THE TRUE STORY OF LAWYER DISCIPLINE IN OHIO: 1967-1983

by

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INTRODUCTION

The title has been suggested by an article of two knowledgeable spokesmen of the American Bar Association, Timothy K. McPike and Mark I. Harrison,¹ who responded to the question of whether the profession is lax in dealing with incompetent and dishonest lawyers in the United States. The point of departure of that and like articles is the Clark Committee Report² that not only disclosed widespread tolerance by lawyers of professional misconduct but recommended a thirty-six point program for combating the malaise. These recommendations in turn precipitated the American Bar Association Standards for Lawyer Discipline and Disability Proceedings (hereinafter “ABA Standards”). McPike and Harrison concluded that a perception of professional laxity in dealing with the incompetent and dishonest is unfair, detail the many accomplishments since the Clark exposé, and acknowledge that work remains to be done to complete the Clark reforms.

Ohio is pointed out as among a small minority of states (three) that “still uses procedures identified in the Clark Report . . . as fostering abuse.”³ Although overdrawn, their criticism is not unfair, if the Clark Report’s recommendations and the ABA Standards are accepted as norms. For, the investigative and prosecutorial (“relatorship”) functions are highly decentralized in Ohio. Moreover, Ohio differs markedly from the ABA Standards with regard to several fundamental conceptions of sanctions, namely in Ohio’s “permanent disbarment,” irrevocable voluntary resignation, and “indefinite suspension.” Further, Ohio has failed to avail itself of several other useful sanctions that help “fine tune” the disciplinary machinery.⁴

Ohio’s disciplinary machinery, seemingly controversial from the perspec-

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The author expresses gratitude to two law students, who assisted in research on the matter of reinstatements, Messrs. Bobby Murphy and Robert Tucker, and who are now members of the Ohio Bar.


³ The True Story of Lawyer Discipline, supra note 1, at 94.

⁴ Suspension for a fixed term not to exceed three years, probation not to exceed two years, and court-ordered restitution are among sanctions not authorized by court rule in Ohio.
tive of the ABA, is a paradox resulting from an accident of recent history. In 1952, the ABA created a Special Committee to formulate model grievance and disciplinary procedures "for uniform and effective enforcement of the standards of conduct prescribed by the Canons of Professional and Judicial Ethics," which subsequently issued the ABA Report of the Special Committee on Disciplinary Procedures (the "Phillips Report" after its Chairman, Chief Judge Orie L. Phillips), a precursor of the Clark Report. Serving on the Committee was Benjamin C. Boer of Cleveland, Ohio, Ohio State Bar President in 1952, who filed a minority report.6

President Boer, through the Ohio State Bar Association,7 on the one hand precipitated reform in Ohio well antedating that stimulated by the Clark Report, but Boer's philosophy of disciplinary proceeding on the other created in Ohio a disciplinary hybrid — a hybrid at least from the perspective of the ABA Standards. In advocating a decentralized system with the Ohio State Bar Association and local bar associations as relators, Boer was protecting the turf of the state as well as powerful local bar associations in Akron, Cincinnati, Cleveland, Columbus, Toledo and Youngstown, Ohio.

Boer favored a larger role of the bar association than that assigned by the Phillips majority, a concept of permanent disbarment without the prospect of reinstatement, that suspension should be for an indefinite and not for a fixed period, and that a lawyer who voluntarily resigned from the bar should never be reinstated. Ohio's reformatory rule change of 1956 (Rule XXVII, effective in 1957)8 incorporated Boer's thinking, except for irrevocable resignation that did not become effective until 1972.9

That Ohio's hybrid system "worked" was demonstrated by Professor Schroeder's ten year study of 115 cases10 that were tried under reformatory Rule XXVII: "Discipline was simple and most effective; reinstatement was most demanding, not automatic."11 The reason the reformed procedure looked good was that Schroeder was comparing the post-1956 results with what had gone on before.12 The "before" picture in Ohio was in microcosm that which

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7 Id. at 477.
8 See President's Address, 25 Ohio St. B.A. Rep. 357 (May, 1952), an address delivered by President Benjamin C. Boer during the Annual Meeting of the Ohio State Bar Association, May 1952.
9 167 Ohio St. liii, at lxxvi (1958).
10 29 Ohio St. 2d xxix, at xxxiii (1972).
11 O. Schroeder, Jr., Lawyer Discipline: The Ohio Story (1967), hereinafter "Schroeder."
12 Id. at 23.

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See, e.g., In re King, 54 Ohio St. 415, 43 N.E. 680 (1896), Disbarment by common pleas court, and reinstatement by court pursuant to a statute (R.S. Sec. 563), authorizing the supreme court, court of appeals, or court of common pleas to suspend or remove an attorney-at-law for misconduct, and by implication the disbarred or suspending court could reinstate; In re Disbarment of Lieberman, 163 Ohio St. 35, 125 N.E. 2d 328 (1955), Disbarred in June 1937, amended to two year suspension in October, 1937, reinstated in 1945, guilty of unprofessional conduct resulting in common pleas court disbarment in 1953, reversed by the court
Clark disclosed in his report as generally prevailing in the United States — a system that was apathetic, antiquated, decentralized and deficient.

Notwithstanding the overall favorable grade on Ohio’s performance given by Professor Schroeder, his study suggested several problems. Given a structure of discipline based on permanent disbarment (contrary to the ABA conception), indefinite suspension (also contrary to the ABA definition), public reprimand and private reprimand, a wide gap existed between indefinite suspension and public reprimand. Given a partner who filed a federal partnership income tax return (informational) but who failed to follow up with an individual federal tax return on one occasion, and who was therefore guilty of a federal misdemeanor, should the sanction be public reprimand or indefinite suspension? Or, what of an attorney who effected a loan from his client to a third party borrower, and along with two others split a finder’s fee paid by the borrower, without the knowledge of the client, and where payments under the loan were not forthcoming? To this and other misconduct that did not involve egregious or repeated misconduct the simple answer was a fixed period suspension. Such sanction was not authorized in Ohio until 1981 and it was fixed as one year.

Secondly, the number of abortive attempts at discipline revealed in the Schroeder study was disturbing. About one case in seven, or fourteen percent of the cases, were dismissed by the Board of Commissioners on Grievances and Discipline or by the court either on a procedural point (one case) or insufficient evidence of a substantial violation of the rules (thirteen cases). These data suggested the factor of inexperience of the voluntary agents of the many relators in Ohio who operated with voluntary personnel.

Thirdly, Table J in the Schroeder report indicated the expiration of an average of 422 days and a median of 382 days between date of complaint and...
date of the court decision, and an average number of days of 1053 and a median number of days of 791 between the date of the incident and the filing of the complaint, or an average of 1532 days and a median of 1415 days between the date of the incident and the court decision date. Surely, a delay factor of more than four years during which the offender continues to practice unless convicted of a crime or found to be mentally ill is too long and suggests the need for further reform.

What the Schroeder report does not reveal is whether like offenses are treated alike by Ohio's then ninety-five potential relators.19 Is an attorney, whose negligence results in the running of the statute of limitations against his client's cause, subject to discipline, or does discipline result only if there are aggravating factors (e.g., lying to the client about the matter)? Is the guileless but mistaken young attorney who fails to establish a client's fund (trust) account and who borrows from settlement of claims to provide short term financing from his law practice and who thus delays the client's receipt of money subjected to discipline, or merely admonishment by a local grievance committee? Does it matter in either instance whether the attorney is well liked and well received by the established bar, or whether his life style, professional or otherwise, is frowned upon by the establishment? In a small county with few practitioners and close personal and professional contacts, are one's friends and associates willing to do "the noisome work" of investigation and prosecution?

One cannot tell from the cases filed what cases should have been filed, or whether like offenses are treated uniformly among the many relators. One can only conclude along with Clark that, "A decentralized structure, utilizing a multiplicity of disciplinary agencies and courts, also produces a substantial lack of uniformity in discipline imposed, which is aggravated by an absence of intrastate coordination."20 Ohio has centralized the rule making and adjudicatory power in the state's supreme court. For the most part,21 however, investigation and prosecution continued in the hands of county bar associations with little intrastate coordination, during the period of this study.

The aim of this study is to describe discipline in Ohio for the seventeen year period following the Schroeder study, to evaluate its effectiveness, and to suggest reforms intended to make the system fairer and more effective.

19Ohio has eighty-eight counties, each of which has at least one bar association. Larger counties (e.g., Cuyahoga) have two. Until recently, the Ohio State Bar Association was a relator. The Disciplinary Counsel of the Supreme Court is a relator. Most local bar associations do not have a disciplinary counsel or an investigator, but operate with volunteers.

20"Clark Report, supra note 2, at 821.

21Disciplinary Counsel has exclusive jurisdiction to act as relator in complaints alleging violation of DR 2-101 and DR 2-102(A) and (B) that deal with advertising and professional notices, letterhead, office signs and law lists, with regard to which uniformity is necessary; and under Supreme Court Rules for the Government of the Judiciary. Rule II, Sec. 3, dealing with Disciplinary Procedures for the judiciary. See Samad, Ohio Revised Rules for the Government of the Judiciary and the Bar: A Critique, 13 CAP. U.L. REV. 25 (1983).
A summary of disciplinary actions in Ohio during this period appears as Table I, based on cases reported in the official Ohio State Reports and on the disciplinary docket of the supreme court as it appears from time to time in the Ohio State Bar Association Journal (OBAR).

**Disbarment In Ohio**

Prior to the amendments to the disciplinary rule of 1957, two decisions, among others, provide insight into the meaning of disbarment in Ohio, *In re King* and *In re Disbarment of Lieberman.* In 1882, King was disbarred by the Common Pleas Court of Henry County for conviction of an offense involving moral turpitude. Upon a reversal of his conviction, he applied for admission to the bar as if an initial admittee, to a second common pleas court, and was admitted. He failed to inform the second court of his prior disbarment. The current action was begun in Henry County to revoke the second certificate. The lower court revoked the certificate on the grounds of fraud in its procurement, and failing to follow the proper procedure for reinstatement. The proper procedure was to apply to the court which disbarred him for reinstatement, in a proper showing of reformation "or other satisfactory reason." This early decision indicates that disbarment was not permanent but revocable, that reinstatement was possible, and that trial courts of general jurisdiction exercised jurisdiction to disbar under applicable statute.

In *Lieberman,* decided fifty-nine years later, the respondent was disbarred for solicitation and for mishandling clients' funds, in June, 1937. In October of that year, the sanction was amended to two year probation, provided he make restitution. In 1945, he was reinstated. In 1953, he was again charged in the common pleas court of unprofessional conduct and the finding was against him. On appeal, the finding was reversed by the court of appeals and the charges dismissed. The issue of the case concerned questions of evidence. The point for this discussion is that disbarment in Ohio was but a form of indefinite suspension, with no minimum period for cessation of practice, and that courts other than the supreme court continued to exercise the power to disbar.

All this was changed by Rule XXVII, effective January 1, 1957. "Misconduct" under the statute (Ohio Rev. Code § 4705.02, Gen. Code §1707, and its

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22*Supra* note 12.

23*Id.*

24*By amendment to Rule XXVII, effective Jan. 1, 1946, the supreme court began to exercise control over reinstatements 147 Ohio St. lxxvii. Section 2 of Rule XXVII read:

When, after due notice and hearing, a disbarred or indefinitely suspended attorney at law has been ordered reinstated by a court of this state other than the Supreme Court, the court ordering the reinstatement shall set forth in its journal entry its finding of facts and conclusions of law upon which its order is based. The Clerk of that court shall certify forthwith to the Clerk of the Supreme Court a copy of such journal entry; and if so ordered by the Supreme Court, the clerk thereof shall note on the Journal and on the Roll of Attorneys that the privilege of engaging in the practice of law in this state has been restored to such disbarred or indefinitely suspended attorney.
precursor Rev. Stat. §563) was "misconduct in office, conviction of a crime involving moral turpitude, or professional conduct involving moral turpitude." Court Rule XXVII(5) (a) expanded the definition of the term "misconduct" to include

any violation of any provision of the oath of office taken upon admission to practice of law in this State, or any violation of the Canons of Professional Ethics or the Canons of Judicial Ethics as adopted by the Court from time to time, or the commission or conviction of a crime involving moral turpitude.

The Rule then set forth four levels of sanctions including "permanent disbarment from the practice of law." The Rule did not then, nor does its current counterpart (Government Rule V(5)), define those specific offenses that result in disbarment, suspension or censure. This position is consistent with that expressed in the ABA Standards (and in the Preliminary Statement to the ABA Model Code of Professional Responsibility) that "The discipline to be imposed should depend upon the specific facts and circumstances of the case, should be fashioned in light of the purposes of lawyer discipline, and may take into account aggravating or mitigating circumstances."

What has been the incidence of permanent disbarment in Ohio? The Schroeder study indicates 11 of nearly 100 cases reaching the court (not involving reinstatement) resulted in permanent disbarment. Table 1, supra, indicates that 36 of 250 cases reaching the supreme court resulted in permanent disbarment — about fifteen percent. In addition, voluntary resignations, which, like disbarment, are permanent, account for 115 self removals, or a total of 151 instances of permanent removal from practice in the seventeen year period, or approximately nine lawyers per year, on the average. The vigor of enforcement in Ohio has not diminished since the Schroeder report, at least with respect to egregious offenses, and, if anything, has increased.

For what reasons are lawyers permanently disbarred in the state? Two cases involved disobedience to the order of indefinite suspension by the respondents' practicing law. Sixteen cases involving seventeen lawyers were predicated upon convictions of such serious crimes as: involvement in illegal drug traffic in Florida; securing a writing by deception and misuse of funds in a federal insured bank, as an officer thereof (involving more than $1 million); transporting bank money orders in interstate commerce knowing them to be stolen ($110,000 face value); grand theft from an estate; gross sexual imposi-

\(^{23}\)ABA Standard 7.1.
\(^{25}\)Ohio State Bar Association v. Orosz, 5 Ohio St. 3d 204, 449 N.E. 2d 1310 (1983).
\(^{26}\)Disciplinary Counsel v. Kraft, 5 Ohio St. 3d 197, 449 N.E. 2d 1303 (1983).
\(^{27}\)Bar Association of Greater Cleveland v. Bendis, 70 Ohio St. 2d 282, 436 N.E. 2d 1361 (1982).
\(^{28}\)Toledo Bar Association v. McCreery, 69 Ohio St. 2d 359, 432 N.E. 2d 209 (1982).
tion; murder of wife; embezzlement totaling in excess of $42,000 in one case and nearly $16,000 in another; offering and attempting to bribe a prosecuting attorney; counterfeiting and conspiracy to counterfeite; altering automobile identification and concealing motor vehicle identification; conviction of fifteen counts of use of the mails to defraud in the sale of registered securities; a public official's conviction of soliciting and accepting money to influence his official duties; larceny by trick involving three clients; use of mails to execute a scheme to defraud, involving husband and wife as respondents; and selling nonexempt securities without a license and lending money at usurious rates.

For the most part, the foregoing conduct was not in the capacity of the respondent as a lawyer. However, the misconduct went to matters central to character for the practice of law — honesty, trustworthiness and integrity. They also had the quality of creating a "bad press" for the bar, and permanent disbarment became a form of erasing the blot on the profession.

Seventeen cases did not involve a prior conviction of a crime. Thirteen of these involved mishandling clients' funds either in terms of commingling, misuse, failure to account, or a combination thereof. Of the remaining four, one involved the bilking of a savings and loan and of which the lawyer was an of-

24Bar Association of Greater Cleveland v. Steele, 65 Ohio St. 2d 1, 417 N.E. 2d 104 (1981).
26Lake County Bar Association v. Ostrander, 41 Ohio St. 2d 93, 322 N.E. 2d 653 (1975).
30Ohio State Bar Association v. Mackay, 46 Ohio St. 2d 81, 346 N.E. 2d 302 (1976).
31Cleveland Bar Association v. Fatica, 28 Ohio St. 2d 40, 274 N.E. 2d 763 (1971).
33Toledo Bar Association v. Lichota, 15 Ohio St. 2d 217, 239 N.E. 2d 45 (1968).
34Cincinnati Bar Association v. Shott, 10 Ohio St. 2d 117, 226 N.E. 2d 724 (1967).
35See Grievance Committee v. Broder, 112 Conn. 269, 152 A. 292 (1930). (Attorney disbarred on conviction of adultery). The court observed that the "public notoriety" of the case made it doubly imperative to discipline the attorney, notwithstanding his excellent standing at the bar.
A second involved conflict of interest between the attorney and the beneficiaries of an estate which he was handling, and commingling.\textsuperscript{46}

A third involved gross neglect of one’s practice (21 counts), commingling, issuing “NSF” checks on the attorney’s account, and failure to complete thirty-two probate matters.\textsuperscript{47}

The final case involved several unrelated offenses — fraud in the attorney’s voluntary bankruptcy petition, leaving his office in charge of a non-lawyer who then engaged in unauthorized practice, and abusive use of legal process against a client — clear indicators of an unprofessional attitude and which cumulatively led to disbarment.\textsuperscript{48}

Although not involving criminal convictions, permanent disbarment nonetheless was justified in the last series of cases by such aggravating factors as a repetition of the misconduct,\textsuperscript{49} a collage of lesser offenses, each of which alone would not justify disbarment but when aggregated indicate an unprofessional attitude,\textsuperscript{50} failing to appear and respond to the charges,\textsuperscript{51} the flagrancy of the violation,\textsuperscript{52} failure to make prompt restitution,\textsuperscript{53} or prior sanction.\textsuperscript{54}

These cases meet a test of disbarment in that they demonstrate an attitude wholly inconsistent with the recognition of proper professional standards, or as a single offense “so grave a nature as to be impossible to be a respectable lawyer.”\textsuperscript{55}

In each of these cases, the supreme court has determined in advance that the misconduct is so aggravated that the attorney not be given the opportunity of a second chance through reinstatement. If one accepts the proposition of unpardonable misconduct, then the court has acted fairly in these cases. The

\textsuperscript{47}Toledo Bar Association v. Bartlett, 39 Ohio St. 2d 100, 313 N.E. 2d 834, cert. denied, 419 U.S. 1073 (1974).
\textsuperscript{48}Ohio State Bar Association v. Willard, 50 Ohio St. 2d 3, 361 N.E. 2d 452 (1977).
\textsuperscript{49}Stark County Bar Association v. George, 45 Ohio St. 2d 267, 344 N.E. 2d 132 (1976).
\textsuperscript{50}Ohio State Bar Association v. Willard, supra note 47.
\textsuperscript{51}Stark County Bar Association v. George, supra note 48.
\textsuperscript{52}Ohio State Bar Association v. Talbott, 59 Ohio St. 2d 76, 391 N.E. 2d 1028 (1979); Ohio St. Bar Association v. Willard, 50 Ohio St. 2d 3, 361 N.E. 2d 452 (1977).
\textsuperscript{53}Stark County Bar Association v. George, supra note 48.
\textsuperscript{54}Toledo Bar Association v. Cone, 24 Ohio St. 2d 96, 264 N.E. 2d 909 (1970).
\textsuperscript{56}H. DRINKER, LEGAL ETHICS, 46-47 (1953).
Ohio Supreme Court has delivered a message that it will exclude permanently from the bar not only serious criminal offenders, but the practitioner given to repeated instances of misuse or mishandling of clients' funds or who is given to chronic sloppy practice or who commits substantial violation of the terms of his suspension. Those permanently disbarred do not appear to be the young and inexperienced at the bar, but those admitted long enough to be seasoned and to know better.\(^{56}\)

**INDEFINITE SUSPENSION**

Both disbarment and suspension were available as sanctions to the court prior to the structured, four tier system introduced by Rule XXVII in 1957; however, those disbarred or suspended could be, and often were, reinstated.\(^{57}\) The distinction between disbarment and suspension was thus semantic, not functional, with disbarment suggesting that a more egregious offense had been committed. As noted earlier, consistent with the philosophy of Ohio State Bar Association President Boer, Rule XXVII introduced the notions of permanent disbarment, and indefinite suspension subject to reinstatement, although both notions ran contrary to prior practice and the subsequent ABA Standards.

Table I indicates that indefinite suspension has been the most frequent form of sanction occurring during the seventeen year period of this study — 132 instances — of which some were interim suspensions following the conviction of a serious crime,\(^{58}\) or the filing of a disciplinary action against a judge.\(^{59}\) So in the Schroeder study was indefinite suspension the most frequent sanction (39 cases). Of the 132 instances are 90 cases (involving 92 lawyers) in which indefinite suspension was ordered as a final sanction, and these 90 cases are discussed in this section.

A classification of offenses resulting in indefinite suspension appears in Table II. Conviction of crimes involving moral turpitude (35 cases) was the leading cause, of which income tax offenses (22 cases) was the largest subset.\(^{60}\)

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\(^{56}\)Coen, *A Look at Lawyer Discipline in Ohio*, 7 CAP. U.L. REV. 244 (1977). Attorney Coen, who was a Commissioner on the Ohio Board of Commissioners on Grievances and Discipline, commented at page 250: "It is not against the young and uninitiated practitioner that complaints have been filed. The average age of lawyers involved in disciplinary hearings is fifty, each having practiced law an average of twenty-six years."

Six cases of the 36 disbarment cases used in this study give the year of admission of the lawyer. The average length of time between the year of admission and the year of disbarment was nearly 20 years. The longest period was 33 years, the shortest 9, and the median 17 years. The youngest in point of service was convicted of concealing stolen motor vehicles and altering automobile identification.

\(^{57}\)See cases cited supra note 12.

\(^{58}\)Gov. R. V (8) (a):

Any attorney, admitted to the practice of law in this State who is convicted of an offense, other than a petty offense as defined by the Ohio Rules of Criminal Procedure, or who is convicted of an equivalent offense under the laws of any other jurisdiction, shall be subject to an automatic indefinite suspension.

\(^{59}\)See, e.g., Cincinnati Bar Association v. Heitzler, 31 Ohio St. 2d 187, 287 N.E. 2d 632 (1972) 32 Ohio St. 2d 214, 291 N.E. 2d 477 (1972), cert. denied, 411 U.S. 967 (1973); the first case involved an interim suspension as a judge; the second, indefinite suspension as a final sanction as a lawyer.

\(^{60}\)Criminal cases not involving income tax: Columbus Bar Association v. Tarmey, 4 Ohio St. 3d 81, 446 N.E.
Significantly, not one of these cases involved a client as the victim, and that fact served to mitigate the offense, vis-a-vis disbarment. Further, the crimes were less serious than those involved in disbarment. 61

Neglect of a client's cause and failure to seek his lawful objectives, involving 23 cases, ranked second to criminal offenses in terms of frequency. These were not isolated instances of neglect or failure to act, but cases compounded by repetition of the misconduct or by misleading a client as to the status of the case, or involving a failure to account for funds received from the client, or other aggravating factors. 62 Significantly, more than half of the neglect cases


Cases involving willful failure to file tax returns: Columbus Bar Association v. Dunbar, 62 Ohio St. 2d 360, 405 N.E. 2d 1040 (1980); Ohio State Bar Association v. Stimmel 61 Ohio St. 2d 316, 401 N.E. 2d 926 (1980); Butler County Bar Association v. Bartels, 58 Ohio St. 2d 260, 389 N.E. 2d 1141 (1979); Cincinnati Bar Association v. Pandildis, 57 Ohio St. 2d 47, 385 N.E. 2d 1317 (1979); Dayton Bar Association v. Westbrook, 56 Ohio St. 2d 75, 381 N.E. 2d 1320 (1978); Cincinnati Bar Association v. Beall, 54 Ohio St. 2d 168, 375 N.E. 2d 423 (1978); Stark County Bar Association v. Bernabei, 46 Ohio St. 2d 455, 349 N.E. 2d 300 (1976); Ohio State Bar Association v. Tzagournis, 46 Ohio St. 2d 367, 348 N.E. 2d 690 (1976); Ohio State Bar Association v. Vaporis, 46 Ohio St. 2d 364, 348 N.E. 2d 689 (1976); Dayton Bar Association v. Kern, 46 Ohio St. 2d 342, 348 N.E. 2d 707 (1976); Dayton Bar Association v. Moore, 46 Ohio St. 2d 241, 348 N.E. 2d 318 (1976); Bar Association of Greater Cleveland v. Kates, 46 Ohio St. 2d 34, 346 N.E. 2d 297 (1976); Ohio State Bar Association v. Moore, 45 Ohio St. 2d 57, 341 N.E. 2d 302, cert. denied, 426 U.S. 924 (1976); Dayton Bar Association v. Radbaugh, 43 Ohio St. 2d 155, 331 N.E. 2d 410 (1975); Ohio State Bar Association v. Tekulve, 42 Ohio St. 2d 285, 328 N.E. 405 (1975); Columbus Bar Association v. Dixon, 40 Ohio St. 2d 76, 320 N.E. 2d 293 (1974); Ohio State Bar Association v. Gerken, 40 Ohio St. 2d 51, 320 N.E. 2d 657 (1974); Cleveland Bar Association v. Stein, 29 Ohio St. 2d 77, 278 N.E. 2d 670, cert. denied, 409 U.S. 949 (1972); Cleveland Bar Association v. Acker, 29 Ohio St. 2d 18, 278 N.E. 2d 32 (1972); Ohio State Bar Association v. Hart, 15 Ohio St. 2d 97, 238 N.E. 2d 560, cert. denied, 393 U.S. 933 (1968).


62 Mahoning County Bar Association v. Walsh, 8 Ohio St. 3d 32, 456 N.E. 2d 1206 (1983); Mahoning County Bar Association v. Kelly, 4 Ohio St. 3d 188, 447 N.E. 2d 1304 (1983); Disciplinary Counsel v. Hiller, 5 Ohio St. 3d 237, 450 N.E. 2d 1157 (1983); Cincinnati Bar Association v. Ebel, 5 Ohio St. 3d 145, 449 N.E. 2d 456 (1983); In re Petition for Atkins, 2 Ohio St. 3d 32, 442 N.E. 2d 754 (1982) (suspended in 1979); Stark County Bar Association v. Ergazos, 2 Ohio St. 2d 59, 442 N.E. 2d 1286 (1982) (prior public reprimand); Dayton Bar Association v. Moore, 2 Ohio St. 3d 11, 442 N.E. 2d 71 (1982); Columbus Bar Association v. Ham-
Mishandling of funds or property of a client, or commingling or failure or inability to account for funds or property, or a combination thereof accounted for 19 cases, and were sometimes connected with neglect of the client's cause. Like the disbarment cases, many involved repeated instances of mishandling of money or property, but unlike the disbarment cases were not accompanied by a prior criminal conviction, nor were they of the same magnitude or flagrancy. Conflict of interest offenses accounted for 4 cases, in which an attorney abused a confidence or resource of a client for the benefit of self, a second client, or a friend.

Solicitation accounted for 2 cases, one of which reached the Supreme Court.


Lawyer population doubled between 1974 and 1983, but the number of indefinite suspensions tripled. In addition, several cases of neglect appear in terms of one year suspensions. Causes of increased incidence of neglect may be a greater willingness on the part of clients to complains, or a greater incidence of neglect or both. Alcohol abuse appears in three post-1980 cases, and two pre-1981 cases. Physical disability was a cause in one pre-1981 case. Disciplinary authorities and professional associations should be concerned in learning the causes.
Ohio continued its policy of dealing severely with ambulance chasing and other forms of aggressive business-getting.\(^7\)

The ploy of exacting an excessive fee by suggesting that the money was needed to influence a public official or tribunal was dealt with severely in 2 cases, although no money changed hands.\(^6\)

The 6 cases labelled "Miscellaneous" are self-explanatory.\(^6\)

Several of the foregoing cases involving a single instance offense not involving serious criminal misconduct are difficult to justify as meriting indefinite suspension. For example, Bednarczuk's venting his spleen against a common pleas judge by a scurrilous attack merited a sanction, but hardly indefinite suspension, since it did not occur in the judge's courtroom or in a case pending before him by one, a first offender, whose conduct otherwise was found to be good.\(^7\) So in the aggravated menace case by a lawyer, irate over a judge's ruling, who became drunk, pointed a gun "in the direction of" (not "at") the judge's bailiff and fired.\(^7\) A public reprimand was certainly in order at this point. But the attorney, who one presumed was now sober, foolishly wrote a letter to the judge suggesting that the judge influence the bailiff to dismiss proceedings pending against the lawyer, thus exacerbating his offense. The 20 cases involving willful failure to file federal income tax returns were dealt with uniformly by indefinite suspension, apart from any mitigating circumstances, since a public reprimand was ineffective either to deter similar offenses or to expiate the "bad press" that such cases engender.\(^2\)

Solicitation cases were similarly dealt with unduly harshly by imposing in-
definite suspension, as observed heretofore. Ohralk's approach of an accident victim in her hospital room was an imposition, but unless such conduct was habitual, or aggravated, it hardly merited indefinite suspension. A one year suspension, or less, would have been in order. But Ohio afforded no level of sanction between public reprimand and indefinite suspension, at least until 1981, before which seventy-one indefinite suspensions were ordered.

**ONE YEAR SUSPENSION**

Effective January 1, 1981, a suspension for the fixed period of one year was authorized. Reinstatement is not automatic, for an application is required. The applicant must state under oath whether or not any formal disciplinary proceedings are pending against him, must have complied with the order of suspension and must have paid all costs of proceedings as ordered by the court. If the foregoing conditions are met, he will be reinstated.

On reinstatement, he is faced with the provisions of Government Rule V(7) that

A person who has been suspended for a period of one year from the practice of law . . . upon being found guilty of subsequent misconduct shall be suspended for an indefinite period or permanently disbarred, depending on the seriousness of the misconduct.

There is in Rule V no limitation on the time of the running of this effect, nor a provision for expunction. Therefore, it is lifelong, contrary to ABA Standard 6.7 that provides: "Probation should be imposed for a specified period of time not to exceed two years."

The Board has over the first three year period recommended one year suspensions in 15 cases. The court has approved the recommendation in each case. Additionally, the court has increased a recommended public reprimand

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1) See supra note 66.

2) Cf. the use of lay agents in worker's compensation cases where indefinite suspensions were ordered: Columbus Bar Association v. Agee, and Columbus Bar Association v. Potts, supra note 67; cf. also Cleveland Bar Association v. Fleck, supra note 67, (involving solicitation in connection with a labor union), with Ohio State Bar Association v. Ohralk, 48 Ohio St. 2d 217, 357 N.E.2d 1097 (1976) (solicitation stemming from a single accident).

3) Gov. R. V(22):

Suspension for One-Year Period: Reinstatement. At the expiration of a suspension for a period of one year, the Respondent shall be reinstated to the practice of law, upon application by the Respondent. Said application shall be in writing and filed with the Clerk of this Court. It shall indicate the date such suspension was ordered, shall include an affidavit by Respondent indicating whether any formal disciplinary proceedings are pending against said Respondent, and request reinstatement pursuant to this rule. This Court shall order said Respondent reinstated, provided that all costs of the proceedings as ordered by the Court have been paid, that the Respondent has complied with the order of suspension, and that no formal disciplinary proceedings are pending against Respondent. The Clerk of this Court shall provide notice of such reinstatement to all persons or organizations who received copies of the disciplinary order of this Court ordering Respondent's suspension.
to a one year suspension in 3 instances during this period, and reduced a recommended indefinite suspension to a one year suspension in only 1 instance. Thus, there were 19 cases in which this sanction was the final remedy during the period of 1981-1983, inclusive.

A tabulation of this sanction by type of offense is as follows:

<table>
<thead>
<tr>
<th>Offense</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prior Criminal Conviction</td>
<td>7</td>
</tr>
<tr>
<td>Willful Failure to File Income Tax Return</td>
<td>5</td>
</tr>
<tr>
<td>Other</td>
<td></td>
</tr>
<tr>
<td>Unauthorized use of property</td>
<td>1</td>
</tr>
<tr>
<td>Aggravated assault</td>
<td>1</td>
</tr>
<tr>
<td>Mishandling Funds Intended for Client</td>
<td>6</td>
</tr>
<tr>
<td>Neglect of Client’s Cause</td>
<td>3</td>
</tr>
<tr>
<td>Miscellaneous</td>
<td>3</td>
</tr>
<tr>
<td>Conflict of Interest</td>
<td>1</td>
</tr>
<tr>
<td>Disrespect for Court</td>
<td>1</td>
</tr>
<tr>
<td>Sexual Assault on Client</td>
<td>1</td>
</tr>
</tbody>
</table>

The most immediate beneficiaries of this sanction were five lawyers guilty of willful failure to file an income tax return whose cases were before the court after 1981. The Stein rule, adopted in 1972, mandated indefinite suspension, even in the presence of mitigating circumstances. In Columbus Bar Association v. Wolfe, decided in 1982, the court declined to follow Stein in view of the recently authorized one year suspension, when mitigating circumstances were present. The mitigating circumstances were the absence of harm to a client and such things as physical and emotional problems, marital discord, illness and the like. Few, if any, cases of failure to file a lawyer’s personal income tax return harm a client and rare is the case that does not involve a mitigating factor; severe emotional problems and marital discord (Wolfe); debilitating personal and family problems (Mittendorf); a former public servant with a good record, cooperative, with a wife in failing health (Loha); a good record of honesty and integrity and back taxes paid (Zitt); and an earlier

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*Sanctions of public reprimand were increased to one year suspensions by the court in the following: Bar Association of Greater Cleveland v. Carlin, 67 Ohio St. 2d 311, 423 N.E. 2d 477 (1981) (use of vulgarity and profanity during criminal trial); Lake County Bar Association v. Needham, 66 Ohio St. 2d 116, 419 N.E. 2d 1104 (1981) (neglect with reference to three clients); Mahoning County Bar Association v. Walsh, 66 Ohio St. 177, 420 N.E. 2d 1003 (1981) (failed to prosecute, did not refund fee, when dismissed, he filed suit).


*Bar Association of Greater Cleveland v. Litt, 5 Ohio St. 3d 98, 449 N.E. 2d 429 (1983); Ohio State Bar Association v. Loha, 4 Ohio St. 3d 190, 447 N.E. 2d 1306 (1983); Cincinnati Bar Association v. Mittendorf, 4 Ohio St. 3d 123, 447 N.E. 2d 103 (1983); Columbus Bar Association v. Wolfe, 70 Ohio St. 2d 55, 434 N.E. 2d 1096 (1982); Columbus Bar Association v. McClure, 70 Ohio St. 2d 55, 434 N.E. 2d 1096 (1982).

*Cleveland Bar Association v. Stein, 29 Ohio St. 2d 77, 278 N.E. 2d 670 (1972).

*See supra note 78.
suicide of a dependent, the attorney being a person held in high esteem, who had made substantial restitution (McClure).

Wolfe is likely to become the new norm of one year suspensions in cases of willful failure to file federal tax returns absent an aggravating factor, such as the “tax protestor.”

The 2 remaining cases, involving criminal convictions, concerned an attempt to sell a stenotype machine on behalf of a relative to which the relative did not have title, and an aggravated assault case. Although these offenses may well result in indefinite suspension, the stenotype sales case involved, according to the court, no attorney client relationship, and in the single court assault case, the attorney had a good record who was given to a sudden emotional explosion not likely to reoccur. Justice Kurpanski disagreed as a minority of one in the latter case.

The 63 cases involving mishandling of property intended for clients or belonging to clients which resulted in one year suspensions are distinguishable from the indefinite suspension cases in that they were single episodes, and did not involve an act of commingling. In one, there were mitigating factors such as substantial restitution and cooperation with the relator.

Neglect appeared in 3 cases: “Shortcutting” in one (signing grantor’s name to deed and notarizing it, but not for personal gain, followed by failure to file the deed); failure to render service to three clients that did not involve personal gain, and failure to remove himself from a case at the behest of the client; and a single episode of neglect in a third, compounded by the receipt of a part of the fee in advance, failure to refund the money, and when discharged from the case, nonetheless filing a complaint.

Among the 3 remaining cases, a conflict of interest appeared when an attorney, representing the lender, effected a loan to a third party borrower, and received a finder’s fee shared with two others, paid by the borrower. The borrower failed to make payments on the loan. The lender was unaware of the at-

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\(^{1}\)Cleveland Bar Association v. Acker, 29 Ohio St. 2d 18, 278 N.E. 2d 32 (1972).


\(^{4}\)Akron Bar Association v. Goodlet, supra note 83.

\(^{5}\)Ohio State Bar Association v. Weisenberger, 68 Ohio St. 2d 1, 426 N.E. 2d 790 (1981).

\(^{6}\)Lake County Bar Association v. Needham, 66 Ohio St. 2d 116, 419 N.E. 2d 1104 (1981).

\(^{7}\)Mahoning County Bar Association v. Walsh, 66 Ohio St. 2d 177, 420 N.E. 2d 1003 (1981).

torney's receipt of the fee.

A second case involved vulgarities and profanities during a criminal trial, which, *inter alia*, disparaged the judge. The defense that the judge used profanity during the trial did not excuse trial attorney's misconduct. The Board had recommended a public reprimand. That, in the author's judgment, offered a fairer result. However, the supreme court appears highly protective of the judiciary in this and other cases.

Sexual assault of two female persons during scheduled visits is indicative of a seriously deficient professional attitude. However, an offer of evidence that the attorney was suffering from mental illness at the time of the offense served to mitigate, but not to excuse, the misconduct.

But for *Carlin,* involving vulgarities and obscenities during a criminal trial in which the judge also used profanity, the sanction of a one year suspension was commensurate with the offense.

**PUBLIC REPRIMAND**

Sixty-two public reprimands have been issued during the seventeen year period of this study, of which 21 appear in 19 reported cases. Public reprimand functions as a caution to the offending lawyer and to the bar through reported cases that certain conduct involves sufficiently substantial violation of the rules to merit disapprobation, but not so aggravated as to merit an interruption of a lawyer's professional career.

Offenses for which public reprimand have been given include:

- Two cases of conviction of petty or non-serious misdemeanor;
- Six cases involving a conflict of interest between attorney and client;

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9See, e.g., Cincinnati Bar Association v. Bednarczuk, 22 Ohio St. 2d 99, 258 N.E. 2d 116 (1970). Respondent filed a scurrilous pleading against a state judge in the U.S. district court, and published a book, "Glorious Larceny," maliciously attacking the judge. He was indefinitely suspended even though a first offender with a good record.
10Bar Association of Greater Cleveland v. Carlin, supra note 89.
11Cincinnati Bar Association v. Leroux, 16 Ohio St. 2d 10, 242 N.E. 2d 347 (1968) (involving three attorneys for willful failure to file tax returns, a misdemeanor); and Akron Bar Association v. Murty, 62 Ohio St. 2d 301, 405 N.E. 2d 300 (1980) (obtaining an HUD loan by falsely representing the proceeds were to improve property A, but proceeds were used to buy property B. The offense was considered "petty or minor").
12Bar Association of Greater Cleveland v. Carlin, supra note 89.
13Cincinnati Bar Association v. Leroux, 16 Ohio St. 2d 10, 242 N.E. 2d 347 (1968) (involving three attorneys for willful failure to file tax returns, a misdemeanor); and Akron Bar Association v. Murty, 62 Ohio St. 2d 301, 405 N.E. 2d 300 (1980) (obtaining an HUD loan by falsely representing the proceeds were to improve property A, but proceeds were used to buy property B. The offense was considered "petty or minor").
14Lake County Bar Association v. Gargiulo, 62 Ohio St. 2d 239, 404 N.E. 2d 1343 (1980) (lending money to client and overreaching); Dayton Bar Association v. Gunnoe, 64 Ohio St. 2d 172, 413 N.E. 2d 842 (1980) (while acting as attorney, sold client's business to self and others without adequate protection of client's interest, but made good the loss); Lake County Bar Association v. Patterson, 64 Ohio St. 2d 163, 413 N.E. 2d 840 (1980) (client invested money in a corporation in which attorney had an interest, without informing client of interest, but attorney found not to have acted maliciously or for gain); Columbus Bar Association v. Ramey, 32 Ohio St. 2d 91, 290 N.E. 2d 831 (1972) (attorney named self as sole legatee in will of a stranger, and trustee of an inter vivos irrevocable trust, without full disclosure of implications to client; no funds were misused and attorney fully accounted for them); Muskingum County Bar Association v. Tanner, 29 Ohio St. 2d 21, 278 N.E. 2d 21 (1972) (taking fee unilaterally from client's property); Columbus Bar Association v.
One case involving a conflict of interest between two clients;\textsuperscript{95}

Three cases of neglect of, or mishandling, client's cases, but not involving dishonesty or malfeasance;\textsuperscript{96}

Two cases of filing a false suit or harassing pleadings;\textsuperscript{97}

One case involved misuse of clients' funds, but without loss to client;\textsuperscript{98}

One case of obscenities in oral and written communication with an adversary;\textsuperscript{99}

One case of withdrawal from a case without taking steps to protect the client's interests;\textsuperscript{100}

One case of knowingly taking part for a fee in a scheme to defraud that involved an offer to sell back to the owner or insurer a truck known to have been stolen, though respondent had been acquitted of criminal charges;\textsuperscript{101}

One case involving misconduct by an acting Municipal Judge. Having set bail for the accused, he later appeared as his representative at a preliminary hearing and arraignment.\textsuperscript{102} In a second matter, he set bail for the accused, personally effected his release, and thereafter reduced bail at the request of counsel.\textsuperscript{103}

With the exception of the early cases involving a willful failure to file a federal tax return, the public reprimand cases can be distinguished from the earlier indefinite suspension cases and more recently, the one year suspension cases by the following factors:

- A minor or petty offense and not a felony was involved;\textsuperscript{104}

\textsuperscript{95} Nachman, 8 Ohio St. 2d 47, 247 N.E. 2d 289 (1966) (client claimed a fund in attorney's hands was in trust; attorney claimed as fee; evidence in dispute; parties settled after complaint filed; attorney was not as frank, candid or forthright as he should have been).

\textsuperscript{96} Columbia Bar Association v. Grele, 14 Ohio St. 2d 208, 237 N.E. 2d 298 (1968) (dual representation of husband and wife in a divorce followed by dispute as to a personal injury claim settled after divorce; wife claimed interest; attorney sided with husband when he should have withdrawn).

\textsuperscript{97} Dayton Bar Association v. Timen, 62 Ohio St. 2d 357, 405 N.E. 2d 1038 (1980); Ohio State Bar Association v. Alexander, 44 Ohio St. 2d 11, 335 N.E. 2d 867 (1975) (restored client's loss from own resources); Cleveland Bar Association v. McGinty, 18 Ohio St. 2d 71, 247 N.E. 2d 459 (1969) (four complaints; statute of limitations permitted to run against one claim; no affirmative dishonesty or malfeasance found).

\textsuperscript{98} Ohio Bar Association v. Gebhart, 69 Ohio St. 2d 287, 431 N.E. 2d 1031 (1982) (filed a counterclaim to a suit seeking disbarment of two opponents, without merit); Bar Association of Greater Cleveland v. Haffner, 52 Ohio St. 2d 41, 368 N.E. 2d 845 (1977) (filed suit against client for reimbursement of medical bills, got a default judgement and garnishment order; he did not pay the bills until after suit filed; attorney denied any intent to defraud).

\textsuperscript{99} Columbus Bar Association v. Thompson, 69 Ohio St. 2d 667, 433 N.E. 2d 602 (1982).

\textsuperscript{100} Columbus Bar Association v. Riebel, 69 Ohio St. 2d 290, 432 N.E. 2d 165 (1982) (obscenities occurred in three written and one oral communication).

\textsuperscript{101} Akron Bar Association v. Johnstone, 54 Ohio St. 2d 485, 377 N.E. 2d 790 (1971). In addition to improper withdrawal, a second count indicated a neglect of a legal matter.

\textsuperscript{102} Bar Association of Greater Cleveland v. Sandler, 51 Ohio St. 2d 132, 364 N.E. 2d 1168 (1977).

\textsuperscript{103} Ohio State Bar Association v. Gibson, 55 Ohio St. 2d 99, 377 N.E. 2d 751 (1978).

\textsuperscript{104} Id.

\textsuperscript{105} Akron Bar Association v. Murty, supra note 93.
• Where fraud was involved, it was minor;\textsuperscript{105}
• The client did not suffer a financial loss;\textsuperscript{106}
• Or the loss was made good;\textsuperscript{107}
• The misconduct was an isolated instance and not a pattern of repeated misconduct;\textsuperscript{108}
• Or, if the conduct was repeated, it involved no affirmative dishonesty or malfeasance;\textsuperscript{109}
• Each offender was a first offender (had there been a prior public reprimand or one year suspension, the minimum sanction would have been indefinite suspension).\textsuperscript{110}

The court dealt leniently with the early instances of willful failure to file a federal tax return, since it looked for, but did not find, a specific intent to defraud.\textsuperscript{111} Subsequently in Stein,\textsuperscript{112} the court ordered indefinite suspension for willful failure to file a federal tax return, but in Wolfe,\textsuperscript{113} cut the sanction back to a one year suspension. In the other reported instances, the court dealt fairly with the offender.

Reprimand is a humane sanction that is universally recognized. The problem in Ohio is the continuing effect of the sanction over the attorney's entire career.\textsuperscript{114} Thus, an attorney who is once given a public reprimand, who serves responsibly for many years and commits a second act warranting a reprimand, is doomed minimally to indefinite suspension, since a public reprimand and a public reprimand equal indefinite suspension\textsuperscript{115} or permanent disbarment, depending on the seriousness of the offense. The solution to this concern is to limit its effect to two years, or to permit expunction after two years of good conduct.

**DISMISSAL OF CHARGES AND REDUCTION OF SANCTION**

By the time a disciplinary complaint is certified by the Board to the court
with a finding of commission of one or more offenses and a recommended sanction, the complaint has been screened by a bar association grievance committee or the Office of Disciplinary Counsel or both, a hearing panel of the Board, and the Board en banc, each of which is authorized to dismiss the complaint. With three levels of screening, it is not surprising that the supreme court has dismissed few complaints for insufficiency of the complaint or of the evidence. Schroeder reported only two dismissals at the level of the court; this study found only one, for a total of only three in a twenty-seven year period.

The court may modify the sanction upwards or downwards as well as dismiss the complaint. Schroeder reported twelve modifications, five by way of increase, seven by way of decrease, during his study of the first ten years under the reformed rules.

This author observes that the court, during the seventeen year period of this study: increased the sanction in fourteen cases; decreased it in six; and rejected conditional suspension in three instances, ordering indefinite suspensions to be entered.

These data suggest that, while the court is not a rubber stamp, it accords the Board's findings and recommendations great weight. The court will affirm the findings of guilt of an offenders nearly 100% of the time (99.6% to be exact) and the sanction about 90% of the time.

These data suggest that a respondent's contest at the level of the court is in a real sense a contest over sanctions not guilt or innocence to the commission of some offense. To the extent that individual charges may be shown to be unsubstantiated, the more likely the opportunity to win a reduction of the sanction. But there are risks in cases other than disbarment, that the sanction may be increased.

Cases in which disbarment is ordered carry no upside risk, other than loss of costs and counsel fees. In only three instances has a recommendation of permanent disbarment been reduced to a lesser sanction, two reported by Schroeder, and one occurring during the next seventeen years.

Schroeder, supra note 10, at 99.


Schroeder, supra note 10, at 101.

See supra note 10, at 101; Mahoning County Bar Association v. Ruffalo, 176 Ohio St. 263, 199 N.E. 2d 396, cert. denied, 379 U.S. 931 (1964). (Ruffalo advanced living expenses to clients with F.E.L.A. (railroad) claims, thereby acquiring an interest in the actions and compounded the offense by hiring a railroad employee as his agent); Cleveland Bar Association v. Hamilton, 6 Ohio St. 2d 264, 217 N.E. 2d 863 cert. denied, 383 U.S. 988 (1966), (conflict of interest, commingling).

Columbus Bar Association v. Allison, 20 Ohio St. 2d 147, 254 N.E. 2d 366 (1969). Respondent commingled a large sum of money, but made restitution. He claimed he was unaware of the impropriety.
There is upside risk in contesting a recommendation of indefinite suspension. During the period of this study, the court has increased the sanction of indefinite suspension to permanent disbarment in seven cases, reduced it to public reprimand in three cases, and to a one year suspension in one (noting that the last sanction has been available only since 1981).

Challenging the one year suspension is not without risk. The court has reduced the sanction to a public reprimand in one instance, and increased it to indefinite suspension recently during a period not covered by this study.

Challenging a public reprimand also carries upside risks. One seeks the almost unattainable dismissal against a record of six cases of increasing public

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10In the following reported cases, indefinite suspensions were raised to disbarments: Cincinnati Bar Association v. Fennell, 63 Ohio St. 2d 113, 406 N.E. 2d 1129 (1980) (multiple counts of misfeasance and nonfeasance, falsifying a letter from the courts, uncooperative); Ohio State Bar Association v. Talbott, 59 Ohio St. 2d 76, 391 N.E. 2d 1028 (1979) (multiple counts of willful neglect of clients, uncooperative, did not appear before panel to contest); Medina County Bar Association v. Haddad, 57 Ohio St. 2d 11, 385 N.E. 2d 294 (1979) (offering a bribe to prosecuting attorney); Stark County Bar Association v. George, 45 Ohio St. 2d 267, 344 N.E. 2d 132 (1976) (fraud in personal bankruptcy filing, left office in charge of layman, abusive use of process against client); Ohio State Bar Association v. Weaver, 41 Ohio St. 2d 97, 322 N.E. 2d 665 (1975) (conversion, failure to observe statutory law with respect to administering estate, failed to account for trust property, though acquitted of criminal misconduct by jury); Lake County Bar Association v. Ostrander, 41 Ohio St. 2d 93, 322 N.E. 2d 653 (1975) (embezzlement, no restitution, excessive fees); Ohio State Bar Association v. Kahn, 40 Ohio St. 2d 15, 317 N.E. 2d 913 (1974) (commingling, failure to account, neglect, multiple instances).

In Cincinnati Bar Association v. Heekin, 9 Ohio St. 3d 84, 459 N.E. 2d 495 (1984), the attorney-president of River Front Stadium in Cincinnati bypassed two utility meters, obtaining nearly $800,000 of free services. (Convicted of two felonies; Indefinite suspension was increased to permanent disbarment). Since this is a 1984 case, it does not appear in Table I.

11In the following reported cases (all prior to the authorization of one year suspensions), indefinite suspension reduced to public reprimand: Bar Association of Greater Cleveland v. Sandler, 51 Ohio St. 2d 132, 364 N.E. 2d 1168 (1977) (received fee in a scheme to defraud owner or insurer; acquitted of criminal charges); Cleveland Bar Association v. McGinty, 18 Ohio St. 2d 71, 247 N.E. 2d 459 (1969) (several complaints of neglect, no affirmative dishonesty or malfeasance); Columbus Bar Association v. Grelle, 14 Ohio St. 2d 208, 237 N.E. 2d 298 (1968) (dual representation in divorce, failed to withdraw in a post-divorce matter); Columbus Bar Association v. Nachman, 18 Ohio St. 2d 247, 236 N.E. 2d 289 (1969) (dispute with client over fees, and whether fund held by attorney was held in trust for client. Matter settled after complaint filed. Attorney found to be less than forthright).

See Disciplinary Counsel v. Zauderer, 10 Ohio St. 3d 44, 461 N.E. 2d 883 (1984), wherein the panel recommended a public reprimand, the Board indefinite suspension. The Court ordered a public reprimand. (Case involved publicity and advertising by a "Dalkon Shield" expert. First amendment rights were involved). The case was decided in 1984 and is not included in Table I.

12Toledo Bar Association v. Kitchen, 69 Ohio St. 2d 338, 432 N.E. 2d 195 (1982). Here, the offense of unauthorized use of property by attempting to sell it on behalf of a relative (non-client) who did not have title was reduced from indefinite suspension to a one year suspension.


13Columbus Bar Association v. Thompson, 69 Ohio St. 2d 667, 433 N.E. 2d 602 (1982) (Attorney used client's money to pay office expenses, and issued two NSF checks. Sanction mitigated by fact of no loss to client and a substitute secretary unfamiliar with accounts was involved).

14Bar Association of Greater Cleveland v. Wilsman, 9 Ohio St. 3d 5, 457 N.E. 2d 824 (1984). (Neglect of a legal matter, with preparation of a letter falsely indicating the legal matter had been filed). A 1984 case, it does not appear in Table I.
reprimand to indefinite suspension,\textsuperscript{126} or more likely a one year suspension.\textsuperscript{127} But there are those who are willing to gamble on a long shot.\textsuperscript{128}

On one occasion when the Board recommended indefinite suspension, the court deferred its final order for a year.\textsuperscript{129} The respondent was a judge who had on several occasions appeared in judicial proceedings under the influence of alcohol. He had been in a period of rehabilitation for about two years at the time of the hearing. The court stayed an order for a year. When, at the end of a year following the hearing, he appeared rehabilitated, the court entered an order of public reprimand. Subsequently, in three cases in which the Board, Disciplinary Counsel, or other relator sought a probationary or conditional period of practice for the offender, the court rejected the effort because it was not authorized by the current rules.\textsuperscript{130} The policy ground was that the state lacks a probation authority for such offenders (supervision, counseling, and review).

\textbf{Resignations}

As Table I indicates, 115 lawyers resigned their franchises during the seventeen year period of this study. Typically, resignations follow conviction of a serious crime, or occur during the pendency of an investigation not involving a crime. Thus, these resignations account for nearly 30\% of the disciplinary actions during the period in question.

The Clark Report noted a risk that stemmed from "Inadequate procedure for accepting resignations."\textsuperscript{131} That Report had in mind a ploy whereby the resignation terminated a pending investigation without marshalling and

\begin{itemize}
  \item In the following cases, public reprimands were increased to indefinite suspension: Mahoning County Bar Association v. Walsh, 8 Ohio St. 3d 32, 456 N.E. 2d 1206 (1983) (prior public reprimand in unrelated disciplinary sanction; evidence of emotional depression raised question of present fitness); Ohio State Bar Association v. Stimmel, 61 Ohio St. 2d 316, 401 N.E. 2d 926 (1980) (willful failure to file income tax returns under \textit{Stein} rule required indefinite suspension); Ohio State Bar Association v. Consoldane, 50 Ohio St. 2d 337, 364 N.E. 2d 279 (1977) (suggested to client money was needed to influence official action; respondent previously had been a member of the court family); Columbus Bar Association v. Dixon, 40 Ohio St. 2d 76, 320 N.E. 2d 293 (1974) (willful failure to file income tax return, court felt bound by \textit{Stein} rule); Cleveland Bar Association v. Stein, 29 Ohio St. 2d 77, 278 N.E. 2d 670 (1972) (willful failure to file income tax return; conduct of attorney should be above reproach).
  \item Bar Association of Greater Cleveland v. Milano, 9 Ohio St. 3d 86, 459 N.E. 2d 496 (1984). (Public reprimand increased to one year suspension. Here, a practitioner of over a quarter of a century was disrespectful and discourteous to the court on several occasions during a criminal trial. Not included in Table I.)
  \item Toledo Bar Association v. Demars, 6 Ohio St. 3d 12, 450 N.E. 2d 1168 (1983) (misconduct and funds, alcohol a problem); Disciplinary Counsel v. Hiller, 5 Ohio St. 3d 237, 450 N.E. 2d 1157 (1983); Toledo Bar Association v. Kolby, 22 Ohio St. 2d 185, 259 N.E. 2d 111 (1970) (wrote to a private investigator suggestion that he give a witness "a few bucks" to testify respondent's client was not driving under the influence of alcohol).
  \item \textsuperscript{Supra} note 2, at 897-901.
\end{itemize}
preserving the evidence, and without obtaining an admission of guilt of misconduct. A subsequent effort at reinstatement by the attorney based upon a denial of guilt and an allegation that the resignation was made under stress was difficult to meet when evidence was no longer available.

The Clark solution effected by the ABA Standards was "disbarment by consent," i.e., an admission of guilt and consent to the sanction, subject to approval of the adjudicative body.

President Boer conceived of resignation with prejudice to reinstatement. Irrevocable resignations, however, did not appear in Rule XXVII of 1957. It was not effected until February 28, 1972. Therefore, those resigning prior to that date could (and some did) reapply for reinstatement.

Government Rule V(7) (a successor to Rule XXVII) provided:

A person disbarred or a person who has voluntarily surrendered his license to practice shall never thereafter be readmitted to the practice of law in this state.

Further, the order accepting the resignation provides that the attorney resigning "[F]ully understands that a cancellation and revocation of his license to practice as an attorney and counselor at law is final."

CAUSATIVE FACTORS: ALCOHOL AND DRUG ABUSE

In the Schroeder report discussed earlier, the most frequent types of misconduct noted were the violation of conventions concerning advertising and solicitation followed by the mishandling of clients' money and property. A generation later, with profound amendment of the advertising rules, the mishandling of clients' money and property had moved into first place, followed by a form of fraud — usually willful failure to file a personal federal income tax return.

What are the causes of these and other seriously deviant behavior by the practicing lawyer? The current Chairman of the Ohio Board of Commissioners on Grievances and Discipline asserted that the "major cause" is "alcohol or drugs," followed by "plain old greed."

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12ABA Standard 11.2. Discipline by Consent: "If the respondent admits in writing the truth of the charges against him, the respondent and the counsel should be able to agree on the nature and extent of the discipline to be imposed upon the respondent, subject to the approval of the appropriate adjudicative body."

1329 Ohio St. 2d xxix at xxxiii (1972).


15See, e.g., a notice of resignation, 49 Ohio St. B.A. Rep. 1546 (Nov. 8, 1976) in which this "boiler plate" appears.

Support for the proposition that alcoholism is "a significant causative factor in disciplinary actions" is found both in studies of lawyer behavior elsewhere and in mechanisms that have been developed to meet the problem. Further, there is frequent reference in reported Ohio disciplinary cases that indicate the presence of alcohol abuse, sometimes coupled with drug abuse. For example, in thirteen of 163 disciplinary case reports covering the period of 1967-1983, inclusive, involving misconduct serious enough to merit permanent disbarment or indefinite suspension — about one case in twelve — alcohol has been stated to have been a factor. Most of these cases involved mishandling of funds or neglect of a client’s cause, or both. In some other cases that involve a pattern of neglect, failure to respond to clients’ inquiries, mishandling of funds, uttering bad checks and failure to report income, one suspects a problem of alcoholism even though an alcohol problem is not expressed in the case report. Anecdotal evidence supports this view.

The Ohio Supreme Court, consistent with opinion elsewhere, does not accept alcohol or drug abuse as an excuse for the misconduct. This reflects the view that discipline is prophylaxis, not punishment, though alcoholism may be considered as mitigation in determining the sanction. For the most part, the court in practice has shown little compassion for those who abuse alcohol or drugs and who appear before them as respondents.

140In re Driscoll, 85 Ill. 2d 312, 316, 423 N.E. 2d 873, 874 (1981): "[Alcoholism is at most an extenuating circumstance, a mitigating factor, not an excuse."
142See Lake County Bar Association v. Ostrander, 41 Ohio St. 2d 93, 322 N.E. 2d 653 (1975), disbarment for mishandling funds, though drinking problem noted, and cases cited, supra, n. 139; cf. Stark County Bar Association v. Weber, 175 Ohio St. 13, 190 N.E. 2d 918 (1963), under different rules, wherein court delayed an order against a trial judge for approximately one year and entered a public reprimand, not indefinite suspension, as recommended by the Board. The judge had acted under the influence of alcohol. But see supra note 129.
Although faced with recommendations from both the Board and Disciplinary Counsel for a continuation of probation of those identified as alcoholic and who have undertaken a program of rehabilitation, the court on two recent occasions has refused to approve "conditional licensure." Refusal was based on the absence in the court rules for probation, and the realization that, to have probation, a system of supervision must be created — probation requires probation officers and counseling, and these mechanisms are not generally available through the bar.

If alcoholism is accepted as a form of illness, and if some alternative to the present disciplinary mechanism is not created, the consequence is likely to be the continued abuse of clients, courts, and colleagues until a sufficient number of instances of misconduct are experienced to indefinitely suspend or disbar the lawyer. *Stark County Bar Association v. Lukens,* involving not alcohol but disabilingating diabetes and prophyria suggests a like outcome in cases involving alcohol as an illness. On the other hand, if procedures to divert an identified alcoholic practitioner from the current disciplinary system were developed, there exists a potential remedy to spare the public from harm, and to save the career of the lawyer. A system of peer review and psychological counseling hold that promise. Both state and local bar associations should be encouraged to develop these, and the court rule changed to provide for probation.

**Reinstatement: Factors**

The courts are in general agreement on both the purpose of reinstatement and the factors relevant to those ends. The purpose of discipline is prophylactic. It is not to punish, though it may have that effect, but to protect the public, the courts, and the profession — the administration of justice — from the errant attorney by removing him either temporarily or permanently from the practice of law, or threatening to do so if his misconduct is repeated. Sanctions serve as a deterrent to similar misconduct by others.

And so it is with reinstatement; its goal is not to relieve from, or to continue, punishment, but to determine whether reinstatement of the attorney to

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144 48 Ohio St. 2d 187, 357 N.E. 2d 1083 (1976).
146 See *supra* note 138.
The purpose of lawyer discipline and disability proceedings is to maintain appropriate standards of professional conduct in order to protect the public and the administration of justice from lawyers who have demonstrated by their conduct that they are unable or are likely to be unable to discharge their professional duties.
practice is in the public interest. The issue is whether the attorney is a fit person to resume the practice of law, that he is not likely to repeat his misconduct, that in his reformation, he has become a law abiding citizen, that he will show proper regard for the duties and responsibilities of his profession, and that his readmission is not detrimental to the public interest, while at the same time, dealing fairly with the attorney. These findings depend in the largest measure on a change in attitude on the part of the applicant and reinstatement will stand or fall on his ability to persuade the court "by clear and convincing evidence" that he has the proper, professional attitude.

Courts recognize that there are no guarantees that the petitioner, if readmitted, will never again engage in misconduct. If guarantees were required, none would qualify. The courts can only reduce the risk to an acceptable level by requiring an affirmative showing by clear and convincing evidence that the petitioner has experienced rehabilitation, that he has returned to a beneficial and constructive role in society, and that he is likely to act in a professional manner.

The court rules or case law require that one possess "all of the qualifications, mental, educational and moral, which would have been a requirement of an applicant for admission to the Bar at the time of his original admission." Courts arrive at a judgment for or against the petitioner by considering eight principal factors: (1) the nature of the prior misconduct; (2) the maturity and experience of the petitioner at the time of the discipline; (3) whether the petitioner recognizes the nature and seriousness of the misconduct; (4) whether the petitioner has made restitution or made good the loss resulting from his misconduct; (5) the nature of his conduct since he was disciplined; (6) time elapsed since his disbarment or suspension; (7) his forthrightness (sincerity, frankness, and truthfulness) in presenting and discussing these factors relating to his suspension and reinstatement; and (8) his current proficiency in the law.

In addition, the following evidentiary factors may be considered: (1) Whether his bar association (frequently the relator) recommends or opp...
poses reinstatement; (2) whether the offender was a public official; whether he has a record of prior offenses and sanctions; whether the petitioner has been pardoned of the offense; whether the prior misconduct is now an offense (change of law); mental and physical condition at the time of the application; and testimony and testimonials of prominent citizens, public officials, and lawyers.

A discussion of the foregoing is in order. Ohio has resolved the problem of unforgivable misconduct by the sanction of permanent disbarment. Thus, the court determines at the time of the original discipline whether or not the opportunity for reinstatement is to be held out. Some jurisdictions that do not recognize permanent disbarment reach the same result by stating that some offenses are of such heinous moral turpitude that the court will refuse even to appoint a referee to take testimony on a petition for reinstatement. Dishonest conduct by public officials, for example, may place them beyond the pale. Ohio reaches this result by the *Fatica* Rule that permanently disbars both bribe taking public officials and bribe offering attorneys.

The view that best expresses the prophylactic, as opposed to the punitive view, of disbarment or suspension is that of the Massachusetts court in *In the Reinstatement of Hiss*.

No offense is so grave that a disbarred attorney who seeks reinstatement is automatically precluded from attempting to demonstrate through ample and adequate proof that he has achieved a "present fitness" to serve as an attorney and has led a sufficiently exemplary life to inspire public confidence once again, in spite of his previous actions.

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156 In re Reinstatement of Hughes, 66 Ohio St. 2d 135, 420 N.E. 2d 1000 (1981).
157 Petition of Centracchio, 345 Mass. 342, 187 N.E. 2d 383 (1950) (previously venal judge who was disbarred was not to be reinstated despite showing of present good moral character); *Matter of Gordon*, supra note 147, (higher standards for reinstatement when the disbarment was prompted by misconduct while a judge venality).
158 Cleveland Bar Association v. Pleasant, 171 Ohio St. 546, 172 N.E. 2d 911 (1961). Pleasant had been previously suspended and reinstated. This was an attempt for a second reinstatement; (denied).
161 Gov. R. V. Sec. 26, supra note 151.
163 Application of Van Wyck, 225 Minn. 90, 29 N.W. 2d 654 (1947).
164 Petition of Centracchio, supra note 157; *Petition of Gordon*, supra note 157; but see Reinstatement of Kearns, supra note 155 (County prosecutor convicted and disbarred for embezzling $210 from a public fund; reinstated 16 years later).
165 Cleveland Bar Association v. Fatica, 28 Ohio St. 2d 40, 274 N.E. 2d 763 (1971) (Convicted as City Councilman of soliciting and accepting money to influence his official duties; permanently disbarred.)
166 Medina County Bar Association v. Haddad, 57 Ohio St. 2d 11, 385 N.E. 2d 294 (1979) (Offense was offering bribe to a prosecuting attorney. *Fatica* rule controlled sanction of permanent disbarment.)
167 In re Hiss, supra note 149.
Under this doctrine, Alger Hiss was reinstated after a twenty-three year absence from the bar following a conviction of perjury.

But the more serious the offense, the greater the onus on the petitioner to prove his rehabilitation, and the longer the likely period of suspension from the bar.168

The maturity and experience of the petitioner at the time of the original discipline is a factor considered in the matter of reinstatement.169 Experience demonstrates that rarely is the young, professionally immature attorney the perpetrator of misconduct resulting in serious discipline. Recalling a statement of Commissioner Coen of the Ohio Board of Commissioners on Grievance and Discipline, he makes the point that: “It is not against the young and uninitiated practitioner that complaints have been filed. The average age of lawyers involved in disciplinary hearings [in Ohio] is fifty, each having practiced an average of twenty-six years.”170

Recognition of the nature and seriousness of one’s misconduct followed by remorse, regret and apology — in short, contrition — evidences a proper attitude for rehabilitation and professional rebirth.171 Yet, in the Alger Hiss case,172 Hiss steadfastly maintained his innocence and contrition would have been out of character and an act of hypocrisy on his part; so in Braverman173 who, convicted under the Smith Act, adamantly maintained his innocence. To demand contrition as an inexorable test for reinstatement is improper, as the Hiss and Braverman courts pointed out.

Restitution, partial restitution, or an attempt to make restitution is critical to reinstatement by those with the means to pay;174 so with repairing damages to a client.175 The just person does not reap where he has not sown, and gives to each man his due. Failure to act justly bears on professional attitude. On the
other hand, those who cannot make restitution are not expected to do so.\(^7\)

In the Matter of Batali,\(^7\) where a suspended attorney filed a voluntary
petition in bankruptcy and had discharged (rightly or wrongly) debts owed
those subrogated to the client's position for money owed them and federal in-
come tax obligations, the issue was raised whether the Washington Supreme
Court could condition the attorney's reinstatement on the post-bankruptcy
reaffirmation of these discharged debts. The court properly held such condi-
tion violated both the federal Constitution (Supremacy Clause) and the
Bankruptcy Act. However, the case does not foreclose consideration of one's
failure to reaffirm just obligations as evidence of an unrepentant attitude.

One's conduct since he was disciplined is cogent evidence of reformation
and proper attitude.\(^7\) There are no mechanical steps to be taken by which one
can gain readmission. But the following are favorable indicators: that he has
earned an honest living, that he has been engaged in a position of trust and
gained the respect of others, that he has led an upright life, and that he has
been charitable.\(^7\)

Fatal to reinstatement is the violation of the order of one's disbarment
(under the ABA definition) or suspension; e.g., failing to inform clients, adver-
saries and courts before whom cases are pending of his disability,\(^8\) continuing
to practice law, or holding one's self out as practicing law by failing to remove,
where possible, his name from legal directories and listings, or failing to
remove or cover up a shingle or office sign.

One may be employed as a law clerk (at least in Florida), but if he is
employed by his former partner as a clerk, he should withdraw if an objection
is raised.\(^8\) Employment as a law clerk is desirable since it preserves one's skills.
Yet, the line between what a lawyer and a layman may do is not bright, and he
may easily be accused of stepping over it. Employment in a quais-legal position
in business\(^8\) or government\(^8\) is a desirable choice.

Proceedings in reinstatement are inquisitorial rather than adversarial in

\(^{7a}\)In re Hawkins, 27 Del. 200, 87 A. 243 (1913). Restitution is given little weight since it may depend more
on financial ability than repentance.

\(^{7b}\)See supra note 154.

\(^{8a}\)Id. at 777-78.

\(^{8b}\)Disbarred attorney seeking admission should avoid questionable financial dealings with clients and business
associates and engaging in conduct precariously approaching unauthorized practice. Reinstatement
denied. Committee on Legal Ethics of West Virginia v. Pence, 297 S.E. 2d 843 (W.Va. 1982).

\(^{8c}\)Steps that a disqualified or resigned attorney must take in Ohio appear in Gov. R. V, sec. (20) (b) (i), and
generally in the ABA Standard 6.11.

\(^{8d}\)Florida Bar v. Thomson, 310 So. 2d 300 (S. Ct. Fla, 1975), noted 4 Fla. St. L.J. 296 (1976); contra In re

\(^{8e}\)See In re Rasor, 40 Ohio St. 2d 25, 317 N.E. 2d 915 (1974) (personnel manager engaged in labor relations
in a manufacturing firm).

\(^{8f}\)See In re Reinstatement of Kearns, supra note 155, claims examiner in Industrial Commission of Ohio.
nature. The petitioner is therefore expected to be candid and forthright in his presentation. Concealment of material fact, such as two arrests which occurred since his suspension, even though they were dropped, was fatal in *In re Gehring.*, a fortiori affirmatively false statements in the petition.

The length of time elapsed between disbarment or suspension and the application for reinstatement is a factor commonly appearing in the law of reinstatement. The time elapsed may be too short to establish a reasonable basis or judging good character. On the other hand, it should not be needlessly lengthened to punish the offender. Court rules usually provide for a minimum period of suspension before one can be reinstated, e.g., five years for those jurisdictions following the definition of disbarment in the ABA Standards, or two years for those indefinitely suspended in Ohio. Apart from these minima, no mechanical answer can be given to the question of how long an attorney must wait. As noted earlier, certainly the more grievous the offense, the more likely a longer period of rehabilitation. With time, public memory dims, and the less reluctant is the tribunal to reinstate those whose offenses, like Hiss's, gained notoriety.

In addition to the establishment of good moral character, the petitioner must be competent as a lawyer, i.e., have sufficient legal learning to carry out the duties of his office. A long period of absence from the law and the rapidly changing corpus juris may cast doubt on the petitioner's competency, absent persuasive evidence that he has kept abreast of the law. The acid test of competency is passing the state's current bar examination. Whether passing a current bar examination should be a condition of admission is left to the sound discretion of the courts in most jurisdictions.

In Ohio, "[T]he order of reinstatement may be conditioned upon the petitioner's subsequently taking and passing a regular bar examination of this Court . . ." *In re Petition for Reinstatement of Atkins,* the petitioner had

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184 See *In re Hiss*, supra note 149; though away from practice for twenty-three years, he had kept current in the field of his specialty, international law.

185 *Gov. R. V., Sec. 26, supra note 151.*

186 See cases cited *supra* note 168.

187 *Gov. R. V., Sec. 26, supra* note 151.

188 *See* *In re Hiss*, *supra* note 149; though away from practice for twenty-three years, he had kept current in the field of his specialty, international law.

189 *2 Ohio St. 3d 32, 442 N.E. 2d 754 (1982).*

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22 Cal. 2d 708, 140 P. 2d 413 (1943).


90 *In re Palmer*, 8 O.C.D. 508, 15 O.C.C. 94 (Fayette Co. Cir. Ct., 1897).

192 *ABA Standard 6.2: "The lawyer should not be able to apply for readmission until at least five years after the effective date of his disbarment. . . ."*
been admitted to the bar in 1959, engaged in limited practice, and was suspend-
ed in 1979 for neglect of clients' affairs and failing to seek their lawful objec-
tives. He applied for reinstatement and a hearing was held in 1982. On oral ex-
amination by a representative of the local bar, Atkins was shown to be
unaware of Ohio's then recently codified Rules of Evidence, and changes in
Ohio tort law. The court rejected his petition and conditioned his reinstate-
ment at a later date upon his passing the Ohio bar examination or alternately,
undergoing a program of bar sponsored continuing legal education. On the
other hand, one Fleck was readmitted without such condition, though he had
been suspended for eleven years, based upon his uncontradicted testimony that
he had kept abreast of the law by reading various current legal publications.195

In In re Petition for Reinstatement of Rasor,196 the petitioner volunteered
to take the Ohio bar examination and he was reinstated with that condition.

Fleck and Atkins can be reconciled only by the fact that Fleck's legal
learning was unchallenged, whereas Atkins was examined by the relator's at-
torney who demonstrated by oral examination that Atkins was not current on
the law. Reinstatement ought not turn on the fortuity of whether one is orally
tested or not. The passing of a bar examination for those who are not readmit-
ted within a four-year period following suspension should be routinely re-
quired, save in the most exceptional cases.197

As previously observed, present competency includes all the qualifications
"mental, educational and moral" which appertained at the time of the peti-
tioner's original admission. But what of meeting residency requirements where
they exist? The intent to practice law? Rasor provided a response to the latter
question. As a matter of law, one need not intend to practice as a "Main
Street" lawyer in Ohio to be reinstated. His interest may be to continue as an
administrator or inside counsel, and may be, as in Rasor, to benefit his
employer. Indeed, one may simply want to be restored to a status once held,
for its own sake. But in a highly discretionary proceeding, one so motivated is
likely to generate little empathy with a Board of busy, dedicated practitioners.

One would expect a like response to the lawyer who does not wish to prac-
tice in the state of disbarment but in a second state. And so the Iowa Supreme
Court has properly held that where one intends to practice is irrelevant198 to
reinstatement.

Residency in a state may be a requirement either for admission to the bar,

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195In re Reinstatement of Fleck, 49 Ohio St. 2d 82, 278 N.E. 2d 669 (1972).
196Supra note 182.
197See, e.g., Reinstatement of Coogan, 35 Ohio St. 2d 114, 298 N.E. 2d 518 (1973). Petitioner was out of prac-
tice for forty-seven months and taught business law at a major university. The author would advocate waiv-
ing the taking of a bar examination in such case.
198State v. Maxey, 186 N.W. 40 Iowa, 1922).
or a condition of practicing law in the state. What of the practitioner who met the requirement initially, but was disbarred or suspended, and at the time of his petition for readmission is a non-resident? Where a residency requirement exists, the courts have not been uniform in their response. A New Mexico court denied the application of a petitioning non-resident in view of a state residency requirement which had existed since the time of his initial admission to the bar of that state. In Indiana, a disbarred attorney seeking reinstatement need not establish the fact of residency as a condition of reinstatement or that he intends to practice in that state. To date, the Ohio Supreme Court has not had occasion to rule on this issue.

In addition to meeting the "mental" requirement of Rule V, Sec. 26, the petitioner should be free of the psychiatric and psychological problems that caused or contributed to his misconduct. Those who are alcoholic should be certified as recovered and able to cope with that illness (the alcoholic is said never to be cured). The addict should have successfully undertaken a rehabilitation program, and those whose stability depends on regular dosages of prescribed drugs to maintain their stability (e.g., lithium treatment) should be under supervised treatment. The Ohio Supreme Court, unfortunately, expects a "cure," not practice under supervised probation while a cure is being undertaken. The rationale of rejecting probation for the alcoholic and the drug addicted is that probation, "conditional licensure," is not authorized by the Court Rule. A policy argument, as noted earlier, is that the bar associations have not, for the most part, established supervisory groups for those who are alcoholic or addicted to drugs.

Concerning subsidiary factors, bar support, or at least lack of opposition does not assure success. On the other hand, objections of the bar who served as relator or in whose territorial jurisdiction he resides, is quite likely to defeat his application, at least in Ohio.

The existence of a prior sanction tends to defeat a petition for reinstate-

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199 In re Fleming, 36 N.M. 93, 8 P. 2d 1063 (1932).
200 Matter of Beck, supra note 159, by court rule.
201 See cases cited supra note 143.
202 Id.
203 Id.
204 State v. Russo, 230 Kan. 5, 630 P. 2d 711 (1981); Cleveland Bar Association v. Pleasant, 171 Ohio St. 546, 172 N.E. 2d 911 (1961) (where no objection was interposed by the local bar association).

See In re Morton, 75 Cal. App. 497, at 498, 243 P. 32, at 33 (1925), where the court said: The Bar Association presents no opposition to the reinstatement. On the contrary, the justices are directly informed by the president of the association that its trustees have considered the matter and have determined that no objection should be made. We take this as a definite decision that no objection ought to be made. The petition was allowed. (Emphasis in original).

205 In re Petition for Atkins, 2 Ohio St. 3d 32, 442 N.E. 2d 754 (1982); In re Reinstatement of Hughes, supra note 156 (those local bar associations opposed); In re Edwards, 172 Ohio St. 351, 176 N.E. 2d 409 (1961). The opposition of the Akron Bar Association appears in the record of the case, Brief in Opposition to the Recommendation of the Board of Commissioners.
ment. In *Cleveland Bar v. Pleasant*, the applicant for reinstatement was suspended for eight months in 1941, and reinstated. In 1958, he was indefinitely suspended for fraud in the probate of an estate. In 1960, he petitioned for reinstatement. The Cleveland Bar Association did not oppose. The hearing panel agreed that he had been rehabilitated. The court rejected a recommendation that he be reinstated, saying he was "'Weighed in the balance and found wanting' . . . Not once but twice of record."

The courts uniformly hold that a full and unconditional pardon of the offense that led to a disbarment does not nullify the disbarment proceedings. Most courts hold that a pardon does not compel a court to reinstate an attorney. A pardon may open a door that is otherwise barred, as for example, in those states that have a law that a convicted felon may not hold the office of attorney (a "felony-disbarment" rule). Ohio has no such rule. The existence of a pardon may open the door in another sense, that of mitigating or avoiding adverse public reaction to the reinstatement of a lawyer whose crime gained notoriety.

The fact that a lawyer, convicted of conduct that was an offense at the time, would not be convicted of the same conduct under today’s rules, does not itself justify reinstatement. Thus, one who has been disbarred in a federal court because of a conviction of the Smith Act found unavailing an argument that today Smith Act prosecutions, which cost him his license, are outmoded, and his application for reinstatement was denied. The lawyer is expected to abide by rules lawful at the time. One would expect the same consideration to apply to those disbarred or suspended for publicity, unprofessional at the time, but now permitted, as in the case of limited advertising.

One cannot question the logic of a view that a change of law does not remove the former offense. But since the nature of a prior offense is a factor in the highly judgmental matter of reinstatement, the current legality (or at least acceptance) of the conduct should lessen the weight of that factor.

Testimonials by prominent citizens, public officials, and lawyers get mixed reception from the courts. They are relevant to proof of good report and good character. But they carry little weight if they appear motivated by sympathy, or by statement that the applicant “has been punished enough” or where the writer is ignorant of the grounds of disbarment; so it is also with references from persons distant from the city in which the applicant is employed. On the other hand, favorable letters of recommendation and the personal

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205 See *supra* note 158.
207 *Id., contra*: Ex Parte Crisler, 159 Miss. 247, 132 So. 103 (1931).
testimony of witnesses are entitled to great weight if they address the relevant issues of integrity, trustworthiness, law abidance, and sobriety by persons who have had frequent and intimate contacts with the petitioner. Such evidence alone is not conclusive, however.

REINSTATEMENT: INCIDENCE IN OHIO

Judicial attitudes toward reinstatement vary from virtual inexorability of the prior sanction on the one hand to extreme compassion on the other. Drinker found support in case law, for the proposition that reinstatement after disbarment should almost never occur, and should be granted only in exceptional cases and advocated it. On the other hand, views expressed by Justice Field in 1871 down to a recent Massachusetts judge in a disciplinary hearing who refused to continue the suspension of lawyer O’Brian because it “would result in extreme hardship to Mr. O’Brian’s family” were those of undue compassion.

The problem facing Ohio in the decade of the 1950’s was the decentralization of the reinstatement process in the hands of the trial courts in eighty-eight counties, and the existence of a problem later identified by the Clark Report as nationwide, “Disbarred attorneys [are] too readily reinstated by the Courts.”

Rule XXVII, effective in 1957, required all petitions for reinstatement to be addressed to the supreme court for hearing by the Board of Commissioners on Grievances and Discipline and review by the courts and that the applicant possess all the qualifications, mental, educational, and moral which would have been a requirement of an applicant of the bar at the time of his original admission, to be proved by clear and convincing evidence. The petitioner began the proceedings with the entire record of his prior sanction as evidence against him.

In the first ten years of operation under this Rule, there were four applications for reinstatement, two of which were denied by the Board and confirmed by the court. Two petitions were recommended to be granted by the Board who found the petitioners rehabilitated. The court rejected the recommendations and denied the petitions. In one, the attorney had been suspended by a local court for eight months, reinstated, found guilty of a fraud on the court,

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212 H. Drinker, Legal Ethics, 49 (1953). Support for Drinker’s statement, both before and after its publication include: Petition of Emmons, 330 Mich. 303, 47 N.E. 2d 620 (1951); In the Application of Koker, 214 Or. 357, 329 P. 2d 894 (1958).
213 80 U.S. (Wall) 335, at 355: “To deprive one of the office of this character [attorney at law] would often be to decree poverty to himself and destitution to his family.”
215 Clark Report, supra note 2, at 946.
216 Disbarment of Lieberman, 163 Ohio St. 35, 125 N.E. 2d 328 (1955).
217 Schroeder, supra note 10, at 99.
218 Id.
and sanctioned a second time with indefinite suspension. There was little to support the applicant other than the passage of time, no post-suspension misconduct, and no opposition from the bar. There was no affirmative evidence to show that the applicant would not repeat his misconduct.  

The second case was one to evoke great sympathy, and apparently did so with the Board. But the Akron Bar Association, through a blue ribbon committee, opposed the recommendation successfully by showing delay in making restitution for converting a settlement to a disabled workman, and alleged lack of candor in petitioner's discussing the use of the proceeds.

The attitude of the then Ohio Supreme Court was as suggested by Drinker. A petitioner in reinstatement, if it were to occur at all, would have to meet the most exacting standards.

Table I indicates that forty-five petitioners for reinstatement have been filed, of which only four have been denied. At first blush, a 93% success rate strikes one as unduly high. But these data must be viewed in context.

First, from the 41 successful applications must be deducted 4 one year suspensions, which, while not automatic, do not involve a question of rehabilitation. Secondly, the Ohio Supreme Court has diverted from the stream of reinstatements 36 permanent disbarments and 115 resignations with prejudice to reinstatement. It is within these 151 cases that the most difficult decisions for reinstatements would fall and denials would likely occur. Thirdly, the inauguration of the one year suspension in 1981 has spawned the Wolfe rule, vice Stein, in the matter of sanctions for the willful failure to report one's income for federal tax purposes. Whereas Stein mandated an indefinite suspension for the offense, notwithstanding extenuating circumstances, Wolfe, with a one year suspension, has become the norm where mitigating circumstances are present. About half the successful petitions have been granted to those indefinitely suspended for the aforesaid tax offense, after the decision in Wolfe.

A difficulty in evaluating the current judicial attitude is the absence of reported cases dealing with successful reinstatement, and indeed, not all the denials are reported. Three of four denials are reported, however, and only 5 of 41 successful applications merited a report. The remainder appear as docket entries.

The three denials were justified in terms of affirmative evidence of the

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21In re Edwards, 172 Ohio St. 351, 176 N.E. 2d 409 (1961). The record appearing in the case indicated that Edwards was suspended in 1933 for converting a $2,000 settlement of a claim and using the proceeds for his own purposes. He turned to barbering, raised a family of three children, and thereafter had a clear record. He served as sometime Treasurer to four organizations. At age 72, he made a second attempt at reinstatement, indicating a willingness to retake the Ohio bar. The Akron Bar Association opposed the reinstatement on the basis that he had strung out the reimbursement of the client over a fourteen year period and had not been candid with regard to the use of the money.
lack of rehabilitation: belated performance of obligation post-suspension in one (but reinstated on the second try);\textsuperscript{221} failure to make restitution and vigorous bar opposition in a second;\textsuperscript{222} and lack of sufficient legal learning in the third.\textsuperscript{223}

Of the five successful applications reported: alcohol was a problem in one and it affirmatively appeared that its victim was rehabilitated;\textsuperscript{224} personal tragedy and psychiatric problems were causes in a second and it affirmatively appeared that these had been overcome;\textsuperscript{225} a third involved solicitation, hardly a matter involving \textit{crimen falsi}, where the applicant had good references and no opposition from the bar;\textsuperscript{226} a fourth involved a conflict of interest with clients in a business transaction, adverse judgments, a good work record for two years, settlements to the satisfaction of the clients, and no opposition from the local bar;\textsuperscript{227} a fifth involved an embezzlement of a small sum of public money by a prosecutor who reapplied after sixteen years, with affirmative support of the bar, with a good work record in a state agency.\textsuperscript{228}

"Reformation and regeneration should be open to any man," a California court declared, "and when effected should merit a just reward."\textsuperscript{229} Most would agree. The problem, however, lies in the ease or difficulty of the proof of reformation. If a case for reinstatement is made out merely by the passage of time during which a person has made a living in an acceptable occupation, without any business improprieties following discipline, the absence of opposition from the local bar, without an affirmative showing of reformation and regeneration, then suspended attorneys are too readily readmitted by the court and the purpose of discipline and reinstatement has been defeated.

The Ohio cases of reinstatement granted discussed above, to the extent that they are a fair sample, the frequency with which reinstatement is granted in recent times, and the treatment of tax offenders under the \textit{Wolfe} doctrine demonstrate a compassionate application of the factors of reinstatement, in some case, too compassionate, by the supreme court.

CONCLUSIONS

Professor Schroeder, it may be recalled, concluded his ten year study with an observation that, "Discipline was simple and most effective, reinstatement

\textsuperscript{221}Ohio State Bar Association v. Hart, 15 Ohio St. 2d 97, 238 N.E. 2d 560 (1968).
\textsuperscript{222}Reinstatement of Hughes, 66 Ohio St. 2d 135, 420 N.E. 2d 1000 (1981).
\textsuperscript{223}Reinstatement of Atkins, 2 Ohio St. 3d 32, 442 N.E. 2d 754 (1982).
\textsuperscript{224}Reinstatement of Coogan, 35 Ohio St. 2d 114, 298 N.E. 2d 518 (1973).
\textsuperscript{225}Reinstatement of Rasor, 40 Ohio St. 2d 25, 317 N.E. 2d 915 (1974).
\textsuperscript{226}Reinstatement of Fleck, 29 Ohio St. 2d 82, 278 N.E. 2d 669 (1972).
\textsuperscript{227}Reinstatement of Miller, 35 Ohio St. 2d 135, 298 N.E. 2d 583 (1973).
\textsuperscript{228}Reinstatement of Kearns, 28 Ohio St. 2d 121, 276 N.E. 2d 650 (1971).
\textsuperscript{229}In re Andreani, 14 Cal. 2d 736, 749, 97 P. 2d 456, 462 (1939).
was most demanding and not automatic." During the next seventeen years, Ohio continued to pursue vigorously and with fewer abortive attempts the more serious offenses, particularly in the post-Watergate era. Lawyer population doubled between 1974 and 1983, but disciplinary enforcement more than kept pace.

Available sanctions have been augmented to provide a fairer response to less serious misconduct, as the awkward gap between indefinite suspension and public reprimand was closed by the adoption of one year suspensions.

Reinstatement was not automatic, but was less demanding and more compassionate than during the first ten years.

Spokesmen for the American Bar Association view the Clark reform as uncompleted in Ohio, absent a state-wide, unified disciplinary system. Ohio is, in fact, centralized in terms of disciplinary rule-making power and adjudication, which rest exclusively in the Ohio Supreme Court. Criticism is addressed to the existence of ninety-four potential relators at the point of intake with investigative and prosecutorial powers. The criticism is muted somewhat by the fact that most cases were brought by only seven relators — six large, metropolitan bar associations, and the Ohio State Bar Association with a full time staff of disciplinary counsel, whose contribution was especially useful for complaints from the smaller counties. But whether the number is potentially ninety-four, or effectively seven, the system is not unified. The matter is simply one of degree.

A development that is likely to shape the future course of discipline in Ohio and lead to the eventual centralization of the relationship function was the creation in 1977 of the Office of Disciplinary Counsel as an arm of the Ohio Supreme Court and the Board. Initially, it was a two-lawyer office with exclusive jurisdiction over advertising and publicity offenses, and backup jurisdiction when called upon by a local relator. In 1983, its jurisdiction was expanded to include exclusive jurisdiction over all cases of misconduct involving judges and candidates for judicial office, power to investigate and prosecute any complaint that comes to its attention, and to supersede a local bar association for delay in an investigation. The loser has been the Ohio State

Schroeder, supra note 10, at 33.

Clark viewed too much decentralization as a prime cause for the scandalous situation that he found. Decentralization in the hands of lower courts produced a lack of uniformity in sanctions imposed. Prosecutorial power in the hands of local bar associations, especially smaller ones, meant that lawyers were required to discipline one another with the evils of cronyism and the "good old boy" syndrome. Clark, supra note 2, at 801.


"Gov. R. V. Sec. (3): "... All complaints alleging violations of DR 2-101 and DR 2-102(A) and (B) shall be referred to or filed with Disciplinary Counsel." Id., Sec. (4):

Disciplinary Counsel and any committee authorized by any regularly organized bar association shall investigate any matter referred to them or which comes to their attention and may cause complaint to be filed pursuant to this rule...
Bar Association, who has been decertified as a relator, and the potential losers are the local bar associations.

The local bar associations are apprehensive of the newcomer. The concern stems from the potential for abuse, or imprudent use, of concentrated power. For one thing, all complaints that result in formal charges have been screened by the local or state bar association by a Grievance Committee who looks for probable cause, much like a grand jury. No such committee screens the charges brought by Disciplinary Counsel. He operates by information, not by true bill. For another, there is a fear that the Disciplinary Counsel will be "too tough" with regard to less serious misconduct that may be viewed at the local level as not an offense, or not a substantial offense, or one that may be remedied by a less drastic alternative (e.g., malpractice suit). The fear is not without foundation.\textsuperscript{234}

Apart from the issue of decentralization, the court has failed to avail itself of a full panoply of sanctions recommended by ABA Standards: definite period suspension of six months to three years;\textsuperscript{235} court ordered restitution;\textsuperscript{236} and probation.\textsuperscript{237} Court ordered restitution is important, since numerous complaints stem from money owed clients through a breach of trust by the attorney. It provides little relief to the client that the attorney is suspended, but the debt unpaid, or even unrecognized in the form of an enforceable decree.

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\textsuperscript{234}A concern was expressed by Board of Commissioners and Grievance and Discipline Chairman Robert M. Blakemore of the Akron Bar, Lawyer Says Discipline Is Too Tough. The Plain Dealer. Sec. D-1, col. 1. Oct. 4, 1984:

Blakemore said he thought Gagliardo (Disciplinary Counsel) was too tough on lawyers accused of first offenses such as missing a court deadline or allowing the statute of limitation to expire on a case.

Blakemore said he does not believe every case of negligence should be prosecuted.

Gagliardo looks at every such negligence case as a serious ethics violation.

"We need to consider circumstances (particularly) how the client was affected, if restitution has been made and the lawyer's general conduct."

\textsuperscript{235}ABA Standard 6.3: "Suspension should be ordered for a specified period not in excess of three years."

\textsuperscript{236}Id. Sec. 6.12: "The Court may require a respondent to make restitution to persons financially injured by his willful conduct and to reimburse the client security fund."

\textsuperscript{237}Id. Sec. 6.7: "Probation should be imposed for a specified period, not in excess of two years."
Probation has been recognized only once in Ohio, and denied thrice for want of the machinery of supervision, counseling and review. Probation should be added to the sanctions while simultaneously organizing the human resources of Ohio’s state and metropolitan bar associations to serve as probation authorities.

Ohio has failed to include in its rules a physical disability inactive status, whereby those identified as too ill to practice competently, whether by reason of alcoholism or other disease, may be involuntarily removed without stigma, and may be reinstated when rehabilitated in a medical, and not a moral, sense. This procedure is more humane and less socially costly than permitting the consequences of the illness to run into fourteen counts of misconduct to establish a conclusive case of misconduct, to the hurt of the clients and the lawyer.\(^2\)

Ohio suffers from the same problems endemic to disciplinary enforcement predicated upon the ABA Standards and the present Code of Professional Responsibility: failure on the part of lawyers and judges, generally, to report observed misconduct,\(^2\) unless the lawyer or judge is the victim of the offense; that the system is generally dependent upon triggering by a written, signed complaint, absent the notoriety of the misconduct, i.e., it is not self-starting;\(^2\) the unevenness of sanctions absent appropriate sentencing guidelines;\(^2\) that the system is fault-oriented, predicated historically on notions of “moral turpitude,” and is deficient as a system of quality control, predicated upon efficiency and economy of performance.\(^2\) A Clark Report of these days would focus on professional incompetence, its causes and its cures, less on immoral conduct.

Ohio began its reforms earlier and from a point of departure different from the Clark Report which was yet to come. Its hybrid system conceived by Bar President Boer was designed to improve the system while preserving the

\(^{20}\) Stark County Bar Association v. Lukens, 48 Ohio St. 2d 187, 357 N.E. 2d 1083 (1976).

\(^{21}\) See Sternberg, Board of Attorneys Professional Responsibility: 1982-83 Annual Report, 56 Wisc. Bar Bull. 17 (Dec., 1983). In analyzing 1098 Board files closed, the source of grievance from lawyers were 95 or 8.7% and from judges 14 or 1.3%. for a total of 10% from these two categories. Fifty-four, 4.8%, were Board or staff initiated, and the remainder of 935, or 85.2%, were from clients or the adverse party. These data are not atypical.

\(^{22}\) Id.

\(^{23}\) See Sternberg, Board of Attorneys Professional Responsibility: 1982-83 Annual Report, 56 Wisc. Bar Bull. 17 (Dec., 1983). In analyzing 1098 Board files closed, the source of grievance from lawyers were 95 or 8.7% and from judges 14 or 1.3%. for a total of 10% from these two categories. Fifty-four, 4.8%, were Board or staff initiated, and the remainder of 935, or 85.2%, were from clients or the adverse party. These data are not atypical.

\(^{24}\) Id.

\(^{25}\) Marks and Cathcart, Discipline within the Legal Profession: Is It Self Regulation?, 1974 Ill. L. Forum 193, concluded that the Code of Professional Responsibility has failed as a device for promoting efficient legal services. Performance issues will likely have to be dealt with separately, apart from the Code.
roles of its powerful state and metropolitan bar associations. Although hybrid, the system has worked, though it may be improved.

The future is likely to see the reform as contemplated by the Clark Report fully effected, through further centralization of discipline in the Office of Disciplinary Counsel of the Ohio Supreme Court. Ohio's state and local bar associations will then play a different, but important, role. No longer relators pursuing the errant, they may serve as rescuers of the afflicted. No longer accusers of miscreants, they may serve as assessors of quality. For, professional responsibility comprises not only good conduct, but efficient performance. In the latter lies the challenge of the future.

### Table I

**Ohio Disciplinary Actions 1967-1983, Inclusive**

*Source: Official Ohio State Reports and Disciplinary Actions as Reported in OBAR*

<table>
<thead>
<tr>
<th>Year</th>
<th>Disbar</th>
<th>Susp.</th>
<th>Ind. 1 Yr. Public</th>
<th>Sub</th>
<th>Resignation</th>
<th>Grant</th>
<th>Deny</th>
<th>Sub</th>
<th>Grand</th>
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*One year suspensions not available until 1981 and thereafter

**In addition, one name was stricken from the roll of attorneys. D.D. 83-14. 9-28-83

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**Id.**
### Table II

**Indefinite suspension as a final sanction in disciplinary actions in Ohio 1967-1983**

**Causes and Frequency**

<table>
<thead>
<tr>
<th>Cause</th>
<th>Frequency</th>
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<tbody>
<tr>
<td></td>
<td>Sub Cases</td>
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<tr>
<td>Prior Criminal Convictions</td>
<td>35</td>
</tr>
<tr>
<td>Income Tax Violations</td>
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<tr>
<td>Willful Failure to File Return</td>
<td>20</td>
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<tr>
<td>Filing False Return</td>
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<tr>
<td>Other Criminal Misconduct</td>
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<tr>
<td>Fraud (Conspiracy to Embezzle, Filing False Insurance Claim, Issuing Checks to Defraud)</td>
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<tr>
<td>Obstructing Justice (Conspiracy to Bribe, Tampering with Public Records (2))</td>
<td></td>
</tr>
<tr>
<td>Property Offenses (Grand Theft, Receiving Stolen Property, Petit Theft)</td>
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</tr>
<tr>
<td>Assault (Felonious, Aggravating Menace)</td>
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</tr>
<tr>
<td>Conspiracy to Deal in Firearms</td>
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<tr>
<td>Trafficking in Drugs</td>
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<td>Neglect and/or Failure to Seek Lawful Objectives of Client</td>
<td>23</td>
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<tr>
<td>Mishandling Clients’ Money, and/or Commingling and/or Failure to Account</td>
<td>18</td>
</tr>
<tr>
<td>Breach of Confidential Relationship and/or Using Client’s Secret to Advantage of Another and/or Representing Adverse Interests</td>
<td>4</td>
</tr>
<tr>
<td>Implying Use of Improper Influence</td>
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<tr>
<td>Solicitation</td>
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<td>Miscellaneous</td>
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<td>-----</td>
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<td>Attempt to Influence Witness</td>
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<td>Check Kiting</td>
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<td>Failure to Inform Court of State of Case</td>
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<td>(Fraud on Tribunal)</td>
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<td>Failure to Terminate Relationship</td>
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<td>Where Client Has No Valid Claim</td>
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