Case Western Reserve Law Review

Volume 12 | Issue 4 Article 6

1961

Evidence Problems under Ohio Supreme Court Rule XXVII

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NOTES

Evidence Problems Under Ohio Supreme Court Rule XXVII

> Well, your Honor, there we come into the question of what are the rules of evidence that govern this panel. . . . I have examined the rules in this procedure and I don't know what the rules of evidence are.[1]

At the beginning of 1957, the Ohio Supreme Court adopted amended Rule XXVII as the exclusive procedure regulating disciplinary and reinstatment hearings.[2] The purposes of the amended rule[3] are essentially: (1) to set forth a comprehensive procedure under which the Ohio Supreme Court can exercise its inherent authority over the conduct of Ohio's attorneys;[4] and (2) to provide for a uniform system of disciplinary proceedings throughout Ohio.[5]

The amended rule authorizes a seventeen-member Board of Commissioners on Grievances and Discipline (hereinafter referred to as the Board) to serve as an arm of the court in conducting hearings. A panel of three commissioners is to hear evidence upon filing of a complaint against an attorney by a local bar association.[6] If the panel makes a finding against the attorney charged and a majority of the board approves the finding, the respondent has resort to the Ohio Supreme Court under an "order to show cause" why the Board's report should not be confirmed.[7]

While the conduct and intial review of the proceedings by the Board are administrative in practice, the safeguards of a judicial hearing are preserved. Rule XXVII provides:

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1. Record, vol. 1, p. 315, Cleveland Bar Ass'n v. Pleasant, 167 Ohio St. 325, 148 N.E.2d 493 (1958). To this question by counsel for respondent, the chairman of the hearing panel replied: ". . . because of the fact that we are a creature of the Supreme Court of the State of Ohio and that we are merely taking the place of other procedure which has always been followed in the lower courts, . . . we would necessarily be required to follow the ordinary rules of evidence as we lawyers know them in the courts."

2. OHIO SUP. CT. R. XXVII, 167 Ohio St. lxxvi-lxxxiv (1958).

3. Rule XXVII is, in part, adapted from the Model Rules of Court for Disciplinary Proceedings, approved by the American Bar Association in 1956. See 81 A.B.A. REP. 481-89 (1956). A number of changes recommended in the minority report, *id.* at 479-80, were incorporated into OHIO SUP. CT. R. XXVII §§ 6 and 21. The member of the American Bar Association who filed its minority report also served on the committee which drafted the Ohio rule.

4. *In re* McBride, 164 Ohio St. 419, 427, 132 N.E.2d 113, 118 (1956), *cert. denied,* 351 U.S. 965; *In re* Thatcher, 80 Ohio St. 492, 89 N.E. 39 (1909); *cf.* Mahoning County Bar Ass'n v. Franko, 168 Ohio St. 17, 20, 151 N.E.2d 17, 21 (1958).

5. Reply Brief for Ohio State Bar Association, Amicus Curiae, p. 16, In the Matter of Amendment of Court Rule No. XXVII (Ohio 1956).

6. OHIO SUP. CT. R. XXVII §§ 2, 3, 8, and 9.

7. *Id.* at § 16.

> All rules of evidence shall be observed in the conduct of all hearings, and the Respondent may be represented by counsel who shall enter formal appearance.[8]

Despite this comprehensive requirement, more specific provisions in Rule XXVII necessarily preclude the application of certain technical rules of evidence to disciplinary proceedings.[9] Only a small minority of states include such an evidentiary requirement in their rules.[10] A significant number of states hold that disciplinary proceedings are "not circumscribed by technical rules of evidence usually attendant on the trial of an action in the courts."[11] These latter states apparently recognize that the special nature of disciplinary proceedings raises evidentiary problems which require a departure from established rules in ordinary actions. While tracing some of these problems which have arisen in recent disciplinary and reinstatement cases under Rule XXVII and comparing them with similar problems treated in other jurisdictions, this article may offer some suggestions as to how they may be approached in Ohio.[12]

APPLICATION OF THE RULES

Disciplinary Proceedings — Civil or Quasi-Criminal?

Rule XXVII makes no specific statement as to whether disciplinary proceedings are to be regarded as civil or criminal in nature.[13] However in *In re Lieberman,* decided less than two years before the adoption of amended Rule XXVII, the Ohio Supreme Court declared:

> We believe and, therefore, hold, that the degree of proof required in a disbarment proceeding is that required in an ordinary civil action, a preponderance of the evidence.[14]

8. *Id.* at § 34.

9. See OHIO SUP. CT. R. XXVII § 5 (admissibility of criminal conviction as substantive evidence), and § 7 (admissibility of prior order of public reprimand). The requirement of adherence to "all rules of evidence" appears to contravene the more general provision that "the process and procedure under this rule . . . shall be as summary as reasonably may be." *Id.* § 37.

10. AMENDED RULES GOVERNING CONDUCT OF ATTYS. IN ALA., § B(22); S.C. SUP. CT. RULES, DISCIPLINARY PROC., § 24.

11. State v. Dawson, 111 So. 2d 417, 431 (Fla. 1959). OKLA. BAR ASS'N REV. R., pt. 1 § 16 (e); *In re* Wilson, 76 Ariz. 49, 258 P.2d 433 (1953). The Arizona court said in regard to the provision that the rules of evidence are to apply "as far as practicable."

"This section of the rule prevents a star chamber inquisitorial proceeding while providing for a hearing that comports with the concept of due process yet leaving those charged with conducting the investigation free of the rigid rules governing proceedings in court." *Id.* at 53, 258 P.2d at 436. See also, UTAH STATE BAR, REV. RULES OF DISCIPLINE, rule iv, § 42 (hearings conducted as shall best arrive at the truth).

12. Especially problems raised in Cleveland Bar Ass'n v. Pleasant, 167 Ohio St. 325, 148 N.E.2d 493, *cert. denied,* 358 U.S. 842 (1958), 171 Ohio St. 546 (1961) (reinstatement hearing).

13. At least one Ohio court in the past has determined that a disciplinary proceeding is "neither a civil action nor a criminal prosecution, but partakes of some of the attributes of each." *In re* Dombey, 68 Ohio L. Abs. 36, 40 (C.P. 1954).

14. *In re* Lieberman, 163 Ohio St. 35, 43, 125 N.E.2d 328, 332 (1955).

This opinion is in line with prior decisions of the court and with the majority view in other jurisdictions.[15] Lower courts, however, before the supreme court's latest pronouncement, have not always taken the same view. In some cases, disbarment proceedings were defined as quasi-criminal and a higher degree of proof was required than in ordinary civil cases.[16] Despite the statement of principles of the Ohio Bar Association and the American Bar Association that the purpose of discipline is "not the punishment of the person disciplined,"[17] the United States Supreme Court has stated that disbarment proceedings are "not of the ordinary run of civil cases."[18] While an attorney may be disbarred or suspended by a preponderance of the evidence showing misconduct, he may nevertheless be entitled to certain of the privileges of an accused in a criminal proceeding. To what extent, then, are the privileges and rules of evidence in criminal cases appropriate to disciplinary proceedings?

Compulsory Testimony

In formulating a policy on compulsory testimony the Board looked to the Ohio Supreme Court's declaration in the *Lieberman* case. With support from a California case,[19] the Board adopted the position that as in civil cases, the

> respondent may be called to tesify at a hearing before the panel, as upon cross-examination, without infringing upon his right to decline to answer particular questions on the ground that his answers would *incriminate* him.[20] (Emphasis added.)

But what constitutes self-incrimination? While under existing policy an attorney may invoke the privilege if his answer might lead to criminal prosecution, may he invoke it if his answer would be grounds for disbarment? The Oklahoma rule says he may, if he "shall personally state that he declines to answer any particular question on the grounds that his answer might . . . show him guilty of an act or offense that would

15. *In re* Nevius, 159 Ohio St. 341, 112 N.E.2d 380 (1953); *In re* Thatcher, 80 Ohio St. 492, 670, 89 N.E. 39, 89 (1909); State *ex rel.* Joseph v. Crossland, 152 Ohio St. 199, 201, 88 N.E.2d 289, 290 (1949); Annot., 105 A.L.R. 984 (1936).

16. *In re* Hawke, 63 N.E.2d 553, 556 (Ohio Ct. App. 1945); Schwartz v. State, 18 Ohio App. 373 (1924); *In re* Lundy, 8 Ohio C.C. Dec. 111 (1897).

17. 28 OHIO BAR 469, 470 (1955).

18. Konigsberg v. State Bar of Cal., 353 U.S. 252, 257 (1957). Since the writing of this article, the Supreme Court has heard this case a second time. The majority opinion suggests that for the purpose of invoking the privilege against self-incrimination the evidentiary rules in disbarment proceedings are analogous to those in civil cases. Konigsberg v. State Bar of Cal., 29 U.S.L. WEEK, 4341, 4344 (1961).

19. *In re* Vaughn, 189 Cal. 491, 209 Pac. 353 (1922); see also *In re* Eaton, 14 Ill. 2d 338, 152 N.E.2d 850 (1958).

20. Memorandum from F. W. Gooding, member of the Board of Commissioners, to the Board, May 9, 1957; see also OHIO REV. CODE § 2317.07.

be grounds for disbarment."[21] The Ohio position has not yet been made so clear.[22]

The Board's general policy, however, as far as it extends, is in accord with the policy of the majority of states. At least two states, Florida and Michigan, provide expressly in their rules that the accused attorney has a duty "to present himself for cross-examination."[23] New York and California have gone even further and held that an attorney has an absolute duty to make full disclosure to the court whose officer he is and that failure to do so is itself grounds for disbarment regardless of any possibility of self-incrimination.[24]

On the side of the minority, Utah and Idaho provide that an attorney charged with misconduct "shall not be required to testify, but if he offers himself as a witness at the hearing, he may be examined with respect to all material matters. . . ."[25] These latter rules conform to Ohio law governing criminal proceedings: that an accused cannot be called for cross-examination, but if he volunteers to testify, he cannot then invoke the personal privilege against self-incrimination.[26] No Ohio case has been found which meets squarely the right of a party in a civil suit to invoke the privilege against self-incrimination when called for cross-examination by his opponent.[27] But within the framework of such Ohio law as there is and the Board's working policy statement, it would ap-

21. OKLA. BAR ASS'N, REV. RULES, art. VII, pt. I § 11.

22. Not every Ohio court before the adoption of amended Rule XXVII allowed the prosecutor to call respondent for cross-examination in a disciplinary proceeding. See *In re* Dombey, 68 Ohio L. Abs. 36, 40 (C.P. 1954).

23. MICH. SUP. CT. RULES CONCERNING THE STATE BAR, rule 14, § 9; INTEGRATION RULE OF FLA. BAR, art. XI, § 3.

24. *In re* Cohen, 7 N.Y.2d 488, 166 N.E.2d 672 (1960), apparently overruling *In re* Grae, 282 N.Y. 428, 26 N.E.2d 963 (1940) (refusal to testify in good faith not grounds for disbarment). [Since the writing of this article, the Supreme Court has affirmed the decision of the New York Court of Appeals in Cohen v. Hurley, 29 U.S.L. WEEK 4367 (1961). The court said: "In this regard all that New York has in effect held is that petitioner, by resort to a privilege against self-incrimination, can no more claim a right not to be disbarred for his refusal to answer with respect to matters within the competence of the Court's supervisory powers over members of the bar, than could a trustee claim a right not to be removed from office for failure to render accounts which might incriminate him." *Id.* at 4368.]

See also Konigsberg v. State Bar of Cal., 52 Cal. 2d 769, 344 P.2d 777 (1959), *aff'd*, 29 U.S.L. WEEK 4341 (1961) (admission to the bar); RULES OF THE STATE BAR OF WIS., rule 10. *But cf. In re* Integration Rule of Fla. Bar, 103 So. 2d 873 (Fla. 1956), where it was said by the court: "To hold that one's attempt to invoke the protection of the Fifth Amendment or refusal to answer questions that would tend to incriminate him would be prima facie evidence that he is unfit to practice law would place an undue burden. . . . It seems to me that a course like this is the only one consistent with our tradition of fair trial and equal protection." *Id.* at 878.

25. UTAH STATE BAR, REV. RULES OF DISCIPLINE, rule iv, § 42; IDAHO STATE BAR, RULES GOVERNING CONDUCT OF ATTYS., rule 165.

26. But see State v. Hollos, 76 Ohio App. 521, 65 N.E.2d 144 (1944); OHIO REV. CODE § 2945.43.

27. State *ex rel.* Simons v. Kiser, 98 N.E.2d 322 (Ohio Ct. App. 1950 (dictum) (bastardy proceeding); 42 OHIO JUR. *Witnesses* § 48 (1936).

pear that an attorney may invoke the privilege when called to testify by the prosecutor in a disciplinary hearing but may not invoke the privilege when cross-examined after testifying on his own behalf.

Moral Character

The supreme court and the Board have tended to apply the rules of evidence for criminal proceedings on the issue of respondent's moral character. For instance, in one case the court considered testimony of an attorney's claim to be a member of both political parties as proof of an aggravated offense.[28] In another case, the court took into account testimony of an attorney's good reputation and modified a Board recommendation of suspension to an order of public reprimand.[29] In both instances, character was in issue as an evidentiary fact, and in a civil proceeding would properly have been excluded.

Further, as the criminal code prescribes what acts constitute a crime, so Rule XXVII prescribes what acts constitute misconduct — violation of the Code of Legal Ethics, of the oath for admission to practice, and commission of a crime involving moral turpitude.[30] In disciplinary proceedings since the adoption of Rule XXVII the court has been careful to sustain only those charges which proved specific acts of misconduct. In *Cleveland Bar Association v. Wilkerson*,[31] the court refused to consider evidence which was not sufficient to sustain a specific charge. In *Cleveland Bar Association v. Pleasant*,[32] decided before the Code of Ethics was included in the definition of misconduct, the opinion went to some lengths to show at least a technical violation of a statute regulating probate procedure.[33] The grounds for initiating the charges against respondent were that he had represented two clients with opposing interests; the rationale for sustaining the charges was that in doing so he had violated the statute. Both cases indicate a reluctance by the Ohio Supreme Court to discipline an attorney on the basis of bad character alone, unsupported by a specific charge.[34]

28. Mahoning County Bar Ass'n v. Franko, 168 Ohio St. 17, 34, 151 N.E.2d 17, 29 (1958). (claim made during judge's campaign for city prosecutor).

29. Cleveland Bar Ass'n v. Vann, 168 Ohio St. 481, 155 N.E.2d 922 (1959).

30. OHIO SUP. CT. R. XXVII § 5.

31. 168 Ohio St. 478, 156 N.E.2d 136 (1959).

32. 167 Ohio St. 325, 148 N.E.2d 493, *cert. denied*, 358 U.S. 842 (1958).

33. OHIO REV. CODE § 2113.36.

34. An Illinois case illustrates how far a court will go in finding a specific charge for misconduct before imposing discipline. People *ex rel.* Chicago Bar Ass'n v. Martin, 288 Ill. 615, 124 N.E. 340 (1919). Eleven counts were charged against an attorney, the last stating that his "general reputation for truth, veracity, fair dealing and professional honesty as a lawyer in the City of Chicago is bad." The referee, who heard the testimony, found there was sufficient evidence to support only the eleventh charge and recommended disbarment. The

In *In re Lieberman,* however, the court stated broadly that "the moral character of an attorney is at all times to be scrutinized . . . and such moral character is necessarily at issue in a disbarment proceeding."[35] Under the facts of that case the court's statement goes no further than to authorize admission of a prior disciplinary order as probative evidence of an attorney's character.

Rule XXVII implicitly provides for admitting into evidence a record of a prior suspension or public reprimand and requires that it be weighed heavily in determining the degree of discipline in the subsequent proceeding.[36] Further, the new rule empowers the Board "to entertain and inquire into . . . practices of any attorney . . . or judge which tend to defeat the administration of justice or to bring the courts or the legal profession into disrepute."[37] The court's dictum in the *Lieberman* case and the broad investigative power of the Board granted by the new rule could be reasonably construed to mean that bad character, while not sufficient in itself to sustain suspension or disbarment, is to be considered as an *auxiliary* issue in disciplinary proceedings. How then may the adversary parties present character testimony for the Board's scrutiny?

In criminal cases, the prosecutor may introduce testimony as to the character of the defendant only if the latter places his character in issue.[38] In civil cases neither party may introduce testimony as to his own or his adversary's character unless the issue is joined in the pleadings.[39] And it has been only in slander and malicious prosecution cases that the Ohio Supreme Court has permitted character to be put in issue by the pleadings.

The exception in slander cases appears to have been extended to disciplinary proceedings where informal pleadings are allowed[40] and where the supreme court has declared that character is "necessarily at issue." However, the outer limits of the exception — which admits character testimony as substantive evidence in a civil action — have not been defined. There has yet been no determination by the supreme court whether

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Supreme Court of Illinois found sufficient evidence to support the first four specific counts and affirmed the order. As to the eleventh count the court said:

"While such a charge is not of itself sufficiently specific to comply with said rule so as to form a basis for disbarment, yet, as one of the qualifications of an attorney at law is that he be of good moral character, it is competent to consider his general reputation for truth, honesty, fair dealing, and ethical practices in connection with specific charges filed against him." *Id.* at 623, 124 N.E. at 343.

35. *In re* Lieberman, 163 Ohio St. 35, 41, 125 N.E.2d 328, 331 (1955).

36. OHIO SUP. CT. R. XXVII § 7.

37. *Id.* § 1(b).

38. State v. Markowitz, 138 Ohio St. 106, 33 N.E.2d 1 (1941). Of course, a prosecutor may introduce evidence as to general reputation for truth and veracity to impeach a defendant who takes the witness stand.

39. Sloneker v. Van Ausdall, 106 Ohio St. 320, 140 N.E. 121 (1922), overruling Blakeslee v. Hughes, 50 Ohio St. 490 (1893); *cf.* Melanowski v. Judy, 102 Ohio St. 153, 131 N.E. 360 (1921).

40. OHIO SUP. CT. R. XXVII § 8.

a prosecutor may call character witnesses before respondent has placed his character in issue, whether these witnesses may offer their personal opinion of respondent's character and whether they may testify in regard to specific misconduct not charged in the complaint.

Before these outer limits are defined it should be remembered: first, that the reason for the general rule against admitting character testimony is to protect civil trials from degenerating into "a contest between neighborhood factions;"[41] and, second, that the reasons for the rule's exception to plaintiffs in slander cases is "because an unfavorable outcome affects his character to a degree equivalent to a punishment."[42] In disciplinary proceedings, where the outcome may be "equivalent to a punishment" for the respondent-attorney, it is well to set the outer limits as they have been set in criminal actions and allow character testimony in evidence only at the option of the attorney whose reputation is at stake.

Conviction of a Crime

Section 5 of Rule XXVII includes in its definition of misconduct "commission or conviction of a crime involving moral turpitude." In 1943, an Ohio court of appeals, in construing similar language in the state disbarment statute,[43] reasoned that the legislature must have had a particular reason for including both "conviction" and "commission" as grounds for disbarment.[44] This observation led the court to conclude that where misconduct is predicated upon *commission* of a crime alone, a full fledged hearing into the commission is in order, but where there has been a *conviction*

> and the statute violated involves an act of moral turpitude . . . , an allegation of a conviction of a violation of that statute is a sufficient compliance with the provision which requires the charge to state "distinctly the grounds of complaint."[45]

Apparently applying this same reasoning to the new rule, the relator in *Cincinnati Bar Association v. Massengale* filed a complaint in which the first ground simply alleged conviction of a crime involving moral turpitude.[46] The supreme court delivered a sharp rebuke to the respondent for his attempt to go behind the judgment of conviction and show his innocence:

41. 3 WIGMORE, EVIDENCE § 921 (3d ed. 1940).

42. I WIGMORE, EVIDENCE § 66 (3d ed. 1940).

43. OHIO REV. CODE § 4705.02 ("misconduct or unprofessional conduct in office involving moral turpitude, or conviction of a crime involving moral turpitude" grounds for discipline).

44. *In re* Jacoby, 74 Ohio App. 147, 162, 57 N.E.2d 932, 938-39 (1943).

45. *Id.* at 162, 57 N.E.2d 939.

46. 171 Ohio St. 442 (1961).

> Respondent's endeavor to show that he was wrongly convicted of the wire-tapping charge was hardly permissible.[47]

Ohio law provides that a record of conviction of a felony or statutory misdemeanor involving *crimen falsi* introduced to impeach a witness cannot be explained or justified to rehabilitate the witness.[48] The judgment

> must forever stand, under the well-known and long established rule of res adjudicata . . . if the conviction should be followed by a pardon, that could likewise be shown. But the conviction itself cannot thereafter be questioned. . . .[49]

Under this long standing rule and in view of the dictum in the *Massengale* case, Ohio appears to be in line with those states which hold that a judgment of conviction of a crime involving moral turpitude is conclusive in a subsequent disciplinary proceeding.[50] At least two states hold that such conviction is not conclusive as to misconduct on which the attorney is sought to be suspended or disbarred but is only prima facie evidence.[51]

If a judgment of conviction is conclusive proof of misconduct, should not a verdict of acquittal or judgment of reversal be equally conclusive?

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47. *Id.* at 444. See also Butler County Bar Ass'n v. Schaefer, 172 Ohio St. 165 (1961), where the Board's refusal to allow respondent to explain the extenuating circumstances of a plea of guilty to an indictment of offering a false prescription for a narcotic drug was upheld by the supreme court.

48. Harper v. State, 106 Ohio St. 481, 140 N.E. 364 (1922); *but cf.* State v. Snyder, 157 Ohio St. 15, 104 N.E.2d 169 (1952) (prosecution for neglect following divorce judgment). The court held it was "clearly prejudicial error" for the trial court to refuse to permit the accused to present evidence tending to show he was not the father of the children allegedly being neglected.

For a reverse application of the rule, see *In re Linthicum*, 32 OHIO L. REP. 254 (Ct. App. 1930). Attorney claimed that judgment of conviction and prison sentence suspended on condition that he refrain from practicing law was res judicata and, therefore, a bar to subsequent disciplinary proceeding.

49. Harper v. State, 106 Ohio St. 481, 487, 140 N.E. 364, 366 (1922).

50. *In re* Needham, 364 Ill. 65, 4 N.E.2d 19 (1936); *In re* Eaton, 14 Ill. 2d 338, 152 N.E.2d 850 (1958); *In re* Welansky, 319 Mass. 205, 65 N.E.2d 202 (1946); see WASH. SUP. CT. RULES FOR DISCIPLINE OF ATTYS., rule 10 (i).

51. State v. O'Leary, 20 Wis. 70, 241 N.W. 621 (1932); Louisiana State Bar Ass'n v. Cawthorn, 223 La. 884, 67 So. 2d 165 (1953) (rebuttable presumption only).

The rule that a judgment of conviction is conclusive for the purposes of the disbarment proceeding has led to some odd results. For instance, an Illinois attorney was convicted of federal income tax evasion and in a separate hearing was suspended from the bar of the federal district court. In the subsequent state proceeding, where under Illinois law conviction of such a crime is conclusive proof of unfitness to practice law, the attorney charged was not permitted to explain the mitigating circumstances of the offense. On appeal, the Illinois Supreme Court avoided its own restrictive rule by turning to the record of the federal disciplinary hearing. The disbarment order entered by the lower state court was modified to three years suspension. *In re* Teitelbaum, 13 Ill. 2d 586, 150 N.E.2d 873, *cert. denied*, 358 U.S. 881 (1958).

In New York, where the state statute provides for automatic disbarment upon a felony conviction, N.Y. JUDICIARY LAW § 90(4), an attorney so disbarred received a presidential pardon years later. The Court of Appeals said that the pardon removed the impediment of the conclusive record and opened "the range of scrutiny . . . as wide as it was at the common law." *In re* Kaufman, 245 N.Y. 423, 428, 157 N.E. 730, 732 (1927); *but see In re* Ginsberg, 1 N.Y.2d 144, 148, 134 N.E.2d 193, 195 (1956) (dissent).

The courts have not so held.[52] In Ohio, where disciplinary proceedings are civil in nature and require only a preponderance of the evidence, the analogy may be a fallacious one. But the analogy, unsound as it may be, suggests a deeper fallacy, one of overemphasizing the technical conviction as opposed to the facts which sustained such conviction.[53]

Another aspect of the problem involves the question of moral turpitude for disbarment purposes. In *Stark County Bar Association v. Beyoglides*,[54] some members of the supreme court were doubtful as "to whether conviction of the offense of selling intoxicants to a minor shows moral turpitude" where the statute covering such sales does not require scienter to sustain a conviction.[55] In a case decided before adoption of the rule, an Ohio court of appeals held that "whether a crime involves moral turpitude or not, is sometimes a question of law and sometimes a question of fact."[56] But if moral turpitude is a question of fact, then requiring the record of a prior conviction to stand as conclusive is tantamount to denying the attorney a reasonable defense. As an Ohio court of appeals has said:

> Notwithstanding his plea of guilty, he had a perfect right, in a disbarment proceeding, to establish, if he could, that he did not know that there was any such law and, if he succeeded in establishing that fact, there was no moral turpitude in his act which would make him subject to disbarment for the violation of such law.[57]

52. *In re* Abrahms, 36 Ohio App. 384, 173 N.E. 312 (1930); *In re* Doe, 95 F.2d 386 (2d Cir. 1938). At least one court has held that such a verdict of acquittal or judgment of reversal was not even admissible as evidence for the defense. *In re* O'Brien, 95 Vt. 167, 113 Atl. 527 (1921).

53. In *Ex parte* Wall, 107 U.S. 265 (1883), the Supreme Court of the United States said in regard to criminal convictions determining the outcome of disciplinary actions "that it is not the technical conviction which is required, but a fair effort on the part of the prosecutor to bring the offender to justice." *Id.* at 278.

Mr. Justice Bradley, writing the majority opinion, listed the common-law reasons why courts (or boards) should wait for a conviction before initiating disciplinary proceedings:

1) The court should be cautious of putting a party into a situation where, by answering, he might furnish a case against himself on an indictment to be afterwards preferred.

2) The court should hesitate to take summary action against an offender which might remove the inducements the injured party would otherwise have for proceeding against him and thus interfere with the course of justice.

3) A jury is the most suitable tribunal for passing upon a question of fact depending on conflicting evidence. *Id.* at 277-78.

The general rule that a court will not inquire into the conduct of an attorney, not connected with his status as an attorney, until the matter has been determined by a criminal proceeding, is said to be one of propriety, not of power. Annot., 90 A.L.R. 1111 (1934); *In re* Dellenbaugh, 9 Ohio C.C. Dec. 325 (1899).

54. 169 Ohio St. 201, 158 N.E.2d 361 (1959).

55. *Id.* at 202, 158 N.E.2d at 362. In State v. Morello, 169 Ohio St. 213, 158 N.E.2d 525 (1959), the court held that for a conviction under OHIO REV. CODE § 4301.22(B) proof of *scienter* is not required.

56. *In re* Jacoby, 74 Ohio App. 147, 158 N.E.2d 932, 937 (1943).

57. *In re* Burch, 73 Ohio App. 97, 106, 54 N.E.2d 803, 808 (1943) (concurring opinion). Burch had been convicted of a violation of the federal foreign agents registration act. The majority opinion maintained that to warrant disbarment "the evidence must show . . . that

The Ohio rule which forbids the explanation or contradiction of a record of a criminal conviction introduced to impeach the character of a witness is not appropriate to disciplinary proceedings. As the conviction is itself grounds for discipline, there is less likelihood of involvement with remote collateral matters. Further, there are too many situations which demand an exception to the rule. More important than the technical conviction itself are the facts which support the conviction. If the respondent has the opportunity to explain these facts, he has had a fair hearing. Thus, where certain facts are not explained by the conviction itself, it may be well to allow in evidence the entire record of the criminal trial.[58]

Records of Prior Civil Proceedings

In the past, Ohio courts have sometimes followed the practice of admitting records of prior civil proceedings in a subsequent disbarment proceeding.[59] In an Ohio federal case, an attorney was disbarred solely on the basis of his perjured testimony transcribed in a previous case.[60] In a single hearing, the court issued an order of contempt and a rule to show cause why the respondent should not be removed from the rolls.

Before the adoption of Rule XXVII, the state courts followed a similar procedure. The Ohio Supreme Court held that where

> the evidence sustains both the charges of contempt and of disbarment, the court may adjudge the respondent guilty of contempt . . . and in the same proceeding enter an order of cancellation of the certificate of such attorney.[61]

Rule XXVII, however, discontinues this practice by giving the board of commissioners exclusive jurisdiction over disciplinary proceedings,[62] and by requiring that the rules of evidence be applied.

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his misfeasance or malfeasance must have been in his capacity as an attorney." *Id.* at 104, 54 N.E.2d at 807. *Cf.* State v. Metcalfe, 204 Iowa 123, 214 N.W. 874 (1927) (assault with intent to inflict bodily injury not moral turpitude); *contra, In re* Welansky, 319 Mass. 205, 65 N.E.2d 202 (1946).

In California conviction of a felony results in automatic disbarment. CAL. BUS. & PROF. CODE § 6102. But the state supreme court rules allow the attorney so convicted to show cause in "law or in fact why a final order of disbarment should not be made." CAL. SUP. CT. R. FOR DISCIPLINARY PROC. ON CONVICTION OF CRIME (a). The attorney's entry may show either that the circumstances of the commission of the crime did not involve moral turpitude or any facts that would mitigate the extent of discipline.

58. For cases which have allowed in evidence the record of a prior criminal trial, see Louisiana State Bar Ass'n v. Sackett, 234 La. 762, 770, 101 So. 2d 661, 663 (1958); State v. Metcalfe, 204 Iowa 123, 127, 214 N.W. 874, 875 (1927).

59. State *ex rel.* Guille v. Chapman, 11 Ohio 367, 369 (1842); *In re* Neff, 34 Ohio C.C. Dec. 261, 266 (1912).

60. *In re* Ulmer, 11 OHIO L. REP. 467 (N.D. Ohio 1913).

61. State *ex rel.* Turner v. Albin, 118 Ohio St. 527, 161 N.E. 792 (1928); see also State *ex rel.* Levy v. Savord, 143 Ohio St. 451, 55 N.E.2d 735 (1944).

62. OHIO SUP. CT. R. XXVII § 4.

Where a criminal proceeding follows a civil proceeding and is based on the same charges, the rule in Ohio is that neither the judgment record nor the transcript of testimony from the first suit is admissible.[63] One of the reasons for the rule is that in the first case the jury may be convinced by a preponderance of the evidence whereas in the second it must be convinced beyond a reasonable doubt.[64]

An Ohio court of appeals has adopted the same policy in a state disbarment proceeding to exclude testimony taken in a federal court contempt hearing.[65] The findings of the referee and the order of the district judge should not have been admitted, the court said, because a judgment in a civil suit "is not predicated upon that degree of proof which is required in the instant proceedings where a higher degree of proof is required."[66] Since the proof is now held to be the same for disciplinary proceedings as for ordinary civil proceedings, this basis for excluding transcripts of record is no longer valid. There is, however, the general rule that unless the witness is unavailable in the second proceeding, his transcript of testimony in the first is hearsay and, therefore, inadmissible.[67]

In *Cleveland Bar Association v. Pleasant,*[68] disciplinary proceedings were brought against respondent after a probate judge found in a formal contempt hearing that the attorney had committed a fraud on the court. On appeal to the court of appeals the contempt order was modified and on appeal to the supreme court the original order was affirmed.[69]

At the outset of the disciplinary proceedings counsel for relator made a motion that both parties submit all the testimony of the prior contempt hearing along with briefs and that the panel render judgment thereon.[70] The panel denied the motion on the grounds that respondent was entitled to a trial de novo and presumably because the transcript of testimony was hearsay.[71] The panel did, however, agree to take judicial notice of the opinions by the court of appeals and the supreme court.[72]

63. Gee v. State, 10 Ohio St. 485 (1899); State v. Schwartz, 137 Ohio St. 371, 30 N.E.2d 551 (1940).

64. State v. Schwartz, note 63 *supra,* at 375, 30 N.E.2d at 552.

65. *In re* Hawke, 63 N.E.2d 553 (Ohio Ct. App. 1945).

66. *Id.* at 556.

67. Annot., 161 A.L.R. 898 (1946). For a criticism of the rule in Ohio, see Note, *Use of Reported Testimony in Subsequent Cases,* 11 WEST. RES. L. REV. 471 (1960).

68. 167 Ohio St. 325, 148 N.E.2d 493, *cert. denied,* 358 U.S. 842 (1958) (suspension proceedings).

69. *In re* Estate of Wright, 123 N.E.2d 52 (Ohio Ct. App. 1954), *modified,* 165 Ohio St. 15, 133 N.E.2d 350 (1956).

70. Record, vol. 1, p. 24, Cleveland Bar Ass'n v. Pleasant, 167 Ohio St. 329, 148 N.E.2d 493 (1958).

71. See OHIO REV. CODE § 2317.06 (civil), § 2945.49 (criminal).

72. Record, vol. 1, note 70 *supra,* at pp. 34, 36. The chairman of the hearing panel commented: "And that which we take judicial notice of, of course, is one thing; but otherwise I don't think we should be influenced any by the decisions of the lower court." *Id.* at p. 36.

Included in the supreme court opinion was a detailed account of the findings of fact by the probate court.[73] Later, on cross-examination of the respondent-witness, relator moved that respondent's entire testimony in the prior contempt hearing be introduced for the purpose of impeachment.[74] The motion was granted. Thus, what appeared in the beginning to be a strict ruling on admissibility in the end did not seriously affect relator's manner of presenting the evidence.[75]

Adherence to the technical rules of evidence allowed the hearing panel and the board to take judicial notice of the findings of fact of the probate court through the published opinion of the supreme court, but required them to exclude the transcript of testimony of the prior proceedings. The result was exactly opposite to established procedures for disbarment actions in other jurisdictions where the transcript of testimony of a prior civil suit is admissible but not the findings of fact.[76] The justification for this alternative procedure is that due process is preserved if the witness whose recorded testimony is later admitted was subject to cross-examination and impeachment in the first proceeding by the attorney charged or his counsel.[77]

The rules of the Kentucky Court of Appeals specifically provide for admitting a certified transcript of testimony from a prior proceeding if the disciplinary case involves "the same charge or any charge growing out of matters connected therewith."[78] As an additional safeguard, the rules authorize either party to the disciplinary action to recall any witness, if available, for further examination.[79] These restrictions on the admissi-

73. *In re* Estate of Wright, 165 Ohio St. 15, 19-25, 133 N.E.2d 350, 353-57 (1956).

74. Record, vol. 1, note 70 *supra,* at 403. Counsel for relator's method of getting some 150 pages of testimony from the contempt proceeding into the record was on the grounds of prior inconsistent statement (or lack of statement). Respondent testifying in his own behalf was discovered to have added one fact which he allegedly had never mentioned in testifying at the prior hearing. The entire record of respondent's former testimony was admitted to prove he had never before stated such fact.

75. On appeal, relator referred extensively in his brief to the findings of fact set forth in *In re* Estate of Wright, 123 N.E.2d 52 (Ohio Ct. App. 1954). Brief for Relator, pp. 21-7, Cleveland Bar Ass'n v. Pleasant, 167 Ohio St. 329, 148 N.E.2d 493 (1958).

76. *In re* Santosuosso, 318 Mass. 489, 62 N.E.2d 105 (1945); *In re* Integration Rule of Fla. Bar, 103 So. 2d 873, 878 (Fla. 1956); *In re* Falzone, 220 S.W.2d 765 (Mo. Ct. App. 1949); Annot., 161 A.L.R. 898 (1946); *contra,* People *ex rel.* Bar Ass'n v. Amos, 246 Ill. 299, 92 N.E. 857 (1910); *but cf. In re* Feldman, 373 Ill. 563, 566, 27 N.E.2d 471, 473 (1940).

77. *In re* Santosuosso, 318 Mass. 489, 494-95, 62 N.E.2d 105, 108 (1945). The Massachusetts Supreme Court explained: "The necessity for the preservation of the integrity of the courts and the safety of the public rises above the strictly technical rules of evidence that govern such adversary proceedings between the parties."

The Massachusetts rule distinguishes prior civil proceedings from prior criminal proceedings: the transcript of prior civil or contempt proceedings may be admitted, but the findings of fact from such proceedings may not be admitted; the transcripts of prior criminal proceedings may not be admitted but the fact of criminal *conviction* may be admitted. Compare *In re* Welansky, 319 Mass. 205, 65 N.E.2d 202 (1946).

78. KY. CT. OF APP. RULES, DISCIPLINARY PROC., § 3.380.

79. *Ibid.*

bility of a transcript of testimony from a prior proceeding prudently avoid the objection that

> . . . the records from the case[s] . . . not only were introduced against [the attorney], who was neither a party nor a counsel in either, but were the sole evidence to produce the direct case against him.[80]

There is needed in Ohio a more flexible approach to the problem of admissibility of a prior transcript in a disbarment proceeding. For instance, Rule XXVII requires the admission of a prior order of suspension or public reprimand, but is silent concerning an order of private reprimand.[81] Even when a charge has been dismissed, the transcript of the proceedings may be pertinent to a subsequent case involving the same party.[82] More important than adhering to the technical rules of evidence in this area is obtaining the facts which aid in revealing an attorney's total pattern of misconduct. The Supreme Court of California has pointed it up clearly:

> The prior record not only tends to prove facts in issue, but gives substantial aid in determining the degree of discipline to be administered.[83]

The same policy should apply to civil proceedings outside the jurisdiction of the Board. The issue should not be whether a contempt order or even a criminal conviction is res judicata for the subsequent disciplinary proceedings. Rather the issue should be what testimony is relevant to the charges now being heard and whether it is fair to the attorney charged to admit it as evidence. In the area of records of prior proceedings, it is necessary to depart from the rules of evidence.

REINSTATEMENT PROCEEDINGS

Opinion Testimony

In the first reinstatment hearing under the new rule, petitioner paraded twenty-nine witnesses before the panel. On direct examination they were asked:

> Now do you have an opinion as to whether or not petitioner has the moral qualifications which are required of persons applying for admission to the bar?

or:

> Do you know of anything that petitioner has done since his suspension that would not entitle him to reinstatement?

80. Kingsley v. Dorsey, 338 U.S. 318, 325 (1949) (dissent).

81. OHIO SUP. CT. R. XXVII § 7.

82. See OKLA. BAR ASS'N REV. RULES, art. vii, pt. 1, § 21; BY-LAWS UNDER INTEGRATED RULE OF FLA. BAR, art xi, § 23.1.

83. Resner v. State Bar of Cal., 53 Cal. 2d 605, 349 P.2d 67 (1960).

All of the witnesses at the first hearing answered these questions in a manner favorable to petitioner; a few testified as to facts upon which they based their opinion.[84]

In the second hearing, two months later, the local bar association called eleven witnesses before the panel who testified generally in opposition to the reinstatement application. Counsel for the committee opposing the reinstatement attempted to put the same question concerning the moral qualifications of the petitioner, but this time objection to it was sustained.[85] From that point on, the panel restricted counsel to questions relating only to the petitioner's general reputation as an attorney.

Other jurisdictions not only allow opinion testimony in reinstatement proceedings but prescribe it as the generally accepted method of proving character rehabilitation.[86] Ohio courts in the past have also admitted opinion testimony in reinstatement proceedings.[87] But these latter cases were heard before the adoption of the requirement that "all rules of evidence shall be observed in the conduct of all hearings."

At one time, the Ohio rules of evidence allowed opinion testimony derived from personal acquaintance and excluded testimony as to the reputation of a man's character. The reasons for this earlier rule were based on the policy that

> . . . those who know the character of the man, his moral habits, are by law competent to give their opinion . . . , while those who know nothing but the witness' reputation, of what is generally said of him, are not competent. . . . A man's character must be true, his reputation may be false.[88]

The Ohio Supreme Court reversed its rule in 1851 and adopted the rule, instead, that reputation is the orthodox and exclusive mode of proof.[89] This rule has been consistently applied ever since.[90] The basis of the

84. Record, vol. 1, Cleveland Bar Ass'n v. Pleasant, 171 Ohio St. 546 (1961) (reinstatement proceeding).

85. Record, vol. 2, note 84 *supra*, p. 484 (ruling on basis of 21 OHIO JUR. 2D *Evidence* § 225 (1956)).

86. *In re* Daniel, 315 P.2d 789 (Okla. 1957); *Ex Parte* Marshall, 165 Miss. 523, 147 So. 791 (1933) (estimations of witnesses intimately acquainted admissible); Feinstein v. State Bar of Cal., 39 Cal. 2d 541, 248 P.2d 3 (1952) (letters of recommendation admissible, but not conclusive). The Supreme Court of Oklahoma said in *In re* Daniel: "It is a well recognized rule of law that the proper method and manner of establishing the character trustworthiness of one seeking readmission to the Bar is by presentation of recommendations and statements of those who are in a position to know and judge the petitioner." 315 P.2d at 791.

87. *In re* Joseph, 74 Ohio L. Abs. 268, 69, 140 N.E.2d 72 (C.P. 1956); *In re* Rothenberg, 31 Ohio L. Abs. 370, 374 (Ct. App. 1940).

88. Seely v. Blair, Wright 358 (1834); *accord,* Wilson v. Runnyon, Wright 651 (1834).

89. Bucklin v. State, 20 Ohio 18 (1851).

90. French v. Millard, 2 Ohio St. 45 (1853); Craig v. State, 5 Ohio St. 605 (1854); Hillis v. Wylie, 26 Ohio St. 574 (1875); Cowen v. Kinney, 33 Ohio St. 422 (1878). Regarding the rule that reputation testimony is the exclusive mode of proving character Wigmore comments: "The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the

rule is to prevent extensive testimony on the collateral issues of a witness' character. For this reason it has not always been applied when the character of one of the parties to the suit is directly in issue.

In homicide cases, for instance, the Ohio Supreme Court has allowed the defense to offer opinion testimony regarding the character of the accused as it relates to the probability of his guilt. At first only a negative description that the prisoner had led nothing but a peaceful and quiet existence was permitted.[91] Later, positive testimony by those "most intimate" with him was allowed.[92]

The homicide cases are an exception to the rule, tolerated perhaps because a man's life is in the balance.[93] Yet, in the homicide cases the character of the accused is relevant only as it tends to demonstrate the probability of his conduct on a specified occasion. In reinstatement cases, the character of the petitioner is the issue. In one regard, then, there is even a stronger reason for allowing such testimony in reinstatement proceedings.

The Uniform Rules of Evidence provide:

> When a person's character or a trait of his character is in issue, it may be proved by testimony in the form of opinion, evidence of reputation, or evidence of specific instances of the person's conduct.[94]

As the Ohio Supreme Court has not expressly precluded the use of opinion testimony when a man's character is the sole issue, application of the Uniform Rules of Evidence to reinstatement proceedings would not be inconsistent with Rule XXVII's evidence requirements. Nor is there any inconsistency in excluding opinion testimony in disciplinary proceedings and admitting it in reinstatement proceedings. In the former, character may be in issue as an evidentiary fact, giving support to specific charges. In the latter, character is the ultimate issue which must be tested from the outset of the proceeding.

As the supreme court itself declared in restating the rule allowing opinion testimony in homicide cases:

> It may easily happen that a defendant could not prove general good reputation for peace and quiet, and yet his intimate friends, and mem-

way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip we term 'reputation.'" 7 WIGMORE, EVIDENCE § 1986 (3d ed. 1940).

91. Gandolfo v. State, 11 Ohio St. 114, 117 (1860).

92. State v. Dickerson, 77 Ohio St. 34, 53, 82 N.E. 969, 971 (1907).

93. No Ohio opinions were found which allowed opinion testimony on behalf of the character of an accused in non-homicide cases. Reputation testimony is admissible on charges of all grades of homicide. 1 WIGMORE, EVIDENCE § 56 (3d ed. 1940).

94. UNIFORM RULE OF EVIDENCE 46.

> bers of his immediate family might testify in his behalf as to his good character.[95]

Once suspended and publicly reprimanded, an attorney may never be able to overcome a bad reputation. He may, however, have genuinely rehabilitated himself. How else can he prove rehabilitation except by calling witnesses who know him by his character and not by his reputation?

The Problem of Relevancy

At the outset of the first reinstatement hearing under Rule XXVII, opposing counsel were at odds in regard to the admissibility of evidence of petitioner's original misconduct. Counsel for petitioner maintained that the evidence should be limited to conduct subsequent to the suspension:

> He has either rehabilitated himself satisfactorily since the date of suspension to the present time or he has not.[96]

Counsel for the committee opposing the reinstatement, admitting that there was no evidence available showing that petitioner had done anything wrong during his two years of suspension, sharply protested:

> It is the position of our committee that if that should be the guide, then there is no purpose; we might as well retire.[97]

The issue turned out to be a critical one. One witness later called by counsel opposing the application stated he would favor petitioner's reinstatement considering the situation since the date of suspension, but that he would not favor it considering petitioner's entire record and overall reputation which was "not good."[98] As to admissibility of evidence relating to the period before suspension, the panel made the following ruling: (1) that since the relevant issue was rehabilitation, the committee could not offer evidence on direct examination of petitioner's original misconduct; (2) but that since rehabilitation had to start somewhere, opposing counsel could cross-examine petitioner's character witnesses as to their knowledge of the grounds for petitioner's prior suspension insofar as it related to present opinion of character.[99]

Clearly, an attorney seeking reinstatement is not in the same position as the attorney seeking admission for the first time.[100] Rule XXVII imposes on the attorney applying for reinstatement the burden of estab-

95. Sabo v. State, 119 Ohio St. 231, 239, 163 N.E. 28, 31 (1928).

96. Record, vol. 1, pp. 90, 91, Cleveland Bar Ass'n v. Pleasant, 171 Ohio St. 546 (1961) (reinstatement proceeding).

97. *Id.* at p. 20.

98. Record, vol. 2, note 96 *supra*, at p. 518.

99. Record, vol. 1, note 96 *supra*, at pp. 102, 103, 154.

100. *In re* King, 54 Ohio St. 415, 417, 43 N.E. 686, 687 (1896).

lishing rehabilitation by "clear and convincing evidence."[101] Courts of a number of other jurisdictions require an attorney seeking reinstatement to overcome a presumption of lack of moral character, a presumption which is conclusive at the time of disbarment or suspension and which is rebuttable at the time of application for reinstatement.[102] Is not the requirement of "establishing by clear and convincing evidence" substantially equivalent to the requirement of overcoming such a presumption?

If there is a presumption of lack of moral character, then a panel entertaining a petition for reinstatement should have some knowledge of the facts underlying the presumption. Rule XXVII so provides.[103] The problem, therefore, does not involve the withholding of certain facts from the panel, as if from a jury, but rather relates to the manner in which the hearing is to be conducted. How much evidence relating to the period prior to the suspension is admissible; how much effect should such evidence have upon the outcome of the hearing? The opposing views expressed by counsel in the first reinstatement hearing focus on situations: (1) where testimony of prior misconduct is adduced by opposing counsel on direct examination of his own witnesses; (2) where leading questions on cross-examination of petitioner expose prior misconduct; (3) where leading questions on cross-examination of petitioner's character witnesses expose such misconduct.

Under the panel's ruling, evidence in the first situation is inadmissible. To avoid the second situation in which the petitioner exposes himself to wide-open cross examination, he should not testify to facts prior to suspension.[104] In the third situation the panel's ruling in accordance with the general rule of evidence allows counsel cross-examining a character witness to uncover facts of past history in order to test the basis of the witness' present opinion regarding the petitioner.[105]

If counsel for petitioner is careful, he may keep these unwelcome facts to a minimum. He must confine the petitioner's testimony on direct

101. OHIO SUP. CT. R.XXVII § 22(d).

102. *In re* Keenan, 313 Mass. 186 47 N.E.2d 12, 32 (1945); Maggart v. State Bar of Cal., 29 Cal. 2d 439, 175 P.2d 505 (1946); see MICH. SUP. CT. RULES CONCERNING THE STATE BAR, rule 14 § 20 (eligibility for reinstatement considered in light of past misconduct).

103. OHIO SUP. CT. R. XXVII § 22(a).

104. See Hamilton v. State, 34 Ohio St. 82 (1877) (testimony as to bad reputation of witness prior to time he entered prison two years before admissible).

105. Michelson v. United States, 335 U.S. 469 (1948); Comment, 15 MINN L. REV. 240 (1930); *but cf.* State v. Dickerson, 77 Ohio St. 34, 55-56, 82 N.E. 969, 972 (1907).

106. Among the objections made to character testimony in the form of personal opinion is that the witness giving the opinion is usurping the function of the jury which is to decide the ultimate issue. Ladd, *Techniques of Character*, 24 IOWA L. REV. 498, 513 (1939). At the reinstatement hearing counsel for petitioner asked a number of witnesses: "In your opinion does the petitioner have the moral qualifications to warrant his reinstatement?" Record, vol. 1, pp. 90, 91, Cleveland Bar Ass'n v. Pleasant, 171 Ohio St. 546 (1961). Objection to the question in this form was eventually sustained. Record, vol. 2, *supra* at 509.

examination to facts subsequent to the date of suspension. He must prepare his character witnesses so that they will be acquainted with the details of petitioner's prior misconduct, ready to parry questions on this subject on cross-examination and willing to reassert their conviction in petitioner's moral qualifications as an attorney despite what has gone before.[106] In this way, he may not only avoid the danger that petitioner's own witnesses will turn against him but he may also prevent opposing counsel from probing into collateral issues which may undermine both the petitioner's character witnesses and his case. At least under the panel ruling counsel for petitioner has the opportunity to de-emphasize prior misconduct and restrict the issue within reasonable limits to rehabilitation subsequent to the order of suspension.

Far from approving the panel's ruling on relevant testimony, however, the supreme court referred to petitioner's course of "recurring conduct in his professional activities which disqualifies him from again" resuming the practice of law.[107] The court's comment suggests that the entire history of a reinstatement applicant is open to re-examination and subject to challenge in the reinstatement hearing. But as the court gave no further explanation for its comment, it is reasonable to expect that future opposing counsel will again argue the relevancy of issues, and that a future panel will again make a ruling thereon.

In support of a ruling restricting the issue to rehabilitation there are the arguments: (1) that it would be impractical to hear again evidence which was or should have been presented at the original disciplinary proceeding, and that it is unfair to require an attorney once disciplined to account for his misconduct a second time;[108] (2) that if evidence of prior misconduct be admissible, no petitioner in the face of such evidence could overcome the presumption of lack of moral character which also stands against him.[109]

In opposition to a restrictive ruling, there are the arguments: (1) that consideration should be given to the question, not whether petitioner has been adequately punished, but whether his reinstatement would serve the best interests of the public and the bar;[110] (2) that Rule XXVII requires petitioner to show in addition to rehabilitation his possession of "all the moral qualifications which would have been a requirement of

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107. Cleveland Bar Ass'n v. Pleasant, 171 Ohio St. 546, 549 (1961). Note that the court may have rendered its decision with an eye to OHIO SUP. CT. R. XXVII § 7 (suspension followed by subsequent misconduct justifies permanent disbarment). Respondent had been disbarred for six months, eighteen years before the reinstatement proceedings.

108. Record, vol. 1, p. 27, Cleveland Bar Ass'n v. Pleasant, note 96 *supra.*

109. Roth v. State Bar of Cal., 40 Cal. 2d 307, 318, 253 P.2d 969, 974 (1953) (dissent).

110. Brief for Appellant, p. 10, Cleveland Bar Association v. Pleasant, note 96 *supra.*

an applicant for admission to the Bar of Ohio at the time of his original admission."[111]

In general, Ohio courts before the adoption of Rule XXVII had followed the second approach,[112] as have the courts of other jurisdictions.[113] In California, the procedure is not to reconsider evidence taken in the prior disciplinary proceedings when such evidence is presented by the petitioner,[114] but to give weight to such evidence when it is offered by opposing counsel in the reinstatement proceeding.[115]

But these pre-Rule XXVII Ohio cases and out-of-state cases involved attorneys who had been *disbarred,* not suspended. Under the new rule an attorney who has been disbarred may never again apply for reinstatement.[116] A question of signal importance is therefore presented: Is suspension under Rule XXVII equivalent to the form of disbarment provided for by the old statute so that Ohio cases decided prior to the rule still apply? Or does suspension merely signify a temporary lapse in an attorney's privilege to practice law, leaving him the opportunity to demonstrate by his attitude and conduct *subsequent* to suspension that he is entitled to reinstatement without having to explain again past misdeeds?[117]

As yet there has been no interpretation of the meaning of "suspension" under Rule XXVII. When such an interpretation has been made by the supreme court, the Board will have a more definite guide for determining what evidence is admissible and what is inadmissible in a reinstatement proceeding. It is important in view of the original purpose of the new rule that objective standards be established and that they be uniformly applied.[118] A suspended attorney seeking reinstatement in one hearing should be faced with the same requirements as an attorney in another hearing. To achieve this end greater flexibility is needed in

111. OHIO SUP. CT. R. XXVII § 22(d); *accord,* ORE. STATE BAR RULES OF PROC., DISCIPLINARY, § 40; WASH. SUP. CT. RULES FOR DISCIPLINE OF ATTYS., rule 46; *But see* S.C. SUP. CT. R., DISCIPLINARY PROC., § 27 (only proof of rehabilitation required after suspension). Note that in all other aspects the South Carolina requirements for a reinstatement petition are identical to those in OHIO SUP. CT. R. XXVII § 22.

112. *In re* Thatcher, 83 Ohio St. 246, 251, 93 N.E. 895, 896 (1910); *In re* Palmer, 15 Ohio C.C.R. 94, 102, 8 Ohio C.C. Dec. 508, 513, 514, *aff'd,* 62 Ohio St. 643, 58 N.E. 1100 (1897).

In a 1956 case petitioner was denied reinstatement after opposing counsel's cross-examination revealed that he had perjured himself in the original disciplinary proceedings. *In re* Joseph, 140 N.E.2d 72 (Ohio C.P. 1956).

113. Annot., 70 A.L.R. 2d 272, 275 (1960).

114. Maggart v. State Bar of Cal., 29 Cal. 2d 439, 443, 175 P.2d 505, 507 (1946); *cf.* Feinstein v. State Bar of Cal., 39 Cal. 2d 541, 550, 248 P.2d 3, 6, 7 (1958).

115. Roth v. State Bar of Cal., note 109 *supra,* at 313, 253 P.2d at 972 (1958).

116. OHIO SUP. CT. R. XXVII § 5, 21.

117. See State v. Dawson, 111 So. 2d 427 (Fla. 1959).

118. See Reply Brief for Ohio State Bar Association, Amicus Curiae, p. 16, In the Matter of Amendment of Court Rule No. XXVII (Ohio 1956).

providing for varying degrees of discipline, greater exactitude in setting standards for reinstatement.

Provision for Indeterminate Suspension — Two Year Minimum

Flexibility in determining the degree of discipline to be imposed upon an attorney found guilty of misconduct was provided for in the Model Rules of Court for Disciplinary Proceedings approved by the American Bar Association. The Model Rules expressly allow for discretion in adjusting the minimum suspension period in accordance with the seriousness of the offense.[119] Further, an effort was made to avoid the general practice of readmitting automatically to the bar attorneys suspended for fixed periods of time. The rules provide that

> the entry of such order [of suspension] shall not be construed to imply that the respondent will be entitled to the termination of his suspension at the end of such minimum period.[120]

The practice of automatic readmission following suspension for a fixed period was of even greater concern to the drafters of Ohio Supreme Court Rule XXVII.[121] The flexible suspension provision in the Model Rules was criticized by at least one of the Ohio drafters, on the ground that "it could be construed by the offender as an invitation to apply for reinstatement upon termination of the minimum period."[122] Instead of such a provision, Rule XXVII directs that suspension be for an *indeterminate* period. The rule then goes on to state, somewhat ambiguously, that no reinstatement shall be entertained within two years from the date of the suspension order.[123]

The first reinstatement case under Rule XXVII indicates that the additional precautionary measures taken by the Ohio drafters may prove ineffectual. In *Cleveland Bar Association v. Pleasant,* petitioner apparently construed the provision precluding application for reinstatement before the lapse of two years as "an invitation to apply for reinstatement upon termination of the minimum period." His petition was filed just two years after he had been suspended.[124]

The Ohio rule's provision for indeterminate suspension bears another disability in that it precludes an ultimate determination at the original disciplinary proceeding of the severity of the sanctions to be im-

119. MODEL RULES OF COURT FOR DISCIPLINARY PROCEEDINGS, § 3.01.81, 81 A.B.A. REP. 470, 488 (1956).

120. *Ibid.*

121. Reply Brief for Ohio State Bar Association, Amicus Curiae, p. 16, In the Matter of Amendment of Court Rule No. XXVII (Ohio 1956).

122. Minority Report to MODEL RULES, *supra* note 118, at 479.

123. OHIO SUP. CT. R. §§ 15 and 21.

124. Ohio Sup. Ct., Disciplinary Docket No. 1 (suspension order issued March 5, 1958; reinstatement petition filed March 9, 1960).

posed. A correlation between the seriousness of the offense and the length of the suspension period cannot be made under the indeterminate suspension provisions. Inappropriately but inevitably, such a determination will be made in the reinstatement proceeding, for if an applicant's petition is contested, opposing counsel will naturally seek to expose the original offense.

For this reason there is needed an amendment to Rule XXVII which would allow the Board to relate the length of the suspension period to the seriousness of the attorney's offense. The severity of discipline should not be determined at the reinstatement hearing but in the original disciplinary hearing. Further, if the details of prior misconduct are allowed in evidence at reinstatement hearings, as the supreme court has intimated they should be,[125] then the new rule's provision for suspension will be equivalent to the statutory provision for disbarment. In that event, there will be no mode of discipline between public reprimand and disbarment. The opportunity for rehabilitation will hardly exist.

CONCLUSION

Disbarment and suspension proceedings are neither wholly civil nor wholly criminal in nature but partake of the attributes of each. In some situations, as in the case of calling respondent for cross-examination, the rules of evidence for civil proceedings should apply. In other situations, as in the case of character testimony, the rules of evidence for criminal proceedings are more appropriate. In a third type of situation, in the case of transcripts of record from prior civil proceedings, the strict rules of evidence should not apply. Rather it should be in the hearing panel's discretion to admit such transcripts in evidence.

Disbarment, suspension and reinstatement proceedings are *sui generis*. Character is necessarily in issue in disbarment and suspension proceedings as an evidentiary fact; in reinstatement proceedings it is in issue as the ultimate fact. Yet, certain restrictions on character testimony are essential. In disbarment and suspension proceedings, the introduction of character testimony should be at the option of the respondent-attorney; in reinstatement hearings, character testimony should be confined as far as possible to rehabilitation or to character *subsequent* to the date of suspension.

Above all, objective standards must be established and uniformly applied for the conduct of reinstatement hearings. To achieve this end, an amendment to Rule XXVII's indeterminate suspension provision to allow for greater flexibility in setting the suspension period is advisable; a clarification of the meaning of suspension under the rule is imperative.

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125. See note 107 *supra*, and accompanying text.