

### XIII. Professional Responsibility

#### A. Enforcement of the Code

1. *General Sanctions Imposed in Disciplinary Proceedings.*— In determining the appropriate discipline to be imposed for a breach of the Indiana Code of Professional Responsibility,<sup>1</sup> the Indiana Supreme Court has chosen to balance the interest of the violating attorney against the need of the public for protection.<sup>2</sup> Many factors are employed in determining the weight of these interests.<sup>3</sup> The following cases reflect examples of prohibited conduct and the discipline likely to ensue.

Otis W. Crumpacker was charged with nineteen different counts of misconduct.<sup>4</sup> For instance, the respondent had demonstrated a pattern of irrational outbursts in court as well as a tendency to publicly insult his opponents.<sup>5</sup> Crumpacker had exclaimed to one opposing counsel, "You snake son-of-a-bitch, that leaves but one thing for me to do, to go down and load up both barrels of my gun, and I'll getcha."<sup>6</sup> The respondent also had utilized former clients' confidential information to their detriment.<sup>7</sup> Moreover, Crumpacker had sent copies of a brief he had written for a pending suit to members of the bar who were not related to the case, thereby publicly disseminating extrajudicial statements concerning evidence and witnesses.<sup>8</sup> The court concluded that such publications amounted to an obstruction of justice and violated several Disciplinary Rules as well.<sup>9</sup> Finally, the respondent had filed suits merely to harass others.<sup>10</sup>

Despite this impressively bad record, the respondent defended on several grounds. Crumpacker alleged that the counts against him were also the subject matter of pending civil and criminal litigation and that the lower courts therefore had exclusive jurisdiction. This argument was dismissed as unfounded because civil and criminal

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<sup>1</sup>1978 IND. CT. R. 335. The Code contains the conduct-regulative Disciplinary Rules [hereinafter referred to as DRs], which establish the minimum professional standards below which no attorney may fall.

<sup>2</sup>See *In re Vincent*, 374 N.E.2d 40 (Ind. 1978); *In re Tabak*, 266 Ind. 271, 362 N.E.2d 475 (1977); *In re Murray*, 266 Ind. 221, 362 N.E.2d 128 (1977), *cert. denied*, 434 U.S. 1029 (1978).

<sup>3</sup>*In re Crumpacker*, 383 N.E.2d 36, 52 (Ind. 1978).

<sup>4</sup>*Id.* at 37.

<sup>5</sup>*Id.* at 46-49.

<sup>6</sup>*Id.* at 40.

<sup>7</sup>*Id.* at 42.

<sup>8</sup>*Id.* at 43-44.

<sup>9</sup>*Id.* at 44. See DRs 1-102(A)(1), (5)-(6); DRs 7-107(G)(1)-(2), (4)-(5).

<sup>10</sup>383 N.E.2d at 50-51.

matters are not decided in an action to discipline a lawyer, even though the disciplinary action involves facts similar to those in other suits.<sup>11</sup>

Crumpacker also claimed that a former Indiana Disciplinary Commission member had a personal interest in the disbarment and that the commission was acting as a part of a conspiracy to harm him. This contention was denied as incredible.<sup>12</sup>

Finally, Crumpacker contended that an investigation by the commission of charges filed but not listed in a formal grievance was inappropriate. The court responded that disciplinary grievances should not be strictly construed and that an investigation was appropriate in all areas indicative of the general tenor of the complaints.<sup>13</sup>

Thus, Crumpacker employed his fiduciary role as a lawyer as a facade for frivolous suits, false accusations, and other de facto vindictive instruments. The court recognized that the lawyer should represent his client with zeal,<sup>14</sup> but also stipulated that when "a lawyer loses sight of his purpose and uses the legal system for personal vengeance, he fails in his obligation to his client, profession and self."<sup>15</sup> Appropriately, Crumpacker was disbarred.<sup>16</sup>

*In re Cochran*<sup>17</sup> involved three counts of misconduct. As the administrator of an estate, Cochran had been in possession of an insurance policy. While the beneficiary was unaware of the policy's existence, the respondent forged the beneficiary's signature to obtain the policy proceeds and intermingled the proceeds with personal funds. The monies were eventually depleted without being repaid to the beneficiary.<sup>18</sup>

Cochran forwarded several excuses. He claimed that the coadministrator had knowledge of the funds and had not informed the beneficiary. The court responded that misconduct by the client does not waive the attorney's ethical responsibility.<sup>19</sup> Also, the respondent claimed that he had forged the signature in a zealous effort to protect his client from litigation. The court held, however, that good motives would not protect the respondent in his failure to establish a proper trust fund account.<sup>20</sup>

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<sup>11</sup>*Id.* at 38.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 52.

<sup>15</sup>*Id.*

<sup>16</sup>*Id.* at 53.

<sup>17</sup>383 N.E.2d 54 (Ind. 1978).

<sup>18</sup>*Id.* at 56.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* The court found that Cochran's conduct violated DRs 1-102(A)(1), & (3)-(5), constituting illegal conduct involving moral turpitude and conduct prejudicial to the administration of justice. *Id.*

The second count against Cochran entailed knowingly making a false statement of the law and knowingly failing to disclose information that he was required to reveal. The respondent urged a client to forge a minor's signature on a notice of waiver of the appraisal required under the inheritance tax laws.<sup>21</sup> The respondent caused the waiver to be filed without authorization of the minor's guardians. Cochran also served as notary to the signature. The respondent's defenses were that authorization of signatures outside the presence of the notary was customary and that any financial or personal gain was not to inure to his benefit. The court concluded that these were not valid excuses and found the conduct was not within the bounds of the Code.<sup>22</sup>

Finally, the third count accused Cochran, among other charges, of failing to reveal the receipt of cash and stock intended for the benefit of an estate. As a defense, Cochran claimed that the stock was worthless and that the funds were deposited in his account by error. The fact finder rejected these explanations as incredible and found that Cochran failed to preserve the identity of his client's property,<sup>23</sup> failed to act competently,<sup>24</sup> and failed to act in a manner which reflected positively on his fitness to practice law.<sup>25</sup>

The mitigating factors of the respondent's good character, professional accomplishments, cooperation with the disciplinary commission, and repayment of converted funds were not sufficient to diminish the seriousness of the violations. He was therefore disbarred.<sup>26</sup>

*In re Garrett*<sup>27</sup> involved two counts of misconduct. The court initially found that Garrett had failed to close an estate for a client although the respondent had received full payment for his services.<sup>28</sup> He also had failed to inform the client-beneficiaries of a conveyance in real property pertinent to the estate. Hence, Garrett failed to carry out a professional contract,<sup>29</sup> engaged in conduct prejudicial to the administration of justice,<sup>30</sup> and neglected an entrusted legal matter.<sup>31</sup> Three violations of the disciplinary rules were consequently found.<sup>32</sup>

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<sup>21</sup>See IND. CODE § 6-4.1-5-9 (1976).

<sup>22</sup>383 N.E.2d at 56-57. The conduct violated DRs 7-102(A)(3) & (5), amounting to concealment or failure to disclose and making an intentional false statement. *Id.*

<sup>23</sup>See DRs 9-102(B)(1)-(4).

<sup>24</sup>See DR 6-101(A)(3).

<sup>25</sup>383 N.E.2d at 58. See DRs 1-102(A)(3)-(6).

<sup>26</sup>383 N.E.2d at 59.

<sup>27</sup>377 N.E.2d 1368 (Ind. 1978).

<sup>28</sup>*Id.* at 1369.

<sup>29</sup>See DRs 7-101(A)(2)-(3).

<sup>30</sup>See DR 1-102(A)(5).

<sup>31</sup>See DR 6-101(A)(3).

<sup>32</sup>377 N.E.2d at 1371.

The second count against the respondent emerged when a widow paid a \$500 retainer for the collection of insurance proceeds. Garrett represented to his client that he had filed suit against one of the insurers even though the insurer had never been contacted. The court concluded that Garrett had failed to act competently,<sup>33</sup> intentionally failed to represent his client zealously,<sup>34</sup> failed to carry out a professional contract,<sup>35</sup> and intentionally damaged his client during the course of his representation.<sup>36</sup> For these violations, Garrett was suspended one year.<sup>37</sup>

In *In re Gilbert*,<sup>38</sup> after Gilbert's friend had died, the mortuary found the respondent's card in the decedent's personal effects. Gilbert gave the family's location to the mortuary and, in turn, the mortuary forwarded the key to the decedent's safe deposit box to Gilbert. The respondent opened the box and removed the contents in the presence of the assessor. Also, the respondent was given a check by the bank for the remaining balance in the decedent's two checking accounts. The family then demanded possession of this property. Although Gilbert informed the family that the items were in his possession, he refused to return them. Gilbert, therefore, assumed control over the decedent's estate assets without legal authority to do so. The court found Gilbert guilty of misconduct<sup>39</sup> and suspended Gilbert for sixty days.<sup>40</sup>

2. *Illegal Conduct Involving Moral Turpitude.*—An attorney may be disbarred for a combination of small offenses which, in themselves, may not call for an extreme sanction. When an attorney is involved in illegal conduct, however, the violation obtains a new gravity. Usually, conviction of a felony is enough to warrant disbarment.<sup>41</sup> Nevertheless, DR 1-102(A)(3) condemns an attorney for illegal activity only if such activity involves "moral turpitude."<sup>42</sup> Hence, when examining an alleged violation of DR 1-102(A)(3), the ultimate issue is whether the illegal act displays a defect in character so grave as to signify the complete lack of moral fitness needed to practice law.<sup>43</sup>

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<sup>33</sup>See DR 6-101(A)(3).

<sup>34</sup>See DR 7-101(A)(1).

<sup>35</sup>See DR 7-101(A)(2).

<sup>36</sup>377 N.E.2d at 1371. See DR 7-101(A)(3).

<sup>37</sup>377 N.E.2d at 1372.

<sup>38</sup>375 N.E.2d 1111 (Ind. 1978).

<sup>39</sup>*Id.* at 1112. Gilbert's conduct was dishonest and fraudulent and hence violated DR 1-102(A)(4).

<sup>40</sup>*Id.*

<sup>41</sup>*Cf. In re Effron*, 58 A.D.2d 510, 397 N.Y.S.2d 100 (1977) (recognizing New York's automatic disbarment rule for felonies).

<sup>42</sup>See DR 1-102(A)(3).

<sup>43</sup>For discussion of another survey case involving moral turpitude, see notes 17-26 *supra* and accompanying text.

*In re Gorman*<sup>44</sup> dealt with this issue in a novel area. Gorman was convicted of conspiracy with the intent to distribute cocaine. The Disciplinary Commission brought a single count against the respondent. The commission's conclusion was that Gorman was involved in a crime of moral turpitude, thereby violating DR 1-102(A)(3). Gorman maintained, however, that the distribution of cocaine was only "malum prohibitum."

Throughout this proceeding, Respondent did not dispute the felony conviction or the facts giving rise to the conviction. He admits that he has committed an illegal act (malum prohibitum), but denies that he has done wrong (malum in se), arguing that the use of cocaine is neither addictive nor injurious to health. The Respondent thusly asserts that if he is to be disciplined it should be by reason of the illegality of the conduct and not by reason of a lack of moral fitness or turpitude.<sup>45</sup>

The court turned to *Black's Law Dictionary*<sup>46</sup> to define moral turpitude as an act that reflects a "baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the *accepted and customary* rule of right and duty between man and man."<sup>47</sup> Hence, by definition social norms to a large extent define the boundaries of moral turpitude.

In applying this definition the *Gorman* court's reasoning reduces to two factors. First, Gorman disregarded the impact of his actions on the rest of society. Second, Gorman was involved in a criminal conspiracy, which displayed his anarchistic disregard for society's interest in law and order as well as disregard for the lawyer's vital role in the realization of that interest. "Respondent actively engaged himself in the introduction of a controlled substance into a market place that, unfortunately, is too often occupied by children and adolescents."<sup>48</sup> The court thus recognized that the use of a dangerous substance by young adults has great *social* repercussions that the respondent callously ignored. Moreover, Gorman attempted to "place himself above the law."<sup>49</sup> For all of these reasons, the court

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<sup>44</sup>379 N.E.2d 970 (Ind. 1978).

<sup>45</sup>*Id.* at 971.

<sup>46</sup>BLACK'S LAW DICTIONARY (4th ed. 1968).

<sup>47</sup>379 N.E.2d at 971 (quoting BLACK'S LAW DICTIONARY 910 (4th ed. 1968) (emphasis added)).

<sup>48</sup>379 N.E.2d at 971.

<sup>49</sup>*Id.* at 972.

found that Gorman's actions demonstrated moral turpitude and that he was unfit to practice law.<sup>50</sup>

It may be interesting to compare *Gorman* with *In re Higbie*.<sup>51</sup> Among other issues, *Higbie* confronted the question whether the mere possession of marijuana was moral turpitude per se. *Higbie*,<sup>52</sup> as well as *Gorman*,<sup>53</sup> recognized that certain illegal acts automatically indicate amorality. One of the most outstanding sins cited in *Higbie* was fraud.<sup>54</sup> *Higbie* concluded, however, that it could not be blindly asserted that the use of marijuana or its possession was, in itself, a per se violation of the Code:

[M]easured by the morals of the day . . . its possession or use does not constitute "an act of baseness, vileness, or depravity . . . contrary to the accepted and customary rule of right and duty between man and man" . . . or indicate that an attorney is unable to meet the professional and fiduciary duties of his practice.<sup>55</sup>

Perhaps *Higbie* reflects a trend toward a more lenient view of drug use by attorneys. Certainly, both the *Higbie* and *Gorman* courts primarily condemned the respective respondents' involvement in conspiracies, although the courts were motivated by different reasons. The *Gorman* court was concerned about the marketing of a dangerous substance and its impact on the young.<sup>56</sup> The *Higbie* court, however, emphasized the possible adverse effects of legal experts devoted to breaking the law:

Respondent purposefully disregarded legal standards of conduct in his advice to Bagley [his client], and invited his friend to place himself in jeopardy of the law and to engage in an unlawful conspiracy. Respondent failed to sever himself from

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<sup>50</sup>*Id.*

<sup>51</sup>6 Cal. 3d 562, 493 P.2d 97, 99 Cal. Rptr. 865 (1972). Richard Higbie became involved with a client for whom he had performed work *pro bono publico*. The client, Bagley, proposed a scheme to smuggle marijuana into the country, thereby evading the federal marijuana transfer tax. I.R.C. § 4741 (repealed 1971). The respondent pitied Bagley because of his extreme financial difficulties and contacted several pilots willing to help the client execute the plot. Apparently, Higbie was not motivated by personal gain, but served merely as Bagley's benefactor. 6 Cal. 3d at 565-66, 493 P.2d at 98, 99 Cal. Rptr. at 866. Unfortunately, Bagley convinced Higbie to keep advancing funds so that the respondent was involved in the conspiracy until the last act. The client and his accomplices were apprehended along with the respondent. Higbie pleaded guilty and was convicted of a felony. *Id.* at 566-67, 493 P.2d at 99, 99 Cal. Rptr. at 867.

<sup>52</sup>6 Cal. 3d at 570, 493 P.2d at 102, 99 Cal. Rptr. at 870.

<sup>53</sup>379 N.E.2d at 971.

<sup>54</sup>6 Cal. 3d at 571, 493 P.2d at 103, 99 Cal. Rptr. at 871.

<sup>55</sup>*Id.* at 572, 493 P.2d at 103, 99 Cal. Rptr. at 871.

<sup>56</sup>379 N.E.2d at 971.

that scheme when, on reflection, both conscience and the law so demanded. Moreover, respondent disregarded the legitimate interest and concern of the public that attorneys not use their legal knowledge to counsel and assist clients to violate the law.<sup>57</sup>

Thus, the *Higbie* court, unlike *Gorman*, condemned the respondent's marketing of marijuana for reasons other than its status as a stumbling block for youth.

The holdings in *Gorman* and *Higbie* may support an argument for elevating conspiracy crimes to the per se category. Any lawyer implicated in a mass criminal plot has apparently lost a vital respect for the law as the very fabric of our society.<sup>58</sup>

3. *Use in a Disciplinary Proceeding of Trial Testimony Given Under a Grant of Immunity.*—*In re Mann*<sup>59</sup> dealt with an Indiana statute providing immunity for witnesses' testimony in lieu of their taking a fifth amendment privilege. The Indiana Supreme Court held that the statute granted protection against criminal proceedings only and did not apply to attorney discipline.<sup>60</sup> Mann, as a witness in a criminal trial, had confessed to bribing a client's arresting officer in an attempt to gain favorable testimony. The respondent's complicity in this bribe could only be shown through testimony protected by the immunity granted under Indiana Code section 35-6-3-1.<sup>61</sup> The respondent challenged the use of the testimony in his

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<sup>57</sup>6 Cal. 3d at 573, 493 P.2d at 104, 99 Cal. Rptr. at 872.

<sup>58</sup>These conclusions seem to support the New York rule of automatic disbarment for every felony conviction. 29 N.Y. [JUD.] LAW § 90.4 (McKinney 1968). Such convictions could be said to indicate a fatal disrespect for the law. *See, e.g., In re Talve*, 66 A.D. 489, 413 N.Y.S.2d 472 (1979) (automatic disbarment for the injection of a narcotic substance and subsequent conviction for that felony); *In re Effron*, 58 A.D.2d 510, 397 N.Y.S.2d 100 (1977). *Cf. Committee on Professional Ethics & Conduct v. Hanson*, 244 N.W.2d 822 (Iowa 1976) ("We do not think a lawyer who attempted to engage in illegal drug traffic and who converted partnership funds possesses the qualities of good character essential in a member of the Iowa Bar." *Id.* at 824). The automatic disbarment rule has undergone extreme criticism. *See Automatic disbarment talk of town in N.Y.*, 65 A.B.A.J. 899 (1979); *N.Y. legislature may soften disbarment rule*, 65 A.B.A.J. 690 (1979).

<sup>59</sup>385 N.E.2d 1139 (Ind. 1979).

<sup>60</sup>*Id.* at 1141.

<sup>61</sup>IND. CODE § 35-6-3-1 (1976) reads:

Any witness, in any criminal proceeding, before a court or grand jury, who refuses to answer any question and/or produce any evidence of any kind on the ground that he may be incriminated thereby, may be ordered by the court to answer any question and/or produce any evidence upon a written request by the prosecuting attorney: Provided, That the witness shall be provided with timely notice and a separate hearing on the merits of the order. Unless the court finds that the issuance of the order would be clearly con-

disbarment proceedings.<sup>62</sup>

The immunity statute provided that the witness should not be "prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced,"<sup>63</sup> and the respondent alleged that this language would include disciplinary proceedings within its purview. The court said, however, that Mann's argument failed "to recognize the distinction in the law between a criminal proceeding and a disciplinary action."<sup>64</sup> The court reasoned that the Indiana Supreme Court has exclusive jurisdiction in all matters relating to attorney discipline.<sup>65</sup> Therefore, if the Indiana General Assembly enacted a statute which intruded on this exclusive jurisdiction, that statute would be null and void.<sup>66</sup> In determining the effect of Indiana Code section 35-6-3-1, the court asserted

that the intent of the Legislature in enacting this statute was to provide for immunity in criminal matters; the Legislature's use of the term "penalty and forfeiture" was not intended to touch on matters of attorney discipline. To hold otherwise, would suggest an unconstitutional invasion into this Court's constitutional authority and would allow the unreasonable consequence of placing the power to grant immunity in a local prosecutor and court which might vitiate the constitutional mandate of this Court in disciplinary matters.<sup>67</sup>

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trary to public interest, the witness shall comply with the order of the court. If, but for this section the witness would have been privileged to withhold the answer given or the evidence produced, he shall not be prosecuted or subjected to penalty or forfeiture for or on account of any answer given or evidence produced: Provided, further, That such immunity shall not be allowed in the case of any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order of the court.

<sup>62</sup>385 N.E.2d at 1141.

<sup>63</sup>IND. CODE § 35-6-3-1 (1976).

<sup>64</sup>385 N.E.2d at 1141.

<sup>65</sup>*Id.* See IND. CONST. art. 7, § 4. See also *State v. Bartholomew County Court*, 383 N.E.2d 290 (Ind. 1978); *In re Public Laws Nos. 305 & 309*, 263 Ind. 506, 334 N.E.2d 659 (1975); *Indiana State Bar Ass'n v. Moritz*, 244 Ind. 156, 191 N.E.2d 21 (1963); *Blood v. Gibson Circuit Court*, 239 Ind. 394, 157 N.E.2d 475 (1959).

<sup>66</sup>385 N.E.2d at 1141.

<sup>67</sup>*Id.* The court pointed out that it was not alone in the above interpretation of immunity statutes. Other jurisdictions show substantial support for *Mann's* position. See Annot., 62 A.L.R.3d 1145 (1975). One exception to this rule exists where the legislature has the power to direct the discipline of attorneys and where the questioned statute provides for immunity in "any proceeding." *Id.* But see *Committee on Legal Ethics v. Graziani*, 200 S.E.2d 353 (W. Va. 1973), *cert. denied*, 416 U.S. 995 (1974).



With the court's right to use the testimony secured, Mann was found guilty of several serious Code violations and was consequently disbarred.<sup>68</sup>

### B. Reinstatement from Suspension and Disbarment

1. *The Indiana View.*—*In re Allen*<sup>69</sup> involved a reinstatement petition. Allen had originally been suspended for two years for failing to pay a client's inheritance tax and for subsequently converting the funds forwarded for the tax payment. Initially, the hearing officer had concluded that Allen's conduct during the suspension was "exemplary and above reproach."<sup>70</sup> The petitioner had not practiced law during the suspension period and had abided by the orders of the court. The hearing officer felt, however, that Allen had failed to meet the burden imposed by Admission and Discipline Rule 23(4)(a)<sup>71</sup> by committing an act of perjury during the reinstatement hearing.<sup>72</sup>

In that hearing, Allen maintained that she was innocent of all charges upon which her original suspension was based. In response

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<sup>68</sup>385 N.E.2d at 1143. Mann's conduct violated several DRs, including DR 9-101(C), improperly influencing a public official; and DRs 1-102(A)(1), (3)-(6), the general provisions prohibiting the subversion of justice.

<sup>69</sup>379 N.E.2d 431 (Ind. 1978).

<sup>70</sup>*Id.* at 433.

<sup>71</sup>IND. R. ADMISS. & DISCP. 23(4)(a) reads:

No person whose privilege to practice law has been suspended shall be eligible for reinstatement to practice law in this State unless he establishes by clear and convincing evidence before the disciplinary commission of this Court that:

- (1) He desires in good faith to obtain restoration of his privilege to practice law;
- (2) The term of suspension prescribed in the order of suspension has elapsed or five (5) years have elapsed since the suspension;
- (3) He has not practiced law in this State or attempted to do so since he was disciplined;
- (4) He has complied fully with the terms of the order for discipline;
- (5) His attitude towards the misconduct for which he was disciplined is one of genuine remorse;
- (6) His conduct since the discipline was imposed has been exemplary and above reproach;
- (7) He has a proper understanding of and attitude towards the standards that are imposed upon members of the bar and will conduct himself in conformity with such standards;
- (8) He can safely be recommended to the legal profession, the courts and the public as a person fit to be consulted by others and to represent them and otherwise act in matters of trust and confidence, and in general to aid in the administration of justice as a member of the bar and an officer of the Courts;
- (9) The disability has been removed, if the discipline was imposed by reason of physical or mental illness or infirmity, or for use of or addiction to intoxicants or drugs.

<sup>72</sup>379 N.E.2d at 433.

to questions concerning these charges, Allen testified that she regretted the appearance of wrongdoing, but could not feel remorse over a wrong which she felt was never committed.<sup>73</sup>

New evidence, not considered in the original hearing, was submitted tending to show Allen's guilt. The hearing officer concluded that the petitioner's testimony was contradictory and incredible and therefore amounted to perjury. The Indiana Supreme Court concurred with the findings of the hearing officer and found that Allen had committed an original breach of the Code, and was not worthy of reinstatement.<sup>74</sup>

Allen disputed the court's findings by claiming that the matters surrounding the alleged perjury in the reinstatement hearing were *res judicata*.

It is the position of the petitioner that the consideration of her testimony and its credibility by the original hearing officer in 1973, is *res judicata* as to this hearing. Therefore, the argument goes, such question could not be considered in the present petition for reinstatement by the hearing officer, the Commission, or this Court. The minority position in the present Disciplinary Commission is to the same effect: that even assuming without necessarily agreeing that petitioner committed perjury in the original disciplinary proceeding, such matter was already considered by this court, in its original Order, and necessarily included in that decision.<sup>75</sup>

The petitioner apparently made this *res judicata* argument in connection with her right to maintain a plea of innocence in the reinstatement hearing. Although *Allen* is far from clear on this point, it seems the petitioner argued that allowing the hearing officer to submit new evidence tending to show her guilt and permitting the disciplinary commission to reconsider, *in any way*, the credibility of her innocent plea seriously impaired her right to assert that plea. Obviously, any reinstatement applicant would be reluctant to maintain his innocence in the light of a formerly adverse decision—undoubtedly based on overwhelming evidence—even if such applicant fervently believed that he did no wrong. If the fact finder is allowed to indirectly reconsider such an innocent plea, an inference of guilt and perjury is certain to follow. It would be much easier to lie, to offer a less than heartfelt confession and increase one's chances of reinstatement by feigning remorse. On the other hand, *res judicata* could assure that the peti-

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<sup>73</sup>*Id.* at 434.

<sup>74</sup>*Id.* at 436.

<sup>75</sup>*Id.* at 434.

tioner would never be asked to choose between being rewarded for lying or being rebuked for telling the truth.

*Allen* unconvincingly answered this argument. Although the court may have agreed with the petitioner that the issue of perjury in the *original proceeding* was foreclosed, the court treated the possible perjury in the *reinstatement hearing* as a different issue. Hence, because the reinstatement perjury was not litigated in the original hearing, the question of such perjury had not been barred.<sup>76</sup>

This fine distinction does not answer *Allen's* objection, however. The perjury in the reinstatement and original hearings centered on the same issue, namely, *Allen's* attempts to prove her innocence.

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<sup>76</sup>In response to *Allen's* allegations, the court stated:

Further, the wrong committed by the petitioner was not in her professing innocence of commission of the act for which she was disciplined and found to be guilty. . . . Rather, her wrong was that in attempting to prove [*sic*] her innocence she gave untrue testimony, under oath, before the very tribunal attempting to make the truth determination of her fitness to be reinstated.

*Id.* at 436 (citation omitted). This was an apparent attempt to distinguish *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975). Alger Hiss was convicted of perjury while testifying before the Committee on Un-American Activities of the House of Representatives. Hiss maintained that he never relinquished classified documents of the United States government into unauthorized hands and that he never saw his alleged contact, Whittaker Chambers, until after Hiss had supposedly passed the documents. For this so-called perjury, he was disbarred and sought reinstatement. *Id.* at 448-49, 333 N.E.2d at 431-32.

One of the many issues with which the *Hiss* court dealt was whether statements of repentance and recognition of guilt were necessary for reinstatement. *Id.* at 450, 333 N.E.2d at 436-37. The court concluded that the "continued assertion of innocence in the face of prior conviction does not, as might be argued, constitute conclusive proof of lack of the necessary moral character to merit reinstatement." *Id.* at 457, 333 N.E.2d at 436. The court further stated:

[A] rule requiring admission of guilt and repentance creates a cruel quandary: [A petitioner] may stand mute and lose his opportunity; or he may cast aside his hard-retained scruples and, paradoxically, commit what he regards as perjury to prove his worthiness to practice law. . . . Honest men would suffer permanent disbarment under such a rule. Others, less sure of their moral positions, would be tempted to commit perjury by admitting to a nonexistent offense (or to an offense they believe is nonexistent) to secure reinstatement. So regarded, this rule, intended to maintain the integrity of the bar, would encourage corruption in these latter petitioners for reinstatement and, again paradoxically, might permit reinstatement of those least fit to serve.

*Id.* at 458-59, 333 N.E.2d at 437.

This rule is logical. To require the petitioner to confess his guilt places the bar and the public in general in a no-win situation. The unscrupulous attorney will, of course, confess his guilt and be readmitted while the principled victim will maintain his position and be denied satisfaction. Thus, *Allen's* result—with its practical effect of requiring the petitioner to admit his guilt or face the penalty of impeachment and perjury—must be questioned. Our legal system has never claimed infallibility.

Such a distinction did not relieve her from the horns of the court's dilemma. She was still faced with an indirect reconsideration of her credibility through allegations of perjury. She still took a tremendous risk by asserting what she may have perceived to be the truth.

Justice Prentice dissented by implying that the majority had made a distinction without substance. "It appears to me that under the majority opinion one suspended for misconduct, despite his denial of the charges, may never be reinstated without first admitting to the original guilt."<sup>77</sup> Justice Prentice thus referred to the logical tension between two seemingly conflicting rules. On one side, the court suggested that the petitioner need not admit guilt to obtain a successful reinstatement. On the other, the court imposed a duty upon the petitioner to be truthful in all matters. Therefore, although the petitioner may plead innocent, if he cannot prove his innocence by showing that the decision of the prior proceeding was in error, an inference can be drawn that the petitioner is not being truthful.

2. *A Comparative View of Other Jurisdictions.*—There are four prevailing positions on innocent pleas in reinstatement proceedings. The Oregon Supreme Court in *In re Black*<sup>78</sup> has obtained a result similar to *Allen* through a more direct reasoning process.

The applicant testified at his original disbarment proceeding that he had not employed persons to solicit cases, and in the present proceeding he continues to so maintain. It follows either that applicant was erroneously found guilty or he is presently lying and, therefore, not entitled to reinstatement. Applicant has the burden of proving that he was erroneously convicted.<sup>79</sup>

Hence, Oregon requires those reinstatement petitioners maintaining innocence to prove that the decision in the prior proceeding was wrong.

Another approach is found in *Maggart v. State Bar*.<sup>80</sup> The petitioner for reinstatement offered into evidence a cash receipt showing that he had reimbursed his client for the funds that he had supposedly embezzled, thereby claiming to have exonerated himself of

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<sup>77</sup>379 N.E.2d at 436 (Prentice, J., dissenting).

<sup>78</sup>251 Or. 177, 444 P.2d 929 (1968).

<sup>79</sup>*Id.* at 178-79, 444 P.2d at 930. The presence of a note naming successful targets for solicitation from a solicitor allegedly employed by the applicant was consistent with only two explanations: guilt or frame-up. No credible evidence was presented for the latter explanation although the applicant Black had passed a lie detector test. The court therefore "reluctantly" rejected Black's explanation and denied reinstatement. *Id.* at 191, 444 P.2d at 936.

<sup>80</sup>29 Cal. 2d 439, 175 P.2d 505 (1946).

any related disciplinary charges. The court refused to consider any evidence pertaining to the original disbarment hearing, however, because it felt that by reexamining the charge of embezzlement, it would disturb the findings of the original proceeding, which must be considered final.<sup>81</sup> Reinstatement, according to *Maggart*, was to be based solely on evidence of rehabilitation *subsequent* to the disbarment proceedings.<sup>82</sup>

The California court could have allowed the petitioner to submit the new evidence and then proceeded to impeach him by demonstrating that the receipt was an attempted fraud on the *present* reinstatement examiners, as the *Allen* court did.<sup>83</sup> *Maggart*, however, did not employ this circular reasoning.

The above cases, *Allen*, *Maggart* and *Black*, represent three divergent opinions on a plea of innocence in reinstatement hearings. There is an obvious fourth—to refuse consideration of the petition unless the petitioner admits his guilt. This position might be dubbed the “Star Chamber Approach”<sup>84</sup> and, indeed, the Indiana Supreme Court’s own rule concerning reinstatement<sup>85</sup> would seem to demand a confession of guilt. In Indiana, the petition for reinstatement will

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<sup>81</sup>*Id.* at 443, 175 P.2d at 507.

<sup>82</sup>*Id.* The court asserted that “[t]he evidence presented in support of such an application must relate to the conduct subsequent to disbarment and where this court has reviewed the record and determined in favor of disbarment or suspension, the evidence taken in the disciplinary proceedings will not be reconsidered.” *Id.*

The affirmative duty to show rehabilitation places upon the petitioner the burden of slaying a rather nondescript social dragon. Most attempts to “prove” a reformation of character will center on elements of questionable relevance, such as religious activism. *See, e.g., In re Black*, 251 Or. at 178-79, 444 P.2d at 930. The court in *In re Albert*, 403 Mich. 346, 269 N.W.2d 173 (1978), discussed this lack of objective criteria for establishing rehabilitation in reinstatement proceedings and said:

A suspended lawyer petitioning for reinstatement should not feel compelled to present an exhaustive account of his life and character in the hope that he will, at some point, stumble on the essence of the problem as perceived by the panel and convince it that he is basically a good person who should be permitted to practice law.

*Id.* at 357, 269 N.W.2d at 177. To remedy the indefinite criteria of reinstatement, particularly with respect to suspended attorneys, the court required the suspension orders to impose certain preconditions for reinstatement which would reflect positive steps in rectifying bad behavior. *Id.* at 361, 269 N.W.2d at 179. For example, a lawyer with an alcohol problem would be required to show he had successfully controlled the problem. *Id.* at 359, 269 N.W.2d at 178. In the absence of such criteria, the court felt that the rule requiring “clear and convincing evidence” of rehabilitation would be largely meaningless and subject to the whims of hearing examiners. *Id.* at 360-61, 269 N.W.2d at 179.

<sup>83</sup>379 N.E.2d at 435.

<sup>84</sup>Fortunately, most courts, including the *Allen* court’s opinion on its face, do not support the Star Chamber Approach. *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975), is largely responsible for the widespread rejection of this approach.

<sup>85</sup>IND. R. ADMISS. & DISCP. 23(4)(a)(5).

not be granted unless the petitioner's "attitude towards the misconduct for which he was disciplined is one of genuine remorse."<sup>86</sup> It is difficult to understand how the petitioner is to express remorse for an action which he believes he never committed. Clearly, if the supreme court did not intend to require a petitioner to confess guilt, the remorse requirement should be changed.<sup>87</sup>

At least one court has analyzed this problem well. The Michigan Supreme Court, in *In re Albert*,<sup>88</sup> recognized the precarious balance between the duty to be truthful in the reinstatement hearings and the right to seek reinstatement without admitting guilt:

At a reinstatement hearing the lawyer may be asked hypothetical questions based on the prior misconduct to determine whether he understands the professions's standards. Such questions should be carefully phrased to preserve the lawyer's right to seek reinstatement without acknowledgment that the conduct for which he was disciplined was misconduct.

The *Albert* court then rejected the remorse requirement, believing it to be inconsistent with the applicant's right to maintain innocence.<sup>90</sup>

### *C. Conflict of Interests: Representation of Codefendants*

*Ross v. State*<sup>91</sup> represents an area where professional responsibility meets with criminal procedure in an especially interesting

<sup>86</sup>*Id.*

<sup>87</sup>Notwithstanding these inconsistent interests, the *Allen* court is not alone in its reasoning. *In re Braverman*, 549 F.2d 913 (4th Cir. 1976), involved Maurice Braverman's conviction for conspiracy to teach and advocate the violent overthrow of the government. See 18 U.S.C. § 2385 (1976). Braverman was fined \$1,000, imprisoned for three years, and disbarred. Eighteen years later he sought reinstatement. 549 F.2d at 914. The Fourth Circuit stated that

"although concerned with his failure to express penitence, as we have previously noted, the district court, perhaps persuaded by the viewpoint of the Maryland Court of Appeals, did not refuse readmission on that ground. As we read the majority opinion, Braverman was denied readmission solely because he made statements to the panel of the court "either recklessly or with intent to mislead the panel."

*Id.* at 920 (quoting *In re Braverman*, 399 F. Supp. 801, 807 (D. Md. 1975)).

The Fourth Circuit agreed with the district court to the extent that Braverman did not have to admit his guilt, although he had a duty to be truthful. 549 F.2d at 920. The Fourth Circuit disagreed, however, that the former Communist was playing "fast and loose" with the reinstatement panel. Braverman's reinstatement petition was therefore granted. *Id.* at 921.

<sup>88</sup>403 Mich. 346, 269 N.W.2d 173 (1978).

<sup>89</sup>*Id.* at 353 n.6, 269 N.W.2d at 176 n.6.

<sup>90</sup>*Id.* at 352, 269 N.W.2d at 175 (citing *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975)).

<sup>91</sup>377 N.E.2d 634 (Ind. 1978). For another discussion of *Ross*, see Raphael,

way. Six defendants had been convicted of beating and robbing a priest. Defendant Ross, here the appellant, was the only one of the six to actually stand trial because the others had pleaded guilty. Ross contended that she had been denied effective representation of counsel because her attorney also represented a codefendant.<sup>92</sup>

In addition, the law partner of Ross' attorney represented two other codefendants, both of whom testified against Ross at her trial. The appellant claimed that her attorney was reluctant to zealously cross-examine the other codefendant that he also represented for fear of jeopardizing that codefendant's plea bargain agreement.<sup>93</sup> Ross further asserted that her attorney was inhibited in his duty as an advocate by his partner's interest in preserving the credibility of the other codefendants, thereby protecting their plea agreements.<sup>94</sup>

The court began its consideration with an ethical admonition:

Simultaneous representation of co-defendants is fraught with the potential for chaos at worst and frustration at best. It should be avoided as the plague. Code of Professional Responsibility, Canons 4, 5 and 9; Ethical Considerations 5-14, 15, 16, 17; 9-2. The road of litigation is full of blind curves, and this is especially true of criminal litigation. The lawyer who finds himself pledged to clients with conflicting interests has no completely safe haven. Even total severance leaves pitfalls, both for the clients and the lawyer. For the clients, it is likely that some unfavorable inference will arise; and for the lawyers, they should remember that the unsuccessful litigant seldom appreciates the subtleties of the rules or remember [*sic*] the caveats issued before the stewardship was undertaken.<sup>95</sup>

The court reasoned, however, that dual representation did not present per se evidence of sixth amendment deprivation.<sup>96</sup> Instead, actual prejudice had to be shown absent an objection by the defendant's attorney at trial.<sup>97</sup>

Hence, the appellant had three hurdles to overcome. First, she had to show a conflict of interest between herself and the other codefendants. Second, she had to demonstrate that her counsel's in-

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*Criminal Law and Procedure, 1979 Survey of Recent Developments in Indiana Law*, 13 IND. L. REV. 187, 193 (1980).

<sup>92</sup>377 N.E.2d at 636.

<sup>93</sup>*Id.* at 637.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.* at 636.

<sup>96</sup>*Id.* The sixth amendment requires that an accused shall have "the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

<sup>97</sup>377 N.E.2d at 637.

dependent professional judgment was more than likely affected by the conflict. Finally, she had to demonstrate that she was actually prejudiced by the impairment of her counsel's judgment.

The only conflict between Ross' testimony and the testimony of her codefendants was a discrepancy regarding which defendant struck the priest with a baseball bat. The issue therefore reduced to one of relative culpability. The court pointed out, however, that since the defendant had already admitted her guilt, the degree of culpability between the codefendants made no difference.<sup>98</sup> Indiana law views an accessory to be as guilty as the principal. The issue of who actually struck the priest was therefore moot. The court held that any existing conflict of interest was harmless beyond a reasonable doubt.<sup>99</sup>

In the latest United States Supreme Court decision on dual representation, the Court held that dual representation was not a per se deprivation of sixth amendment rights.<sup>100</sup> The Court, however, left open the question of what level of conflict must be shown before sixth amendment rights will be impaired.<sup>101</sup> Some decisions have held that the mere possibility of conflict is enough to show such a deprivation.<sup>102</sup> Other decisions have required potential or demonstrable prejudice.<sup>103</sup> The result in *Ross* seems to place the Indiana Supreme Court among those courts that require demonstrable prejudice.

The United States Supreme Court has also left open the question of the affirmative duty of the trial judge to assure protection of constitutional rights by intervening.<sup>104</sup> The majority in *Ross* found that the trial judge had no affirmative duty to inquire into possible conflicts absent an objection by the defendant's attorney.<sup>105</sup>

Justice DeBruler dissented on this point and said that whenever one jointly represented codefendant testifies to the detriment of the other, the conflict of interest is clearly established.<sup>106</sup> Thus, the dis-

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<sup>98</sup>*Id.*

<sup>99</sup>*Id.*

<sup>100</sup>*Holloway v. Arkansas*, 435 U.S. 475, 481 (1978).

<sup>101</sup>*Id.* at 483.

<sup>102</sup>*Geer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Lawyer*, 62 MINN. L. REV. 119, 123 (1978).

<sup>103</sup>*Id.*

<sup>104</sup>*See* 435 U.S. at 483.

<sup>105</sup>377 N.E.2d at 637. At least two other jurisdictions have embraced the *Ross* approach concerning the affirmative duty of the trial judge and the failure to find prejudice when relative culpability of codefendants was irrelevant. *See Trotter v. State*, 237 Ark. 820, 377 S.W.2d 14, *cert. denied*, 379 U.S. 890 (1964); *Roberts v. United States*, 348 F. Supp. 563 (E.D. Mo. 1972).

<sup>106</sup>377 N.E.2d at 637 (DeBruler, J., dissenting).



sent maintained that the trial judge should have affirmatively intervened before commencement of cross-examination and ensured that no prejudice to the codefendant would result.<sup>107</sup> Justice DeBruler is not alone in his position. Many decisions in other jurisdictions approach any conflict of testimony with extreme caution as one of those situations fraught with prejudicial hazards.<sup>108</sup>

Neither the dissenter nor the majority considered the possibility of employing the Disciplinary Rules as a check against dual representation and its adverse effects on the public. In a conflict of interest situation, two elements must always be satisfied to avoid a breach of the Code. First, it must be obvious that the lawyer can adequately represent the interests in question.<sup>109</sup> Second, full and fair disclosure of the possible conflicts and their full repercussions on the lawyer's judgment and potential prejudice to his client's rights must be rendered.<sup>110</sup>

It must be assumed that the *Ross* court felt that a violation in the case at bar was avoided by the satisfaction of these elements. A violation will not always be avoided by full and fair disclosure, however.<sup>111</sup> Some situations may be so permeated with conflicts as to exclude the possibility of fair representation in any circumstances.<sup>112</sup> The Indiana Supreme Court has recognized dual representation in a criminal situation as "fraught with the potential for chaos at worst and frustration at best. It should be avoided as the plague."<sup>113</sup>

This recognition, however, was only an admonition at the most. The supreme court suggests that dual representation is deadly, yet the court did not consider whether *Ross* was one of those situations in which, regardless of full and fair disclosure, dual representation was improper. Certainly, as the dissent argued, the *Ross* situation could be justifiably characterized as inherently prejudicial to a codefendant regardless of disclosure.<sup>114</sup> One wonders why the dissent limited its argument to constitutional law.

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<sup>107</sup>*Id.* at 638. Justice DeBruler suggested that the trial judge should have first attempted to obtain a waiver of counsel from the appellant, and if that could not be accomplished, should have discontinued the attorney's representation of *Ross*. *Id.*

<sup>108</sup>See Annot., 34 A.L.R.3d 470, 503 (1970), and cases cited therein.

<sup>109</sup>See generally DRs 5-101 & 5-105.

<sup>110</sup>DR 5-105(A). See *In re Farr*, 264 Ind. 153, 165, 340 N.E.2d 777, 784 (1976).

<sup>111</sup>See *In re A. & B.*, 44 N.J. 331, 209 A.2d 101 (1965); *Kelly v. Greason*, 23 N.Y.2d 368, 244 N.E.2d 456, 296 N.Y.S.2d 937 (1968); *Columbus Bar Ass'n v. Grelle*, 14 Ohio St. 2d 208, 237 N.E.2d 298 (1968).

<sup>112</sup>264 Ind. at 160, 340 N.E.2d at 782.

<sup>113</sup>377 N.E.2d at 636.

<sup>114</sup>Perhaps the *Ross* majority was recognizing Justice Frankfurter's view: "Joint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against the common attack." *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting). However, less severe approaches are

Although dual representation presents an interesting criminal procedure problem, it may present a problem in professional responsibility of even greater magnitude. It has been proposed by some commentators that the present ABA Code of Professional Responsibility, which Indiana's Code closely follows, fails to the extent that the interests of the individual attorney are given an implicit priority over the interests of the client and the public in general.<sup>115</sup> "Because lawyers have consistently been the ones judging 'practicality,' at points of conflict [their own interests] have repeatedly, albeit nonconsciously, prevailed."<sup>116</sup>

This misordering of priorities is also apparent in certain practices of lawyers. For example, the practice of allowing one attorney to represent more than one criminal defendant unequivocally benefits only the attorney by giving him a greater total fee than he would be able to charge a single client. By contrast, the benefit to the client is equivocal. On the one hand, the per capita cost of representation is likely to be lower and the efficacy of a stone wall defense enhanced. On the other hand, however, the client will often suffer significantly from the potential for divisions of his attorney's loyalties inherent in such situations. Finally, multiple representation represents an unmitigated disaster in terms of the fair and expeditious resolution of criminal matters.<sup>117</sup>

Hence, it has been proposed that the problem of dual representation may find a solution not in constitutional law, which employs a result-oriented analysis addressing the problem of actual prejudice when the real harm can only be conjecture in a "what if?" inquiry, but in professional responsibility, which confronts the issue at the time of the attorney's employment and prevents harm before it occurs.<sup>118</sup>

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available. For instance, in *United States v. Garafola*, 428 F. Supp. 620 (D.N.J. 1977), a supervisory rule was established prohibiting dual representation unless the attorney in question could state in good conscience that "there is absolutely no possibility, however remote, of a conflict arising in his joint representation of the defendants." *Id.* at 626. The Indiana Supreme Court has hinted at a similar precaution. In *Martin v. State*, 262 Ind. 232, 314 N.E.2d 60, *cert. denied*, 420 U.S. 911 (1975), the court felt that it was appropriate for the trial judge to initially appoint separate counsel for codefendants for an independent discovery of the facts. Only after such a discovery would the codefendants' defenses be consolidated. *Id.* at 240 n.3, 314 N.E.2d at 66 n.3.

<sup>115</sup>See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

<sup>116</sup>*Id.* at 740.

<sup>117</sup>Geer, *supra* note 102, at 119-20 n.2.

<sup>118</sup>See *id.* at 148.