cum. Supp. 1976).

law, and recommendations as to sanction or dismissal.[18] Either the accused attorney or the prosecuting bar association could file exceptions to the panel's report,[19] a procedure similar to that used when a Master in Chancery's report is presented to an equity judge.

Unlike the 1965 amendments above described, those adopted in 1970 establishing procedures by rule were wholly inconsistent with the statutory ones then found in Article 10 of the Maryland Code which continued to vest original jurisdiction in the nisi prius courts. Fortunately, the 1977 General Assembly eliminated the inconsistency by repealing the repugnant statutory provisions.[20]

The penultimate chapter in the procedural evolution of the disciplinary law of the legal profession in Maryland occurred in 1975 with further amendments to the BV Rules.[21] The prosecutorial function was then removed from the bar associations, the lower courts, and any five volunteering members of the bar, and vested exclusively in an Attorney Grievance Commission,[22] supported by a professional staff of attorneys and investigators under the supervision of a full-time Bar Counsel.[23] Investigations were entrusted to Inquiry Panels[24] subject to review by Review Boards,[25] and, for the first time in Maryland history, the entire disciplinary process found itself concentrated in one centralized court and the prosecutorial function in one centralized agency.

B. *Substantive history*

Historically, the six statutory grounds for disbarment were (1) professional misconduct, (2) malpractice, (3) fraud, (4) deceit, (5) crime involving moral turpitude and (6) conduct prejudicial to the administration of justice.[26] Chief Justice Taney noted over a century

18. MD. R.P. BV 3(b), 4(c), 4(e), 5(a) (1971). The BV rules have since been amended and reorganized. Under the present rules, the procedure for the filing of charges with the Court of Appeals, reference to the three-judge lower court panel, and their disposition of the charges are covered in MD. R.P. BV 9–11 (Cum. Supp. 1976).

19. MD. R.P. BV 5(b)(2) (1971), now codified at MD. R.P. BV 11(b)(2) (Cum. Supp. 1976).

20. *See* 1977 Md. Laws, ch. 305.

21. Some of the new procedures went into effect February 20, 1975 and others on July 1, 1975.

22. MD. R.P. BV 2, 3.

23. MD. R.P. BV 4.

24. MD. R.P. BV 5.

25. *Id.*

26. *See* MD. ANN. CODE art. 10, § 12 (1976) [listing the same grounds as originally set forth in the 1929 Code (*see* note 14 *supra*) as well as that of being a "subversive person" (added by amendment of 1952 Md. Laws, ch. 27, § 2)]. H. DRINKER, LEGAL ETHICS 42 (1953), classifies the grounds for discipline as:

> 1. Cases in which the lawyer's conduct has shown him to be one who cannot properly be trusted to advise and act for his clients [and]

ago that in this litany of offenses, "the statute has done but little, if anything, more than enact the general rules upon which the courts of common law have always acted."[27]

In analyzing these six grounds in *Meyerson,* Judge Markell noted that the first two, professional misconduct and malpractice, are tautological as well as the only ones necessarily relating to the practice of law; the other four are personal offenses usually committed outside such practice — although, of course, if committed professionally they would also amount to "professional misconduct."[28] Conduct prejudicial to the administration of justice may include any offense which impairs the basic objects of the profession, as, for example, participation in a lynching, jury tampering, or other form of interference with the judicial process.

Of the six standards, the one most difficult to construe is "crime involving moral turpitude." The leading legal lexicographers, Black

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2. Cases in which his conduct has been such that, to permit him to remain a member of the profession and to appear in court, would cast a serious reflection on the dignity of the court and on the reputation of the profession.

The members of many professions and occupations having no such direct connection with the courts or other public institutions are nevertheless subject to discipline for nonprofessional misconduct, presumably on the rationale that otherwise the integrity of the remaining members would be tarnished. Thus, for example, licenses are subject to revocation on conviction of a crime of moral turpitude in the following areas of activity: architects [MD. ANN. CODE art. 43, § 524(a)(3) (Cum. Supp. 1976)]; physicians and surgeons [MD. ANN. CODE art. 43, § 130(h)(4) (Cum. Supp. 1976)]; dentists [MD. ANN. CODE art. 32, § 11(b) (1976)]; professional engineers and surveyors [MD. ANN. CODE art. 75½, § 17(a)(3) (1975)]; osteopaths [MD. ANN. CODE art. 43, § 480(a) (1971)]; chiropractors [MD. ANN. CODE art. 43, § 506(a) (Cum. Supp. 1976)]; podiatrists [MD. ANN. CODE art. 43, § 490(b)(1) (Cum. Supp. 1976)]; nurses [MD. ANN. CODE art. 43, § 299(a)(11) (Cum. Supp. 1976) (only if the crime of moral turpitude bears directly on one's fitness to practice nursing)]; physical therapists [MD. ANN. CODE art. 43, § 609(a)(3) (Cum. Supp. 1976)]; and last, but not least, funeral directors and embalmers [MD. ANN. CODE art. 43 § 354(b) (1971)]. Cosmetologists may lose their licenses if found guilty of "unprofessional, immoral or dishonest conduct." MD. ANN. CODE art. 43, § 545(a) (Cum. Supp. 1976). The grounds for revoking the license of a pharmacist are all related to the practice of the profession, except an adjudication as an incompetent. MD. ANN. CODE art. 43, § 266A(c)(1)–(3) (Cum. Supp. 1976). Accountants may be defrocked upon "[c]onviction of a felony, or of any crime an element of which is dishonesty or fraud." MD. ANN. CODE art. 75A, § 12(a)(4) (1975). Presumably, therefore, a social crime such as bigamy, recognized as a felony but having no bearing on an accountant's trustworthiness or capacity to practice his profession, could be a ground for forfeiture of his license. In this connection, see the case of Hawker v. New York, 170 U.S. 189 (1898), upholding a statute authorizing the revocation of a physician's license upon conviction of *any* felony.

Perhaps the time has come for the organized bar to determine whether it is really "less concerned with keeping its house clean than with the pretense that it is clean." Comment, *The Imposition of Disciplinary Measures for the Misconduct of Attorneys,* 52 COLUM. L. REV. 1039, 1051 (1952).

27. *Ex parte* Secombe, 60 U.S. (19 How.) 9, 14 (1857), *quoted in* Rheb v. Bar Ass'n, 186 Md. 200, 203–04, 46 A.2d 289, 291 (1946).

28. 190 Md. at 676, 56 A.2d at 490–91. *See* note 26 *supra.*

and Bouvier, define the term identically 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."[29] Manifestly, the infamous crimes of violence (murder, rape, arson, burglary, armed robbery, etc.) fit this definition with no difficulty, and at the other end of the spectrum, reckless driving, parking violations, and spitting in the street do not. The problem, of course, is in the gray area in between.

In *Board of Dental Examiners v. Lazzell,*[30] the Maryland Court of Appeals, after quoting *Bouvier's Law Dictionary,* analyzed a number of cases in other jurisdictions equating some crimes with moral turpitude, others not. There appears to be no rhyme or reason by which these decisions can be harmonized,[31] except to say that if a particular trier of law happens to find the conduct vile or depraved, he will hold it one of "moral turpitude." Thus, in *Lazzell,* a dentist who had thrice been convicted of indecent exposure was held to have committed a crime of "moral turpitude" and thereupon expelled from the profession of dentistry, Judge Sloan reasoning that "it requires no discussion to argue or prove that the offense is so base, vile, and shameful as to leave the offender not wanting in depravity, which the words 'moral turpitude' imply."[32]

Three other Maryland cases have attempted to pierce the gloom, and all have left the darkness undisturbed.[33]

In *Rheb v. Bar Association*[34] the court held that the crime of failing to file income tax returns was an offense "of such a character as to justify disbarment"[35] without ruling flatly, as the syllabus inaccurately states, that it is a crime of moral turpitude. While indicating that such a *crimen falsi* is "generally recognized" as falling in this category, Judge Henderson hedged with these words:

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29. BLACK'S LAW DICTIONARY 1162 (4th ed. 1951); BOUVIER'S LAW DICTIONARY 2247 (Rawle's 3d rev. ed. 1914).

30. 172 Md. 314, 191 A.240 (1937) (reported in 191 A. *sub nom.* Brun v. Lazzell).

31. A catalogue of the divergent views would serve no useful purpose, a reference to WORDS AND PHRASES being sufficient to make the point. Suffice it to say that, as noted in *Lazzell,* 172 Md. at 321, 191 A. at 243, a violation of the National Prohibition Act was held "in many jurisdictions" a crime of "moral turpitude." Happily, it was never so held in the Free State of Maryland.

32. 172 Md. at 321, 191 A. at 244.

33. Professor Paul A. Freund, a luminary of the Harvard Law School whose scholarship and sense of humor left an indelible impression on the author, was wont to say, "This case has left the darkness unobscured."

34. 186 Md. 200, 46 A.2d 289 (1946).

35. *Id.* at 206, 46 A.2d at 291–92.

"Such conduct might properly be characterized as fraud or deceit, even if it did not involve moral turpitude."[36]

The second case is *In re Meyerson,* discussed above,[37] involving conspiracy to commit abortion. Once more, the court did not rule flatly that this was a crime of moral turpitude, although that result is implicit from the fact that disbarment was ordered and the offense committed did not fit within any of the other five statutory criteria.

The third case is *Braverman v. Bar Association,*[38] involving charges of subversion under the Smith Act,[39] where Judge Delaplaine defined a crime of moral turpitude as grounds for disbarment in these words:

> The question whether a particular crime involves moral turpitude within the meaning of the statute making such a crime a ground for disbarment is to be determined by a consideration of the nature of the offense as it bears upon the attorney's moral fitness to continue in the practice of law.[40]

This pronouncement of Judge Delaplaine epitomizes the circular reasoning that an offense must be held to be one of moral turpitude, and, therefore, ground for discipline, if the court has independently concluded that the respondent should be disciplined. Surely, a statutory ground for imposition of a sanction or other remedy should not thus be construed with reference to the court's predetermination that the sanction or other remedy should be imposed.

Be that as it may, the Court of Appeals may have considerably lightened its own burdens by adopting in 1970, as part of the Maryland Rules of Procedure, the complete text of the Code of Professional Responsibility of the American Bar Association.[41] This Code contains "Ethical Considerations," denominated as professional aspirations, the violation of which does not give rise to disciplinary action, and "Disciplinary Rules" which do. DR 1–102,

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36. *Id.* at 204, 46 A.2d at 291. However, compounding the confusion, the court observed in Maryland State Bar Ass'n v. Agnew, 271 Md. 543, 547, 318 A.2d 811, 813 (1974), that the equation of tax evasion with moral turpitude was "settled" in *Rheb.*

37. *See* text accompanying notes 1 to 9 *supra.*

38. 209 Md. 328, 121 A.2d 473, *cert. denied,* 352 U.S. 830 (1956).

39. *See* 18 U.S.C. § 2385 (1970). [constitutionality upheld in Dennis v. United States, 341 U.S. 494 (1951), but subsequently restricted to narrow limits on first amendment grounds; *see* Scales v. United States, 367 U.S. 203 (1961)].

40. 209 Md. at 344–45, 121 A.2d at 481.

41. Approved by the House of Delegates of the American Bar Association on Aug. 12, 1969, to take effect on Jan. 1, 1970; effective as part of the Maryland Rules of Procedure on Oct. 13, 1970.

"Misconduct," is the crucial one for purposes of this study and reads as follows:[42]

DR 1–102 Misconduct.

A. A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Manifestly, this Disciplinary Rule encompasses all six of the statutory criteria discussed above: "professional misconduct" (DR 1–102(A) (1)); "malpractice" (DR 1–102(A) (1));[43] "fraud" (DR 1–102(A) (4)); "deceit" (DR 1–102(A) (4)); "crime involving moral turpitude" (DR 1–102(A) (3)); and "conduct prejudicial to the administration of justice" (DR 1–102(A) (5)). Furthermore, the rule is broader than the statute in three significant respects because it additionally proscribes: (1) the circumvention of a Disciplinary Rule through the actions of another; (2) any conduct involving dishonesty or misrepresentation; and (3) any other conduct that adversely reflects on the respondent's fitness to practice law. This codification of an expanded spectrum of offenses should have a salutary effect on the development of the law in the future for two reasons.

First, the court will no longer have to struggle with the task of inserting into narrow statutory pigeonholes an attorney's conduct which does not fit without a squeeze. Consider, for example, Judge Henderson's difficulties in *Rheb*.[44] Instead of contemplating whether a failure to file income tax returns might be "fraud or deceit, even if it did not involve moral turpitude,"[45] he certainly could have held it

42. MARYLAND CODE OF PROFESSIONAL RESPONSIBILITY DR 1–102, *published at* MD. R.P. 1007–08 (App. F).

43. This assumes (1) the validity of Judge Markell's observation in *Meyerson* that "professional misconduct" and "malpractice" are tautological (*see* 190 Md. at 676, 59 A.2d at 490–91 and text accompanying note 28 *supra*), and (2) that to "violate a Disciplinary Rule" includes both "professional misconduct" and "malpractice."

44. 186 Md. 200, 46 A.2d 289 (1946) (discussed at notes 34 to 36 *supra*).

45. *See* note 36 and accompanying text *supra*.

to be "conduct that adversely reflects on [the accused attorney's] fitness to practice law," and, depending on extenuating circumstances in a particular case, such an offense could also constitute an act of "dishonesty." But whether it is a *crimen falsi* constituting "fraud" or "deceit" or per se an act so vile or depraved as to amount to moral turpitude might have been a question better left to academic discussion than an opinion of the Court of Appeals. Under the present rule, it could be.

Secondly, the scope of the new Disciplinary Rule should enable the court to fashion more consistent sanctions than those reflected in the cases discussed below. Penalties range from reprimand, to short suspension, long suspension, consignment to inactive status, and, ultimately, the extreme sanction of disbarment.[46] The offenses catalogued in the new Disciplinary Rule run the gamut from conduct adversely reflecting on a respondent's fitness as a lawyer to dishonesty, misrepresentation, fraud, deceit, professional misconduct, and, ultimately, acts of vileness and depravity constituting moral turpitude. The ends of justice demand a consistent correlation between these varying degrees of culpability and sanctions of comparable severity.

The thesis of this article is that in the preponderance of decisions such correlation and consistency have been achieved, but in a significant number they have not. Let us now test this thesis by listening to the symphony and cacophony in the reported cases.

II. THE MARYLAND CASES

(1) *Petty Crimes and Ethical Lapses*

In *Fellner v. Bar Association*[47] the Court of Appeals considered the case of an attorney who fed slugs into a parking meter. After his nolo contendere plea, he paid a fine of $250 and submitted to disciplinary proceedings. Never testifying in his defense, he was disbarred by the Supreme Bench of Baltimore City, the Court of Appeals affirming. The court noted that disbarment proceedings are not criminal in nature, there being, therefore, no constitutional right to remain silent. Then, quoting from *Meyerson,* the court observed, "No 'moral character qualification for Bar membership' is more important than truthfulness and candor."[48]

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46. MD. R.P. BV 5(a).

47. 213 Md. 243, 131 A.2d 729 (1957).

48. *Id.* at 247, 131 A.2d at 732 (quoting from *Meyerson,* 190 Md. at 687, 59 A.2d at 496).

It is difficult to criticize *Fellner,* because the attorney was guilty of fraud, although probably prompted more by immature moral judgment than by malevolence. However, it is impossible to reconcile *Fellner* with the case of *Prince George's County Bar Association v. Vance.*[49] There, an attorney of twenty-five years' standing at the bar, who had distinguished himself in military and civil service, entered the active practice of law upon retirement. In order, however, to continue to avail himself of post exchange privileges, he forged his name to a set of military orders, reproduced the copy, and used it to gain access to the PX. Upon apprehension, the United States Attorney, refusing to prosecute, referred the matter to the bar association. After a hearing before a three-judge panel, the attorney was recommended for reprimand. On review, the sanction was increased to a ninety-day suspension.

Standing alone, either *Fellner* or *Vance* can be justified but the two cannot stand together, since both attorneys were guilty of the same offense of stealing nickles and dimes. In *Vance* the court pointed to the respondent's "genuine contrition," distinguishing his attitude from that of Fellner who "never admitted his guilt."[50] The disparity between a ninety-day suspension and a disbarment for life nonetheless seems difficult to reconcile, and, if "contrition" is relevant, *Vance* cannot stand with *Meyerson,* the case of the returning war veteran whose testimony at his reinstatement hearing drips not only with "contrition" but pathos.[51]

Under this heading of *"Petty Crimes and Ethical Lapses,"* mention must also be made of the recent case of *Montgomery County Bar Association v. Haupt,*[52] involving an attorney accused of taking liberties with his sixteen-year old ward and engaging in frolics with marijuana and hashish. The three-judge panel found those charges

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49. 273 Md. 79, 327 A.2d 767 (1974).

50. *Id.* at 84, 327 A.2d at 770. Fellner had pleaded nolo contendere and was fined, a sequence of events now recognized as conclusive proof of guilt for disciplinary purposes under MD. R.P. BV 10(e)(1). Interestingly, however, the bar association in *Fellner* conceded the reverse. 213 Md. at 246, 131 A.2d at 731.

51. *See* note 3 *supra.* On the subject of "contrition," the court observed in *In re* Barton, 273 Md. 377, 382, 329 A.2d 102, 105 (1974):

> However, to be reinstated, one need not express 'contrition' which is inconsistent with a position to which he honestly and sincerely adheres. As stated in *Braverman* [271 Md. 196, 202–203, 316 A.2d 246, 249 (1974)] "While [petitioner] seems to hinder his cause by not taking what might be the easier way of confession and contrition, the intellectual honesty of his position must be recognized."

Unless the standards for imposing sanctions in a disciplinary case are congruent with those to be applied in criminal sentencing, it is difficult to perceive the circumstances under which contrition would have any relevance.

52. 277 Md. 326, 353 A.2d 629 (1976).

unproven but found the attorney guilty of another charge of unprofessional conduct in dealing directly and abusively with an opposing party known to be represented by counsel. The panel having recommended a one-year suspension, the Court of Appeals reduced the sanction to thirty days but filed no separate opinion explaining the basis for the reduction. While the adoption on the appellate level of well-reasoned lower court panel opinions is to be commended as a means of enhancing their dignity and reducing the work load of the Court of Appeals, any change in a recommended sanction without explanation does not lead to better understanding of the law by the lower bench and bar.

Finally, there are several recent cases dealing with ethical lapses resulting only in reprimands and one resulting in a short suspension; they are noted but otherwise merit no special comment.[53]

(2) *Medical Excuses*

Maurice T. Siegel, an attorney of forty-five years' standing, was disbarred by the Court of Appeals in 1975 after pleading nolo contendere to federal charges of tax evasion, an alleged crime of moral turpitude.[54] He had been previously tried and acquitted on lottery charges. Many of the witnesses who had been discredited in the lottery case were scheduled to testify against him in the tax case. Two distinguished United States Attorneys, Stephen H. Sachs and George Beall, recommended against prosecution of the tax charges but were overruled by the Department of Justice. Sachs characterized the government case as "lousy."[55] Instead of the usual "net worth plus expenditures" analysis, the government proposed an untried method of proving the case by the testimony of a Department of Labor economist to the effect that Siegel and his family spent sums on "consumables" in amounts unreasonable in

53. *See* Attorney Grievance Comm'n v. Leventhal, 279 Md. 350, 369 A.2d 72 (1977) (a six-month suspension for accepting a fee with knowledge that the attorney had already been discharged by the client); Attorney Grievance Comm'n v. Demyan, 278 Md. 240, 363 A.2d 966 (1976) (reprimand for the negligent handling of a client's funds but no fraud, dishonesty, deceit, or misrepresentation); Prince George's County Bar Ass'n v. Blanchard, 276 Md. 207, 345 A.2d 60 (1975) (reprimand where an attorney charged clients for surveys but withheld part of the charge for himself without full disclosure); Maryland State Bar Ass'n v. Robertson, 276 Md. 51, *per curiam order without opinion reported in* 343 A.2d 529 (1975) (reprimand where a part-time attorney improperly identified himself as a lawyer in a publication of his affiliated business, a "peccadillo" regarded by the panel as more of a transgression of etiquette rather than ethics).

54. Bar Ass'n v. Siegel, 275 Md. 521, 340 A.2d 710 (1975). Under MD. R.P. BV 10(e)(1), a nolo contendere plea when followed by imposition of a fine or sentence, is deemed to be a "conviction."

55. 275 Md. at 531–32, 340 A.2d at 715–16 (Levine, J., dissenting).

relation to reported income. This approach was considered "novel" and raised doubts in the minds of the prosecutors as to its chances of success.[56]

Following Siegel's acquittal on the lottery charges but after his indictment in the tax case, he suffered two massive heart attacks. Advised by his physicians that a six-week trial in the tax case, including two weeks of his own testimony, might prove fatal, Siegel submitted a nolo contendere plea which was accepted by Judge Miller of the United States District Court for the District of Maryland. In discharge of sentence, Siegel spent twenty-two days in Allenwood Prison Camp.

In the ensuing disciplinary proceedings, the three-judge panel recommended to the Court of Appeals a one-year suspension, the bar association joining therein. Nevertheless, a majority of the Court of Appeals imposed the extreme penalty of disbarment, finding no "compelling extenuating circumstances" justifying a lighter sanction and, further, that Mr. Siegel's health problems did not palliate the evil proven by the nolo contendere plea and subsequent sentence. Judge Levine dissented with the concurrence of Judges Singley and Eldridge, pointing to the "Hobson's Choice" with which Siegel was confronted — either risk his life in defending himself in the tax case or face certain disbarment.[57] If this is not a case presenting "compelling extenuating circumstances," Judge Levine had difficulty in imagining a set of facts where such circumstances would exist.

Without questioning the soundness of the general rule that health problems developing after the offense cannot be considered as excuses, the rule should be otherwise where those problems have had a direct bearing on a decision to plead nolo contendere to a weak criminal charge.

The result in *Siegel* seems even more unfair when compared with that of *Bar Association v. McCourt*.[58] There, the attorney had been convicted of failing to file income tax returns, although the amount of tax due was minuscule. The three-judge panel recommended a one-year suspension, a sanction approved by the Court of Appeals over the dissent of Judges Digges and Smith. In the panel's report adopted by the appellate court, stress was laid on McCourt's medical problems described by a psychiatrist as "neurotic . . . disorder, medically classifiable as a 'passive-aggressive personality . . . characterized in the patient by emotional immaturity and depend-

56. *Id.*
57. *Id.* at 533, 340 A.2d at 716–17.
58. 276 Md. 326, 347 A.2d 208 (1975).

ency, procrastination and avoidance of unpleasant reality, hedonistic pursuits and difficulty in handling hostile, rebellious and other negative emotions.' "[59]

If, as the Court of Appeals has repeatedly said, the purpose of disciplinary proceedings is not to punish the accused, as in a criminal case, but to protect the public from those who have demonstrated their unfitness,[60] one wonders whether an attorney who has been convicted of a serious crime and who suffers from a neurosis that impairs his ability to cope is a person fit to practice law.[61]

(3) *Misappropriation or Misuse of Clients' Funds*

Of the reported disciplinary decisions by far the largest number fall under this category, and here we find no surprise and no inconsistency — all nine attorneys were disbarred.[62] A tenth[63] escaped the extreme penalty because of a procedural foul-up more fully explained in the next section captioned *"The Ruffalo Barrier."*

One case of particular interest is *Bar Association v. Marshall,*[64] showing that in this area the court takes a consistently stern "no nonsense" approach. There, the three-judge panel had recommended a one-year suspension, but the Court of Appeals, although adopting

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59. *Id.* at 330, 347 A.2d at 210.

60. Maryland State Bar Ass'n v. Sugarman, 273 Md. 306, 315–16, 329 A.2d 1, 6–7 (1974); Maryland State Bar Ass'n v. Frank, 272 Md. 528, 533–35, 325 A.2d 718, 721 (1974); Anne Arundel County Bar Ass'n v. Collins, 272 Md. 578, 582–84, 325 A.2d 724, 727–28 (1974); *In re* Lombard, 242 Md. 202, 207–08, 218 A.2d 208, 211–12 (1966); Fellner v. Bar Ass'n, 213 Md. 243, 247, 131 A.2d 729, 731–32 (1957); Braverman v. Bar Ass'n, 209 Md. 328, 348–49, 121 A.2d 473, 483, *cert. denied,* 352 U.S. 830 (1956).

61. This point has previously drawn a perceptive and well considered barb to this effect in *Survey of Maryland Court of Appeals Decisions 1974–1975 — Attorney Discipline,* 36 MD. L. REV. 351, 370–71 (1976).

62. *See* Attorney Grievance Comm'n v. Silk, 279 Md. 345, 369 A.2d 70 (1977) (of particular interest because the funds were misappropriated from a club of which the attorney was a treasurer, not from a client with whom he had a professional relationship); Bar Ass'n v. Posner, 275 Md. 250, 339 A.2d 657, *cert. denied,* 423 U.S. 1016 (1975); Bar Ass'n v. Snyder, 273 Md. 534, 331 A.2d 47 (1975); Bar Ass'n v. Carruth, 271 Md. 720, 319 A.2d 532 (1974); *In re* Barton, 273 Md. 377, 329 A.2d 102 (1974); Bar Ass'n v. Marshall, 269 Md. 510, 307 A.2d 677 (1973); Balliet v. Baltimore County Bar Ass'n, 259 Md. 474, 270 A.2d 465 (1970); *In re* Lombard, 242 Md. 202, 218 A.2d 208 (1966), *In re* Williams, 180 Md. 689, *reported in* 23 A.2d 7 (1941).

Most recently in Attorney Grievance Comm'n v. Cooper, 279 Md. 605, 369 A.2d 1059 (1977), the attorney was found to have misappropriated clients' funds and to have been generally neglectful. Because the attorney's misconduct had been due to his severe alcoholism, the court, instead of disbarment, ordered him placed on "inactive status." *See* text at note 122 *infra.*

63. *See* Bar Ass'n v. Cockrell, 274 Md. 279, 334 A.2d 85 (1975); text accompanying notes 71 to 79 *infra.*

64. 269 Md. 510, 307 A.2d 677 (1973).

the panel's findings of fact, raised the sanction to disbarment, the accused having been found guilty of violating DR 1–102[65] and DR 9–102.[66] Speaking for a unanimous court, Judge Digges stressed the seriousness of these violations in these ringing words:

> It has been immemorially acknowledged that at the very heart of the attorney-client relationship is the trust concept with the attorney acting as a trustee for his client in all of his undertakings for him. . . . The misappropriation by an attorney of funds of others entrusted to his care, be the amount small or large, is of great concern and represents the gravest form of professional misconduct.[67]

(4) *The* Ruffalo *Barrier*

The Supreme Court of the United States in the case of *In re Ruffalo*[68] dealt with the case of an attorney, who in the course of disciplinary proceedings against him, reveals information giving rise to more serious additional disciplinary charges. There the Sixth Circuit disbarred a lawyer, without granting a de novo hearing, relying solely on an order of disbarment of the Ohio Supreme Court following proof to that court's satisfaction of the attorney's misconduct. The acts which formed the basis for the Ohio court's decision were, however, not included in the original charges against the attorney but were added at the disciplinary hearing as a result of revelations there made by the accused lawyer.[69] The Supreme Court held that this procedure deprived the accused of due process because there was no fair notice of the "precise nature of the charges" against him. The Court reasoned:

> The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it originally been included in those leveled . . . no one knows.[70]

This background brings into focus the strange Maryland case of *Bar Association v. Cockrell.*[71] The bar association had originally

65. Quoted in text at note 42 *supra.*
66. Quoted at note 73 *infra.*
67. 269 Md. at 519, 307 A.2d at 682.
68. 390 U.S. 544 (1968).
69. *Id.* at 546–49.
70. *Id.* at 551.
71. 270 Md. 686, 313 A.2d 816 (1974) (remanding to a new three-judge panel), 274 Md. 279, 334 A.2d 85 (1975).

filed its disbarment petition based on three alleged offenses: the serious charges of inducing a client to defraud an insurance company and paying "kickbacks" to an adjuster and the less serious offense of advancing moneys to the client in excess of expenses of litigation.[72] In the course of the hearing before the three-judge panel, however, it developed that the attorney might have also been guilty of misappropriating another client's funds in violation of DR 9–102, an offense described by Judge Digges as "the gravest form of professional misconduct."[73] The Court of Appeals thereupon deferred disposition of the original charges and remanded the case to a new three-judge panel with instructions first to consider whether *Ruffalo* barred a reconsideration and, if not, to recommend what further action, if any, should be taken against the attorney accused.[74] The second panel in a 2–1 vote held *Ruffalo* no barrier, the attorney's conduct indefensible, and recommended disbarment.[75]

On review, the Court of Appeals scrupulously applied the *Ruffalo* principle that an attorney's constitutional rights are violated if he is forced to respond to charges emanating from facts disclosed by him in his own defense to other charges. In *Cockrell,* the

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72. MARYLAND CODE OF PROFESSIONAL RESPONSIBILITY, DR 5–103(B), *published at* MD. R.P. 1025 (App. F), states:

> While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

73. *See* text at note 67 *supra.* MARYLAND CODE OF PROFESSIONAL RESPONSIBILITY DR 9–102, *published at* MD. R.P. 1038 (App. F), states:

> (A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows: (1) Funds reasonably sufficient to pay bank charges may be deposited therein. (2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
>
> (B) A lawyer shall: (1) Promptly notify a client of the receipt of his funds, securities, or other properties. (2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable. (3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them. (4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

74. 270 Md. 686, 313 A.2d 816 (1974).

75. *See* 274 Md. at 285–86, 334 A.2d at 88.

prosecuting bar association came a cropper on this principle because of the reintroduction before the second panel of the entire transcript of the hearing before the first,[76] including the "self-inculpatory testimony" of the respondent.[77] In an opinion by Judge Digges, which must have pained him in the writing, the additional serious charge of misappropriation was dismissed and the attorney suspended for six months on the relatively minor charge of advancing funds to a client in excess of permissible disbursements. One wonders what the result would have been if, instead of introducing in the second hearing the transcript from the first hearing, there had been a complete trial de novo the second time around.[78] In future cases to be tried by the Bar Counsel, it is hoped that this approach will be used. Otherwise, *Ruffalo* will be a serious impediment to the regulation of decency in the profession of law. An attorney could be charged with trivial unprofessional practice and, in the process of defending himself, admit with impunity that he had misappropriated his client's funds or committed other acts of dishonesty.[79] If the *Ruffalo* rule is that such admissions cannot be used against him in disciplinary proceedings, then the law is, as Charles Dickens put it, "a ass."*

(5) *Tax Evasion*

There have been five disciplinary cases involving tax evasion or aiding and abetting it, and each has resulted in disbarment: *Bar Association v. Siegel,*[80] *Maryland State Bar Association v. Agnew,*[81] *Maryland State Bar Association v. Callanan,*[82] *Maryland State Bar*

76. The Court of Appeals based its reasoning on the language from the Supreme Court's opinion in *In re* Ruffalo quoted in text at note 70 *supra.* 274 Md. at 285, 334 A.2d at 88.

77. 274 Md. at 286–87, 334 A.2d at 89.

78. One also wonders why the court did not remand *Cockrell* to still a third panel, with directions to reconsider without use of the "self-inculpatory testimony" of the respondent which apparently caused the difficulty in the second reconsideration.

79. Judge Digges raises this point in *Cockrell,* noting that because of this "crippling effect" of *Ruffalo,* several courts have resorted to "ingenious reasoning" to avoid its result. 274 Md. at 286, n.3, 334 A.2d at 89, n.3, (citing Black v. State Bar, 7 Cal. 3d 676, 499 P.2d 968, 103 Cal. Rptr. 288 (1972); *In re* Gartland, 47 Ill. 2d 177, 265 N.E.2d 148 (1970); Louisiana State Bar Ass'n v. Jacques, 260 La. 803, 257 So. 2d 413, *cert. denied,* 409 U.S. 877 (1972)).

In Bar Ass'n v. Hirsch, 274 Md. 368, 374, 335 A.2d 108, 112, *cert. denied,* 422 U.S. 1012 (1975), decided shortly after *Cockrell,* the court observed that "*Ruffalo* did no more than extend to the challenged attorney the rights of procedural due process, including fair notice of the charges against him."

* For a discussion of two later cases in which *Ruffalo* was applied, see Addendum, *infra,* at 730.

80. 275 Md. 521, 340 A.2d 710 (1975).

81. 271 Md. 543, 318 A.2d 811 (1974).

82. 271 Md. 554, 318 A.2d 809 (1974).

Association v. Sugarman,[83] and *Attorney Grievance Commission v. Swerdloff.*[84] The *Siegel* case has been reviewed above and *Callanan* was an open-and-shut case following conviction. Accordingly, only *Agnew* and *Sugarman* merit further comment.

Agnew is, of course, a landmark decision because it involved the first disbarment of a former Vice President of the United States. The case reaffirms that (1) the acceptance of a nolo contendere plea followed by imposition of a fine constitutes a final judgment conclusively establishing proof of the commission of a crime; (2) willful tax evasion, as "settled in *Rheb,*" is a crime of moral turpitude; and (3) in the absence of compelling extenuating circumstances disbarment must follow as a matter of course. Judge Digges expressed the court's revulsion at Mr. Agnew's conduct as follows:

> It is difficult to feel compassion for an attorney who is so morally obtuse that he consciously cheats for his own pecuniary gain that government he has sworn to serve, completely disregards the words of the oath he uttered when first admitted to the bar, and absolutely fails to perceive his professional duty to act honestly in all matters.[85]

Sugarman is a particularly interesting case because disbarment resulted from disclosures made by the attorney himself while testifying as a witness in a criminal case[86] under compulsion and grant of immunity[87] after having asserted his fifth amendment privilege against self-incrimination.[88] The compelled testimony revealed that the attorney had aided and abetted his client in tax evasion. The Court of Appeals upheld the use of this testimony in the disbarment case, noting that to rule otherwise would be to delegate to the federal prosecutor the power to determine when disciplinary proceedings should be initiated.[89] The "use immunity" granted by

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83. 273 Md. 306, 329 A.2d 1 (1974), *cert. denied,* 420 U.S. 974 (1975).

84. 279 Md. 296, 369 A.2d 75 (1977).

85. 271 Md. at 552, 318 A.2d at 816.

86. The trial was United States v. Anderson, 368 F. Supp. 1253 (D. Md. 1973), *aff'd,* 506 F.2d 1398 (4th Cir. 1974), *cert. denied,* 420 U.S. 991 (1975).

87. 18 U.S.C. § 6002 (1970).

88. *Accord In re* Daley, 45 U.S.L.W. 2409 (7th Cir. Feb. 11, 1977); Florida Bar v. Massfeller, 170 So. 2d 834 (Fla. Sup. Ct. 1964); *In re* Schwartz, 51 Ill. 2d 334, 282 N.E.2d 689, *cert. denied,* 409 U.S. 1047 (1972); Committee on Legal Ethics v. Graziani, 200 S.E.2d 353 (W. Va.), *cert. denied,* 416 U.S. 995 (1974).

But see Lurie v. Florida State Bd. of Dentistry, 288 So. 2d 223 (Fla. Sup. Ct. 1974) (holding that immunized testimony could not be used in licensing proceedings involving the profession of dentistry).

89. 273 Md. at 318, 329 A.2d at 7.

the statute[90] being co-extensive with the fifth amendment privilege, the witness is absolutely protected against the infliction of any criminal penalties resulting from his compelled testimony. However, the court reasoned that there is no barrier to the use of such testimony in disbarment proceedings since they are not criminal in nature and any sanctions imposed are not penalties.[91]

Sugarman had rested his hopes on the controversial Supreme Court case of *Spevack v. Klein*.[92] There, a New York lawyer had invoked his fifth amendment privilege in refusing to testify or to honor a subpoena duces tecum issued in connection with a judicial inquiry into his own conduct. The Appellate Division of the New York Supreme Court ordered him disbarred and the New York Court of Appeals affirmed. On certiorari to the Supreme Court, the New York result was reversed.

Confusion abounds as to the law of *Spevack*. The plurality opinion of Mr. Justice Douglas (Warren, Black and Brennan, J.J., joining) reasoned in rhetorical terms that a threat of disbarment, being a powerful form of compulsion, cannot be used to coerce a waiver of fifth amendment rights, that the privilege against self-incrimination is available to all citizens without distinction, and that "lawyers also enjoy first-class citizenship."[93] The concurring opinion of Mr. Justice Fortas half-heartedly agreed, noting, however, that the result should be otherwise if a lawyer were a state employee who is asked specific questions about the performance of his official duties.[94] The dissenting opinion of Mr. Justice Harlan, a model of clarity, asserted that the attorney's claim of privilege is no admission of guilt and that the majority holding will encourage future generations of lawyers to think of their calling as imposing no

90. In Kastigar v. United States, 406 U.S. 441 (1972), the constitutionality of the "use and derivative use" immunity granted by the statute (note 87 *supra*), as distinguished from a "transactional immunity," was upheld. Mr. Justice Douglas was an avowed partisan of "transactional immunity." *See* 406 U.S. at 462 (Douglas, J., dissenting).

91. 273 Md. at 318, 329 A.2d at 7. The same reasoning was used by the United States District Court for the District of Maryland in refusing to enjoin disciplinary proceedings against engineers who had similarly testified at the Anderson trial (*supra* note 86) under compulsion and grant of immunity. Childs v. McCord, 420 F. Supp. 428, 434 (D. Md. 1976), *aff'd*, No. 76-2417 (4th Cir. June 22, 1977).

92. 385 U.S. 511 (1967). A companion case, Garrity v. New Jersey, 385 U.S. 493 (1967), had ruled that policemen, having been warned that unless they testified during a state investigation concerning police corruption they could be dismissed, were thereby deprived of their fifth and fourteenth amendment rights in being subjected to criminal charges based on their testimony thus threateningly induced. *See also* Lefkowitz v. Turley, 414 U.S. 70 (1973); Uniformed Sanitation Men Ass'n v. Sanitation Comm'r, 392 U.S. 280 (1968).

93. 385 U.S. at 516.

94. *Id.* at 519–20 (Fortas, J., concurring).

higher standards "than might be acceptable in the general marketplace."[95] Finally, the concurring dissent of Mr. Justice White cogently observed that, since a threat of anyone's discharge from employment (necessarily including the disbarment of a lawyer), renders inadmissible in a subsequent criminal case the testimony so induced,[96] the majority result in *Spevack* has "little legal or practical basis, in terms of the privilege against self-incrimination protected by the Fifth Amendment."[97] Spevack had "incriminated himself in no way whatsoever."[98] The Douglas and Fortas opinions do agree that the fifth amendment privilege has been incorporated in the fourteenth, and is, therefore, applicable to the states,[99] but beyond that there is no consistent reasoning pointing the way to the law of the case.

The controversy over the significance of *Spevack* has been exhaustively explored by many commentators[100] and its relevance to *Sugarman* extensively examined in *Survey of Maryland Court of Appeals Decisions 1974–1975 — Attorney Discipline.*[101] No useful purpose would be served by repeating these analyses. Suffice it to say that although the two cases produced different results in that Spevack's disbarment was reversed and Sugarman's allowed to stand, the narrow holdings in the two cases are not in conflict if one accepts the premise that disciplinary proceedings are not criminal or quasi-criminal in nature. The courts consistently accept this premise as an established principle, while disbarred attorneys whose sanction may appear far more serious to them than a stiff criminal fine, understandably regard it as pure fiction.

(6) *Failure to File*

Only two cases have reached the Court of Appeals involving attorneys who had failed to file income tax returns, *Rheb v. Bar*

95. *Id.* at 521 (Harlan, Clark, Stewart, JJ., dissenting).

96. *See* Garrity v. New Jersey, 385 U.S. 493 (1967).

97. *Id.* at 531 (White, J., dissenting).

98. *Id.*

99. *Id.*, at 514 (Douglas, J.); *id.* at 519 (Fortas, J., concurring). The plurality and concurring opinions confirm that Malloy v. Hogan, 378 U.S. 1 (1963), effectively incorporated in the fourteenth amendment the fifth amendment privilege against self-incrimination, and that Cohen v. Hurley, 366 U.S. 117 (1961), to the contrary, should be considered overruled.

100. *See* Buchanan, *The Privilege Against Self-Incrimination: To What Extent Should It Protect a State Employee or Professional Licensee Against the Loss of His State-Created Status?*, 7 HOUS. L. REV. 297 (1970); Franck, *The Myth of Spevack v. Klein*, 54 A.B.A.J. 970 (1968); Niles & Kaye, *Spevack v. Klein: Milestone or Millstone in Bar Discipline?*, 53 A.B.A.J. 1121 (1967).

101. *Survey of Maryland Court of Appeals Decisions 1974-1975 — Attorney Discipline*, 36 MD. L. REV. 351, 351–64 (1976).

Association[102] and *Bar Association v. McCourt.*[103] Although McCourt received a one-year suspension whereas Rheb was disbarred, the bar association's case against Rheb was belatedly bolstered by charges of a stock swindle, thus introducing an element of out-and-out fraud clearly justifying disbarment. Despite the distinction, the leniency accorded McCourt remains a mystery which has drawn prior critical comment.[104]

The paucity of decisions in "failure to file" cases is surprising since within recent memory the press has reported more than two attorneys who have entered guilty or nolo contendere pleas to this charge. Some may have submitted resignations which were accepted *sub silento*; others may have been suspended or disbarred at the circuit court or Supreme Bench levels without appeal, thus leaving no practical access to the record for those interested in tracing the development of the law in this field. Still others may have escaped public notice altogether if those heretofore vested under Article 10 of the Annotated Code of Maryland with the statutory initiative to prosecute elected to take no action. Now that grievance procedures have been centralized in the Attorney Grievance Commission and original jurisdiction conferred on the Court of Appeals in the BV Rules, it is to be hoped that a more uniform standard of prosecution will evolve in this sensitive area. A lawyer who is convicted or who pleads guilty or nolo contendere to a charge of failing to file income tax returns should be required to account for his conduct on the public record. Any other standard subverts confidence in a learned profession which must, in the public interest, remain free from all suspicion.*

(7) *Perjury, Bribery and Miscellaneous Crimes*

A number of decisions fall in this catch-all group, all of them calling for disbarment: *Maryland State Bar Association v. Frank* (bribery),[105] *Anne Arundel County Bar Association v. Collins* (bribery),[106] *Maryland State Bar Association v. Hirsch*[107] (bribery), *Maryland State Bar Association v. Rosenberg*[108] (perjury), *Maryland State Bar Association v. Green*[109] (perjury), *Maryland State Bar*

102. 186 Md. 200, 46 A.2d 289 (1946).

103. 276 Md. 326, 347 A.2d 208 (1975).

104. *Survey of Maryland Court of Appeals Decisions 1974-1975 — Attorney Discipline,* 36 MD. L. REV. 351, 371 (1976).

* *See* Addendum, *infra,* at 730, for a discussion of Attorney Grievance Comm'n v. Wallman, BV No. 17 (Ct. App., filed June 9, 1977).

105. 272 Md. 528, 325 A.2d 718 (1974).

106. 272 Md. 578, 325 A.2d 724 (1974).

107. 274 Md. 368, 335 A.2d 108, *cert. denied,* 422 U.S. 1012 (1975).

108. 273 Md. 351, 329 A.2d 106 (1974).

109. 278 Md. 412, 365 A.2d 39 (1976).

Association v. Boone[110] (mail fraud), *Maryland State Bar Association v. Kerr*[111] (mail fraud), *Klupt v. Bar Association*[112] (misrepresentation to the client and the court, coupled with excessive fees without the client's understanding or consent), and *Braverman v. Bar Association*[113] (subversion under the Smith Act). Braverman's conviction was a product of the anti-Communist hysteria of the 1950's, and he was later reinstated as mentioned more fully below.[114] The only other case in this category which merits comment is *Frank*.

That case is of interest because the accused had been acquitted of the charges for which he was disbarred, i.e., attempted bribery of an Assistant State's Attorney to induce lenient treatment of his clients. The disciplinary proceedings, not being of a criminal nature, were held not barred by the prior acquittal and to present no problem of double jeopardy.[115] The basis of the disciplinary action was not the commission of a crime but unprofessional conduct flagrantly prejudicial to the administration of justice. On these facts, disbarment was held not too severe a sanction.

Once more, as in *Sugarman*, we are confronted with a conflict between the interest of the court in policing the profession of law and, on the other hand, the personal rights of the accused attorney. In both cases the broader public interest prevailed, a result that will hopefully survive future constitutional attack.*

(8) *Neglect of Duty*

There are four Maryland cases in which disciplinary action was taken against attorneys for neglect of duty in violation of DR 6–101,[116] *Bar Association v. Dearing*,[117] *Maryland State Bar Association v. Phoebus*,[118] and the two recent cases of *Attorney Grievance Commission v. Cooper* and *Attorney Grievance Commission v. Pollack*[119]

110. 255 Md. 420, 258 A.2d 438 (1969) (denial of reinstatement after resignation).

111. 272 Md. 687, 326 A.2d 180 (1974).

112. 197 Md. 659, 80 A.2d 912 (1951).

113. 209 Md. 328, 121 A.2d 473, *cert. denied*, 352 U.S. 830 (1956).

114. *See* text at notes 131 to 133 *infra*.

115. 272 Md. at 535–36, 325 A.2d at 722–23.

* *See* Addendum, *infra*, at 731, for a discussion of Attorney Grievance Comm'n v. Brewster, BV No. 7, (Ct. App., filed June 21, 1977).

116. MARYLAND CODE OF PROFESSIONAL RESPONSBILITY, DR 6-101, *published at* MD R.P. 1026–27 (App. F), states:

> (A) A lawyer shall not: (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it. (2) Handle a legal matter without preparation adequate in the circumstances. (3) Neglect a matter entrusted to him.

117. 274 Md. 66, 332 A.2d 649 (1975).

118. 276 Md. 353, 347 A.2d 556 (1975).

119. *Cooper* is reported in 279 Md. 605, 369 A.2d 1059 (1977), and *Pollack* is reported in 279 Md. 225, 369 A.2d 61 (1977).

The reported decision in *Dearing* consists only of the Order of Court from which the details of the attorney's conduct cannot be gleaned. The evidence, however, was said to be sufficient to support the charge that he had become involved in cases which he should have known he was incompetent to handle, that in others he failed adequately to prepare himself, and that he neglected a number of legal matters entrusted to him. The three-judge panel recommended a one-year suspension, but on review by the Court of Appeals the sanction was increased to two years. A special master was appointed to investigate the attorney's files and ascertain that his clients had been provided with proper representation.[120]

In *Phoebus* the neglectful attorney was disbarred. He had given incorrect advice to a client involved in a tax sale, had failed to dissolve a corporation when instructed to do so, and had mismanaged three decedents' estates. These charges represented the third disciplinary action against him; he had been suspended after pleading nolo contendere on a charge of failing to file income tax returns and again suspended for having made misrepresentations to a client. Because of his "persistent neglect" and "fixed and irreversible habit of dilatoriness,"[121] the court concluded that the public should be protected from his unfitness to practice law.

In *Cooper* an attorney was charged with incompetence in handling a real estate settlement and in administering an estate, as well as misappropriation of a client's funds. The three-judge panel found that the respondent's acute alcoholism was a material contributor to the causes of his misconduct and recommended that he be placed indefinitely on inactive status pursuant to Rule BV (11)(2).[122] This recommendation was adopted by the Court of Appeals.

In *Pollack* the Court of Appeals accepted the recommendation of a three-judge panel for disbarment of an attorney who had been persistently neglectful and dilatory in three separate matters, whose

120. In Andresen v. Bar Ass'n, 269 Md. 313, 305 A.2d 845 (1973), the Court of Appeals granted a local bar association's petition for an audit of an attorney's accounts in real estate transactions which he was alleged to have mishandled. Andresen has become the subject of disciplinary proceedings as a result of his conviction for receiving money under false pretenses and fraudulent misrepresentation by a fiduciary. [(Conviction upheld in Andresen v. State, 24 Md. App. 128, 331 A.2d 78, *cert. denied,* 274 Md. 725 (1975), *aff'd,* 96 S. Ct. 2737 (1976)]. Pursuant to MD. R.P. BV 16, the Court of Appeals suspended Andresen from the practice of law, with the ultimate disciplinary action to be taken upon his release from incarceration. *See* Attorney Grievance Comm'n v. Andresen, 279 Md. 250, 367 A.2d 1251 (1977).

121. 276 Md. at 365–66, 347 A.2d at 563.

122. Compare the treatment of Cooper, whose illness was taken into consideration in the sanctioning decision, with that of Siegel and McCourt, discussed in text at notes 54 to 61 *supra.*

emotional and marital difficulties were held to be no excuse, and who was lacking in candor in his testimony before the panel. The decision is consistent with others brought under DR 6-101; they clearly establish the point that professional incompetence is professionally unethical.

(9) *Reinstatement*

Four decisions of the Court of Appeals have considered the question of reinstatement after previous disbarment: *In re Meyerson,*[123] *In re Braverman,*[124] *Maryland State Bar Association v. Boone*[125] and *In re Barton.*[126] The *Meyerson* case, involving the returning war veteran who was denied reinstatement because of his participation in obtaining an illegal abortion for a young woman to whom he was shortly thereafter married, has already been considered *in extenso* above;[127] and passing mention has been made of *Barton,* the case of an attorney denied reinstatement after disbarment for commingling clients' funds.[128] The cases of *Boone* and *Braverman,* however, require discussion.

A. Gordon Boone, admitted to the Bar of Maryland in 1937, was convicted in 1964 of mail fraud and his resignation from the bar thereupon was accepted by the Circuit Court for Baltimore County. After serving thirteen months in prison, he applied for gubernatorial pardon which was denied. In 1969 he petitioned for reinstatement in the same circuit court, and, after a hearing at which the Baltimore County Bar Association expressed passive acquiescence, he was ordered reinstated over the dissent of Judge Kenneth C. Proctor. Thereupon, the Maryland State Bar Association appealed to the Court of Appeals (even though that association had not been a party to the lower court proceedings) and simultaneously filed motions in the circuit court for intervention, a new trial, a rehearing, and vacation of the order of reinstatement. In a remarkable piece of jurisprudential legerdemain, the Court of Appeals heard the association's "appeal," even though it was dismissed as clearly

123. 190 Md. 671, 59 A.2d 489 (1948) (application denied).

124. 271 Md. 196, 316 A.2d 246 (1974) [application granted; referral to three-judge panel reported in 269 Md. 661, 309 A.2d 468 (1973)]. Respondent's disbarment had been affirmed in Braverman v. Bar Ass'n, 209 Md. 328, 121 A.2d 473, *cert. denied,* 352 U.S. 830 (1956). He was disbarred from the federal court in 148 F. Supp. 56 (D. Md. 1957); his application for reinstatement was denied in 399 F. Supp. 801 (D. Md. 1975); but he was ordered reinstated by the U.S. Court of Appeals for the Fourth Circuit in 549 F.2d 913 (4th Cir. 1976).

125. 255 Md. 420, 258 A.2d 438 (1969).

126. 273 Md. 377, 329 A.2d 102 (1974).

127. *See* text accompanying notes 1 to 9 *supra.*

128. *See* note 62 and accompanying text *supra.*

required by the authorities.[129] In an opinion by Chief Judge Hammond, the association's dismissed appeal was treated as a "motion for review" resulting in a direction to the circuit court to conduct a new hearing at which both the association and Mr. Boone would have the right to present testimony. Members of the circuit court who had professional, personal, or social contacts with Mr. Boone were directed to disqualify themselves "and not sit."[130] The principles laid down in *Meyerson* governing reinstatement of disbarred attorneys were ordered strictly observed.

Whether or not the Court of Appeals acted within its constitutional authority in *Boone* is beyond the scope of this study. Suffice it to say that, in cases not reviewable by the Supreme Court, the Maryland Court of Appeals stands on parity with the Bishop of Rome speaking *ex cathedra* on ecclesiastical matters, there being no one below the rank of God Almighty to gainsay its decisions. However, there are few concerned with public confidence in the administration of justice who would say that the result, however strained the methods of attainment, was not in the public interest.

Having opened with a discussion of *Meyerson*, the case of the young man denied reinstatement because of his complicity in an illegal abortion, it is fitting to close with a discussion of *Braverman*, the case of an attorney convicted in 1952 of conspiracy to overthrow the government of the United States by force or violence in violation of Section 2 of the Smith Act.[131] Braverman was subsequently disbarred both from state and federal practice, and after serving his three-year sentence, he devoted himself to *pro bono publico* pursuits of commendable proportions. Having renounced association with the Communist Party, he established a bookkeeping service for small businesses, became treasurer of the New Democratic Coalition, served as president of the St. John's Council on Criminal Justice, and taught courses on poverty and criminal justice at the Baltimore Free University on the Johns Hopkins campus.[132] His reinstatement was recommended by the Maryland State Bar Association and

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129. *See* cases cited at note 11 *supra*.

130. In the argument on its dismissed "appeal," the Maryland State Bar Association

> took the position that it was improper, if not a vitiation of the court's right to act, for certain members of the Circuit Court for Baltimore County who are or had been in very close association with Boone — politically, economically, socially or in the practice of law — to have sat in the case.

255 Md. at 424–25, 258 A.2d at 440.

131. *See* 18 U.S.C. § 2385 (1970).

132. By contrast, the petitioner in *Barton*, 273 Md. 377, 329 A.2d 102 (1974) (*see* notes 46, 57, & 102 *supra*), an applicant who had been disbarred for misappropriation of a client's funds and denied reinstatement, laid claim to *pro bono publico* service of

endorsed by the three-judge panel. The Court of Appeals concurred.[133]

The three factors bearing on eligibility for reinstatement as laid down by Judge Markell in *Meyerson* and repeated in the other three cases are: the nature of the original offense, the rehabilitation of the respondent, and his present capacity to practice law. In three of the four reinstatement cases, these tests may be said to have been applied harmoniously, the exception, oddly enough, being *Meyerson,* where the tests were fashioned. There, an offense characterized as "not among the minor vices" should not have been equated with one of moral turpitude, since it involved no element of violence or deliberate dishonesty. It was rather, as Mr. Wolman testified, a personal offense, inflicting injury on Meyerson himself, a wrongdoing that imperiled his relationship with a young woman to whom he was later happily married. His army service and statement of contrition being ample evidence of rehabilitation, and his capacity to practice law being unquestioned, he should, like Braverman, have been reinstated.

CONCLUSION

The BV amendments to the Maryland Rules of Procedure in 1970 represented giant steps forward in the cause of better professional responsibility by the bar of Maryland, their most important facet being the transfer of original jurisdiction in disciplinary cases from the nisi prius courts to the Court of Appeals. Prior to that time, the system itself fostered cronyism between respondents and those holding the power to initiate proceedings, failed to produce uniform statewide standards of enforcement, and was usually lacking in a centralized published record for the guidance of the local bench and bar. Only in the relatively rare case of an appeal to the Court of Appeals by an aggrieved attorney would statewide members of the profession, the press, and the public become aware of actions taken by the bar to police its own.[134]

A second giant step occurred in 1975 in the creation of the Attorney Grievance Commission and Bar Counsel with their specialized staffs of attorneys and investigators. It is still too early to assess how well the new system will work, but the concept is

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more modest proportions. The court observed that "he had done some volunteer work of a clerical nature for a family court and a legal aid agency, and . . . had subscribed to the Daily Record for two years." *Id.* at 382, 329 A.2d at 105. Clearly not enough.

133. *See* note 124 *supra.*

134. Under the new procedure, disbarments by consent do not appear in the Maryland Reports but a public record remains in the Maryland Register.

plainly designed to overcome some of the more obvious shortcomings in the old, such as the burden on private attorneys in serving as *pro bono publico* prosecutors and the lack of adequate staff for investigative purposes

However, more remains to be done, particularly in the following three areas:

(1) Now that the Court of Appeals has become the court of first and last resort in disciplinary actions, it finds itself burdened with one of the most difficult tasks of nisi prius judges, the imposition of consistent "sentences" making the "punishment" fit the "crime". It is hoped that this analysis of the cases has shown that in the majority of its decisions in this field the court has demonstrated commendable consistency, but in a substantial number it has not.

(2) The referral to the three-judge panels is a healthy development, as is also the increasing tendency of the Court of Appeals to adopt well reasoned panel opinions as the law of the case. But whenever there is a change in the sanction at the appellate level, a complete explanation is the only way to enlighten the lower bench and bar. Absent such explanation, they remain confused.[135]

(3) Whenever a difficult case presents a superficial reason which does not justify the extreme penalty of disbarment and an underlying one which does, public confidence in the administration of justice would be enhanced if the court were to place exclusive reliance on the latter. This brings us back to *Meyerson* where this inquiry began: if the *real* reason why the returning war veteran was denied reinstatement was the court's belief that he had suborned his wife's so-called, but unproven, "perjury" in the abortion case, then the court should have said so.

The problems of disbarment and reinstatement will remain with us so long as we have a profession of law populated by human beings with the shortcomings in moral fiber with which we are all, in varying degrees, afflicted. The solutions will evolve, case by case, with the passage of time as they have so dramatically in Maryland over the last thirty years, and especially in the last seven. This study will close, therefore, not with any definitive answers to the questions

135. In March of 1977, the Attorney Grievance Commission, pursuant to Md. R.P. BV16, sought the suspension, subject to further order of the court, of an attorney who had been convicted of mail fraud. Without filing any explanatory opinion, the Court of Appeals denied the petition. Attorney Grievance Comm'n v. Reamer, BV No. 12 (Md. filed Apr. 15, 1977). The respondent had challenged the constitutionality of the rule which permits a summary suspension of an attorney on conviction of a crime of moral turpitude, regardless of the pendency of an appeal. As in *Haupt*, discussed in text at note 52, *supra*, the absence of an opinion explaining the action taken raises serious doubts that should have been put to rest. The uncertainty raised by *Reamer* is compounded by the recent invocation of Md. R.P. BV 16 in *Andresen*, *supra* note 120, and a motion for reargument in *Reamer* was granted, hopefully for this reason, on June 1, 1977.

that will confront future generations but with a restatement of the age-old question propounded by Lord Mansfield many years ago:

> "The question is, whether, after the conduct of this man, it is proper that he should continue a member of a profession which should stand free from all suspicion."

ADDENDUM

After the foregoing article had gone to press, the Court of Appeals took action in two cases which must be noted in this Addendum. By asterisk, they have been appropriately flagged in the text of the article and are summarized below:

(1) In *Attorney Grievance Commission of Maryland v. Wallman,*[136] an attorney who had pleaded guilty to a charge of failing to file federal income tax returns was held, in a 4 to 3 decision, not to have committed a crime of moral turpitude under DR 1-102(A)(3) but to have engaged in conduct prejudicial to the administration of justice violating subsection (5) of the rule and conduct adversely reflecting on his fitness to practice law under subsection (6). The three-judge panel had recommended a one-year suspension which the Court of Appeals increased to three years. The court's analysis of "moral turpitude" is defensible, although debatable, and the sanction imposed appears reasonable, but scarcely compatible with *McCourt.*[137] Instead of distinguishing that case on grounds that the respondent there had suffered from " 'passive-aggressive' neurotic personality disorder," it would have been better if *McCourt* had been characterized as an aberration of excess leniency — which it was.

The *Wallman* case is of particular interest, however, because of the majority holding that under *Ruffalo*[138] and *Cockrell,*[139] the court was powerless to take into account in imposing sanctions the fact that the respondent had failed to file Maryland income tax returns for a decade. The point had not been mentioned in the disciplinary charge but was brought out for the first time on cross-examination before the three-judge panel. Relying on *Ruffalo* and its requirement of procedural due process in disciplinary cases, four of the seven judges found their hands helplessly tied.

A sharp dissent was registered by Judge Murphy, with the concurrence of Judges Digges and Smith. The Chief Judge argued

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136. BV No. 17 (Ct. App., filed June 9, 1977).

137. *See* discussion, *supra*, at 715-16.

138. *See* discussion, *supra*, at 717-19.

139. *Id.*

that although a failure to file federal income tax returns is not a per se crime of moral turpitude, it can be so if the respondent is motivated not just by his inability to pay but by a fraudulent intent never to make any payment at all. Such he believed to be Wallman's intent from the record in this case. On the questions of procedural due process involved in the belated revelation of respondent's failure to file Maryland returns, Judge Murphy reasoned convincingly that *Cockrell* should be confined to its particular facts and that, unless *Ruffalo* is to have a crippling effect on disciplinary proceedings, the import of its holding must be narrowly circumscribed. Judge Smith's separate dissent noted that respondent had demonstrated his unfitness to practice law and should on this account be disbarred. The other two dissenters agreed.

(2) In *Attorney Grievance Commission of Maryland v. Brewster,*[140] Judge Smith, a dissenter in *Wallman* but now speaking for a 6-1 majority, held that a former elected official who had pleaded nolo contendere to a charge of accepting an illegal gratuity was not guilty of a crime of moral turpitude and that since this was the only charge placed against him by the Commission, the petition for disciplinary action must be dismissed. Again, reliance was placed on *Ruffalo* and *Cockrell* and again Chief Judge Murphy dissented. While agreeing that the offense was not one of moral turpitude under DR 1-102(A)(3), he saw no reason why, on the record of the case, the respondent should not be held accountable, as in *Wallman,* for conduct prejudicial to the administration of justice under subsection (5) of the rule or for conduct adversely reflecting on fitness to practice law under subsection (6). The three-judge panel had recommended a reprimand but the Chief Judge favored six-months suspension.

The holding in the majority opinon that violations of subsections (5) and (6) of the rule were not sufficiently alleged by the Commission to satisfy *Ruffalo* will do little to advance the consignment of that peculiar case to the state of oblivion where it so clearly belongs. It may be noted, however, that the discerning analyses of "moral turpitude" in *Brewster* and *Wallman,* both unanimous on this point, are healthy developments. They may indicate a trend away from some of the earlier cases discussed in the foregoing article whereunder any conduct deemed offensive to a trier of law might be tossed into the grab-bag of "moral turpitude." Under the expanded range of santionable offenses now set forth in DR 1-102(A) this approach may no longer be the only alternative to dismissal of the petition, assuming, of course, that charges of the

140. BV No. 7 (Ct. App., filed June 21, 1977).

lesser offenses are sufficiently alleged and proven to satisfy the respondent's constitutional rights.

A.W.M., Jr.

July 10, 1977.