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D.C. CODE SECTION 11-2503(a): DISBARMENT OR BANISHMENT?

State courts are charged with the difficult task of regulating the conduct of the members of the bar appearing before them.¹ Disbarment is unquestionably the most feared and effective of all the sanctions applied to attorneys by these courts.² Judge Benjamin Cardozo, however, characterized its purpose as protective rather than punitive: disbarment should act "not as a punishment but as a method of protecting the public."³ Most jurisdictions,⁴ including the District of Columbia,⁵ subscribe to then-Judge Car-

1. See generally Steele, *Cleaning Up the Legal Profession: The Power to Discipline—The Judiciary and the Legislature*, 20 ARIZ. L. REV. 413 (1978); Note, *Disbarment in the United States: Who Shall Do the Noisome Work?* 12 COLUM. J.L. & SOC. PROB. 1 (1975); Note, *Disbarment: Non-Professional Conduct Demonstrating Unfitness to Practice*, 43 CORNELL L.Q. 489, 490 (1958).

In the District of Columbia, D.C. CODE ANN. §§ 11-2501 & 11-2502 authorize the District of Columbia Court of Appeals to regulate the conduct of attorneys who appear before it. D.C. CODE ANN. §§ 11-2501(a) to 11-2502 (1981). Section 11-2503(a) specifically provides for disbarment when an attorney has been convicted of a crime involving moral turpitude. Rule 11 of the District of Columbia Court of Appeals implements the above statutory provisions. D.C. CT. APP. R. 11 (1978).

An attorney who is a member of the bar of the District of Columbia is subject to the disciplinary jurisdiction of the District of Columbia Court of Appeals and the Board of Professional Responsibility. Of particular interest are the following provisions:

(1) The ABA Code of Professional Responsibility as amended by the District of Columbia Court of Appeals provides standards for the practice of law in the District. D.C. CODE OF PROFESSIONAL RESPONSIBILITY.

(2) The rules of the District of Columbia Court of Appeals provide disciplinary rules and procedures. See generally D.C. CT. APP. R. (1978).

(3) D.C. CODE ANN. § 11-2503(a) specifies the disciplinary sanction arising upon conviction of a crime involving moral turpitude. D.C. CODE ANN. § 11-2503(a) (1981).

2. *Byrchby's Case*, 145 Eng. Rep. 187 (Ex. 1584). "[T]he profession of an attorney is of great importance to an individual, and the prosperity of his whole life may depend on its exercise. The right to exercise it ought not to be lightly or capriciously taken from him." *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 530 (1824). See generally H. DRINKER, LEGAL ETHICS (1953).

3. *In re Rouss*, 221 N.Y. 81, 84-85, 116 N.E. 782, 785 (1917). See Tucker, *Disbarment and the Supreme Court of the United States*, 35 A.B.A. J. 40 (1949).

4. See 7 AM. JUR. 2D *Attorneys at Law* § 26 (1980); *In re Ruffalo*, 390 U.S. 544, 550 (1968) ("Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer.").

5. See *District of Columbia Bar v. Kleindienst*, 345 A.2d 146, 148 (D.C. 1975); cf. *In re Wild*, 361 A.2d 183 (D.C. 1976) (discipline imposed should be commensurate not only with need to maintain the integrity of profession and protection of public, but with need for deterrence of other lawyers from engaging in similar conduct).

dozo's theory.

In the District of Columbia, there are three channels by which an attorney's misconduct may reach the scrutiny of the District of Columbia Court of Appeals:⁶ first, a citizen may file a complaint with the Board of Professional Responsibility ("Board");⁷ second, a complaint may be independently initiated by the Board;⁸ finally, an attorney may be sanctioned if convicted of an offense involving moral turpitude⁹ or "serious crime."¹⁰

Most states have a statute that makes conviction of a felony grounds for disbarment.¹¹ The District of Columbia Disbarment Statute goes one step further and mandates permanent disbarment where the offense involves moral turpitude.¹² It also prohibits reinstatement absent a presidential pardon. This "super disbarment" provision¹³ was not applied by the District of Columbia Court of Appeals until 1979, although it was enacted in 1973.¹⁴ Since 1979, however, the court has attempted to reconcile the statute with the disciplinary procedures set forth in the appellate court rules

6. See generally D.C. CT. APP. R. 11.

7. *Id.* at § 5.

8. *Id.* at § 4(3)(a).

9. Section 11-2503(a) of the D.C. Code reads:

When a member of the bar of the District of Columbia Court of Appeals is convicted of an offense involving moral turpitude, and a certified copy of the conviction is presented to the court, the court shall, pending final determination of an appeal from the conviction, suspend the member of the bar from practice. Upon reversal of the conviction the court may vacate or modify the suspension. If a final judgment of conviction is certified to the court, the name of the member so convicted shall be struck from the roll of the members of the bar and he shall thereafter cease to be a member. Upon the granting of a pardon to a member so convicted, the court may vacate or modify the order of disbarment.

D.C. CODE ANN. § 11-2503(a) (1981).

10. Section 15(2) of Rule 11 defines "serious crime" as "any felony and any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves improper conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a serious crime." D.C. CT. APP. R. 11 § 15.

11. Note, *supra* note 1, at 489, 490. See, e.g., ARIZ. REV. STAT. ANN. § 32-272 (1953); CAL. BUS. & PROF. CODE §§ 6101-6102 (Supp. 1981).

12. *Laughlin v. United States*, 474 F.2d 444, 447 (D.C. Cir. 1972). It is this case that stands for the principle that the language of § 11-2503(a) is mandatory.

13. See *In re Willcher*, 447 A.2d 1198, 1205 (D.C. 1982).

14. Prior to the enactment of the D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, tit. I, § 111, 84 Stat. 473 (1973), disbarment upon conviction of an offense involving moral turpitude was not mandatory in its language: "The name of the member so convicted *may* thereupon, by order of the court, be struck from the roll of the members of the bar, and he shall thereafter cease to be a member thereof." D.C. CODE ANN. § 11-2103 (1967) (*repealed by* § 11-2503(a)) (emphasis added).

Moreover, the language requiring that the attorney's name be "struck from the rolls and

and to clarify the moral turpitude standard under the statute. In *In re Willcher*,¹⁵ a case decided this past term, the District of Columbia Court of Appeals upheld the language of the D.C. Disbarment Statute and found that where a conflict exists between the statute and the Appellate Court Disciplinary Rules, the statute supersedes the rules. The court of appeals also indicated that the statute will be strictly applied. This decision is likely to have serious and far-reaching effects on the members of the D.C. Bar.

The controversy arising in *Willcher* had its genesis in the court's ruling in *In re Foshee*.¹⁶ Both *Foshee* and *Willcher* concerned the violation of section 11-2606(b). In *Foshee*, the District of Columbia Court of Appeals applied Disciplinary Rule 1-102(A)(3) and found that the respondent had committed a crime involving moral turpitude by accepting money from a Criminal Justice Act client.¹⁷ In determining the appropriate sanction, the court considered the mitigating circumstances¹⁸ and concluded that as Foshee's actions did not constitute a "rapacious attempt to exploit the impoverished or to cheat the public," a three-month suspension was appropriate.¹⁹ The *Foshee* court, apparently basing its decision solely on the violation of Disciplinary Rule 1-102(A)(3) and the corresponding court rules, failed to mention the Disbarment Statute, although it was law at the time.²⁰

Two years later, in *In re Colson*,²¹ the court found that conviction of a criminal offense, coupled with the Board's finding of moral turpitude

. . . [he] thereafter cease to be a member" was not construed as mandating permanent disbarment. See, e.g., *In re Colson*, 412 A.2d 1160, 1170 (D.C. 1979) (Harris, J., dissenting).

The amended statute reads: "[t]he name of the member of the bar so convicted shall be struck from the roll of the members of the bar and he shall thereafter cease to be a member." D.C. CODE ANN. § 11-2503(a) (1981) (emphasis added).

The statute, as amended, was interpreted as requiring disbarment in *In re Colson*, 412 A.2d 1160 (D.C. 1979), and as prohibiting reinstatement absent a pardon in *In re Kerr*, 424 A.2d 94 (D.C. 1980).

15. 447 A.2d 1198 (D.C. 1982).

16. No. S-48-77 (D.C. Mar. 17, 1977). See also *District of Columbia Bar v. Foshee*, Bar Docket No. 240-74B (Apr. 12, 1976).

17. DR 1-102(A)(3) provides that an attorney shall not "engage in conduct involving moral turpitude that adversely reflects on his fitness to practice law." D.C. CODE OF PROFESSIONAL RESPONSIBILITY. DR 1-102(A)(3) (1979).

18. The court noted that: (1) this was Foshee's first disciplinary proceeding; (2) he believed his client could afford the fee; and (3) he had not applied for compensation from the court. *Foshee*, No. S-48-77, slip op. at 2.

19. *Id.*

20. For a full discussion of *Foshee* and other cases decided prior to the court's application of the statute, see *In re Colson*, 412 A.2d 1160, 1174 (D.C. 1979) (Harris, J., concurring but expressing "dissenting views").

21. 412 A.2d 1160 (D.C. 1979).

under Disciplinary Rule 1-102(A)(3), mandated disbarment under the D.C. Disbarment Statute,²² a different disposition from that in *Foshee*. The matter had first been referred to the Board, which found that Colson's conduct violated Disciplinary Rules 1-102(A)(3) and (5)²³ and constituted moral turpitude under the rules.²⁴ The court, relying on D.C. Code section 11-2503, held that "[b]ecause of legislative fiat . . . , we are precluded from adopting the Board's recommendation of suspension."²⁵ The court explained its decision by stating that the finality of the conviction, coupled with the Board's finding of moral turpitude under the rules, required Foshee's disbarment, as mandated "by the clear language of the statute."²⁶

Judge Harris dissented strongly, describing the majority opinion as "disingenuous" because it "makes disbarment appear both routine and inevitable."²⁷ Moreover, he contended that such a result effected major changes in the court's disciplinary procedures without an acknowledgment that it was doing so. Judge Harris also disagreed with the majority's construction of the Disbarment Statute, especially in the context of the two preceding sections of title 11, which grant the court broad discretionary powers.²⁸ The dissent further noted that the majority's decision was in

22. Charles Colson, a White House aide and Special Counsel to President Nixon, was convicted of violation of 18 U.S.C. § 1503 (1976), and sentenced to a prison term of one to three years and fined \$5,000. 412 A.2d at 1161-62.

23. DR 1-102(A)(3) prohibits an attorney from "engaging in illegal conduct involving moral turpitude that adversely reflects on his fitness to practice law," and DR 1-102(a)(5) prohibits conduct prejudicial to the administration of justice.

24. 412 A.2d at 1163.

25. *Id.*

26. *Id.*

27. *Id.* at 1163-68 (Harris, J., concurring). Through its statutory construction of § 11-2503(a), the court created a collateral procedure which is by inference incorporated in the court rules. This procedure affects, among other things, the scope of review by the court and the Board. Under *Colson*, D.C. Ct. App. Rule 11 is superseded by § 11-2503(a) when an attorney has been convicted of a crime which on its face is "susceptible of a determination that [it] . . . involve[s] moral turpitude per se." 412 A.2d at 1179. When the court finds a statute to involve moral turpitude per se, the Board's consideration is limited to whether the certificate of conviction establishes that "the attorney, in fact, has been convicted of the crime." *Id.* at 1165. Disbarment will be automatic if the attorney has been convicted of an offense which has been held as a matter of law to involve moral turpitude. However, when a crime is not susceptible of a determination that it involves moral turpitude per se, the Board will admit "evidence that goes to the moral implications of the particular respondent's acts, as a way of determining whether his particular offense involved moral turpitude . . ." *Id.* at 1180.

28. Section 11-2501 authorizes the D.C. Court of Appeals to "make such rules as it deems proper respecting the examination, qualification, and admission of persons to membership in its bar, and their censure, suspensions and expulsions." Section 11-2502 provides that the court "may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to

conflict not only with the court rules providing for reinstatement, but also with other provisions as well.²⁹

Judge Ferran concurred with the majority, maintaining that the statute was not inconsistent with preceding sections and, to the extent that Rule 11 conflicts with the statute, the rule must yield.³⁰ The concurrence, however, reserved judgment on the issue of reinstatement—an issue that would appear prominently soon thereafter.³¹

The *Colson* court's interpretation of the statute thus appears to have removed any discretion from the court or the Board to consider particular facts or mitigating circumstances where the attorney has been convicted of a crime involving moral turpitude.³² The reinstatement issue,³³ however,

the administration of justice." D.C. CODE ANN. §§ 11-2501 to 11-2502 (1981) (emphasis added).

29. The dissent referred to three provisions in the court rules:

(1) Section 7(3) of Rule 11 provides that the court adopt the Board's recommendation "unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or otherwise would be unwarranted." D.C. CT. APP. R. 11 § 7(3).

(2) Section 21 of Rule 11 permits application for reinstatement after five years. Although Rule 11 was adopted after § 11-2503(a), there is not restrictive language in the rule to indicate that reinstatement is barred in certain instances. The burden of proof rests with the petitioner to demonstrate by clear and convincing evidence that he has the "moral qualifications, competency, and learning in law required for readmission and that his reassumption of the practice of law will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive to the public interest." D.C. CT. APP. R. 11 § 21(5) (1978).

(3) Section 15. *See supra* note 10.

30. *Colson*, 412 A.2d at 1168 (Ferran, J., concurring).

31. Commenting on the language of § 11-2503(a) requiring that an attorney disbarred under § 11-2503(a) "shall be struck from the roll," Judge Ferran suggested that the language "does not necessarily imply that such expulsion must be permanent. Even if it does, the constitutionality of such a result would have to be considered. Finally, if permanent disbarment were constitutional, we obviously would have to reconsider our reinstatement rule in light of the statute." *Colson*, 412 A.2d at 1184 (Ferran, J., concurring); *cf. In re Kerr*, 424 A.2d 94 (D.C. 1980).

32. *See District of Columbia Bar v. Kleindienst*, 345 A.2d 146 (D.C. 1975) (court's role is to determine continued fitness of attorney to practice by scrutinizing circumstances surrounding his conduct). It is interesting to note that the ABA draft of the Model Rules of Professional Conduct has entirely eliminated the term "moral turpitude" from the Rules. Rule 8.4 which would essentially replace DR 1-102(A)(3) reads in part as follows:

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the rules of Professional Conduct, knowingly assist or induce another to do so, or to do so through the acts of another;

(b) commit a criminal or fraudulent act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) state or imply an ability to influence improperly a government agency or official

The comment following Rule 8.4 supports the exclusion of moral turpitude: it is [a] concept . . . [which] . . . can be construed to include offenses concerning

on which the court had previously reserved judgment, was given an extended hearing several months later in *In re Kerr*.³⁴ Kerr was convicted in 1972 of mail fraud, a violation of Disciplinary Rule 1-102(A)(3), and sentenced to two years imprisonment. She was subsequently disbarred, and applied for reinstatement in 1978. After considering her conduct subsequent to disbarment, the Board recommended reinstatement upon her completion of a course in legal ethics.³⁵ The District of Columbia Court of Appeals disagreed, holding that because the Disbarment Statute was controlling, her application must be rejected.³⁶ The *Kerr* court found the language of the statute clear,³⁷ and therefore held that it did not have the statutory authority to reinstate an attorney convicted of an offense involving moral turpitude.³⁸ The result of *Kerr* is that the reinstatement provision of the District of Columbia court rules no longer applies to

some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.

See Bradway, *Moral Turpitude as the Criterion of Offenses that Justify Disbarment*, 24 CAL. L. REV. 9 (1935). See also *Jordan v. DeGeorge*, 341 U.S. 223, *reh'g denied*, 341 U.S. 956 (1951) (Jackson, J., dissenting) (moral turpitude is an undefined and undefinable standard).

33. For a discussion of the reinstatement issue, see *infra* note 38 and accompanying text.

34. 424 A.2d 94 (D.C. 1980).

35. *Id.* at 97. In the evidence presented to the Board, Kerr presented a picture of rehabilitation: Subsequent to her conviction, she had obtained a graduate degree in psychology, enrolled in a post-doctoral clinical psychology program, and had testified as an expert witness at the request of local attorneys. *Id.* at 96.

36. *Id.* at 99. Kerr was convicted in 1972, seven years before *Colson*. Although she had been disbarred pursuant to § 15 of the court rules, the court relied upon § 11-2503(a) in ruling on her application for reinstatement. *Id.* at 97 n.14.

37. *Id.* at 97.

38. *Id.* at 98; *cf.* Application of Dimenstein, 410 A.2d 491 (Conn. Supp. 1979) (in commenting on statutes which provide for permanent disbarment for certain offenses, court concluded that "permanent" meant "indefinite," or until circumstances warrant a change). Judge Ferran, dissenting in *Kerr*, provided a conceptual framework that would allow the court more flexibility in addressing applications for reinstatement when disbarment occurs under § 11-2503(a). See *Kerr*, 424 A.2d at 99 (Ferran, J., dissenting). See also *In re Kennan*, 37 N.E.2d 516 (Mass. 1941). Judge Ferran felt that unless the court exercised such flexibility, the inherent assumption is that the attorney disbarred under § 11-2503(a) will never be capable of rehabilitation, an assumption that contradicts the most basic underpinning of our system of justice. See *In re Hiss*, 333 N.E.2d 429, 434 (Mass. 1975) ("There is always the potentiality for reform, and fundamental fairness demands that the disbarred attorney have opportunity to adduce proofs."). Although the Maryland disciplinary statute contains language similar to the District of Columbia's, in reinstatement proceedings the Maryland courts consider four factors: (1) the nature and circumstances of the original misconduct; (2) the subsequent conduct and reformation of the attorney; (3) the present character of the attorney; and (4) the present qualifications and competence of the attorney to practice law. *In re Braverman*, 316 A.2d 246 (Md. 1974).

disbarment under the Disbarment Statute. It is this issue which directly confronted the District of Columbia Court of Appeals in *In re Willcher*:³⁹ whether violation of section 11-2606(b) requires an attorney's permanent disbarment under section 11-2503(a).

Willcher, an attorney appointed under the Criminal Justice Act, was convicted of unlawful solicitation of money from an indigent client, a violation of section 11-2606(b).⁴⁰ After Willcher's conviction was affirmed on appeal, the court of appeals referred the matter to the Board to determine whether the offense involved moral turpitude under section 11-2503(a) and, if not, whether Willcher's actual conduct involved moral turpitude.⁴¹ The Board found that violation of section 11-2606(b) was not a crime involving moral turpitude per se.⁴² Upon referral from the Board, the hearing committee determined that although Willcher's conduct did not constitute a violation under the Disbarment Statute, it was a violation of Disciplinary Rule 1-102(A)(3).⁴³ The Board, however, stated that if section 11-2606(b) was not a violation of the statute, it followed that it was not a violation of the disciplinary rule.⁴⁴

The District of Columbia Court of Appeals rejected the Board's finding and held that demands of money from a Criminal Justice Act client is a fraud on both the client and the judicial system which falls "squarely within the definition of an offense inherently involving moral turpitude."⁴⁵ Chief Judge Newman concurred with the majority in affirming the court's construction of the statute. He recognized, however, that the mandated disbarment sanction and the inflexible concept of moral turpitude created a dilemma for the Board.⁴⁶ *Willcher* therefore provides—whether intentionally or inadvertently—an analytical framework within which to determine whether attorney misconduct falls within the disbarment statute, and

39. 447 A.2d 1198 (D.C. 1982).

40. 447 A.2d at 1198. Section 11-2606(b) provides:

Any person compensated, or entitled to be compensated, for any services rendered under this chapter who shall seek, ask, demand, receive, or offer to receive, any money, goods, or services in return therefore from or on behalf of a defendant or respondent shall be fined not more than \$1000 or imprisoned not more than one year or both. D.C. CODE ANN. § 11-2606(b) (1981).

41. *Willcher*, 447 A.2d at 1199.

42. *Id.*

43. *Id.*

44. *Id.* The Board adopted the hearing committee's conclusion which found that Willcher's conduct, "while plainly inimical to the standards of the profession, did not . . . sink to the level of enormity requiring eternal disbarment . . ." *Id.* at 1200.

45. *Id.* at 1200-01.

46. The Supplementary Opinion of Lawrence J. Latta . . . makes clear that the Board and its Hearing Committees 'have struggled' with the meaning of 'moral turpitude' in section 11-2503(a) since our decisions in *Colson* and *Kerr*. This

the procedural steps required where the statute and court rules overlap or conflict.

The *Willcher* court established an analysis under the statute which requires three successive levels of review.⁴⁷ Once an attorney has been convicted of an offense, the initial inquiry by the court of appeals is whether the offense involves moral turpitude per se. The threshold focus is on the type of crime committed. If the crime involves moral turpitude as a matter of law, then the Board's consideration is limited to whether the certificate of conviction establishes that the attorney has been convicted of the crime. The particular circumstances and nature of the acts engaged in by the attorney are immaterial.⁴⁸

Where the court does not find moral turpitude per se, the Disbarment Statute then requires that the Board analyze the language of the statute and its underlying elements to determine whether the offense involves moral turpitude. If the violation is not found to involve moral turpitude, the Board must hold evidentiary hearings analyzing the attorney's conduct and role in the commission of the offense. These instances require a case-by-case review. Although the court possesses no flexibility where the offense has been adjudged to involve moral turpitude per se, it appears the Board may have some discretion in its analysis of the underlying conduct and resulting recommendation. *Willcher's* rejection of the Board's finding that the statute had not been violated indicates, however, that the court will not necessarily follow the Board's recommendations where the Disbarment Statute controls.⁴⁹ The rule requiring the court to adopt the Board's findings and recommendations except where they prove inconsistent, unwarranted, or unsupported by substantial evidence is, therefore, no

'struggle' results from a reluctance to impose the mandated sanction of 'super disbarment.'

While I fully understand the desire to enhance flexibility over mandatory sanctions . . . it is not the province of the Board, the Hearing Committees . . . or this court, to construe the statute based upon disagreement with or disapproval of, the mandated sanction.

Id. at 1201 (Newman, C.J., concurring).

47. If the court of appeals does not find that violation of the statute involves moral turpitude per se, *Willcher* then requires that the Board look to the language of the statute under which the attorney was convicted and the underlying elements of the crime. Only after concluding that the statute does not involve moral turpitude will the Board look to the conduct involved in the commission of the crime. Nevertheless, the court may, as it did in *Willcher*, disregard the Board's recommendation. *Willcher*, 447 A.2d at 1199.

48. For example, had the *Foshee* court considered the respondent's crime under § 11-2503(a) and held that it was one inherently involving moral turpitude, or had the Board found it so, subsequent convictions under § 11-2606(b), such as occurred in *Willcher*, would result in automatic disbarment without the need for an evidentiary hearing.

49. *Willcher*, 447 A.2d at 1198.

longer applicable.⁵⁰ The court has effectively removed much of the Board's authority, while indicating that proceedings under the statute are not necessarily subject to the court rules.

Underpinning the Disbarment Statute is the "moral turpitude" standard against which an offense is judged.⁵¹ For the Board to determine that an offense inherently involves moral turpitude, moral turpitude must be clearly defined. A clear definition is also necessary to determine whether conduct in the commission of an offense involves one of the elements of moral turpitude. The *Colson* court used a variety of definitions, some very narrow—"the act denounced by the statute offends the generally accepted moral code of mankind"⁵²—and others much more expansive—"conduct contrary to justice, honesty, modesty or good morals."⁵³ In contrast, the *Willcher* court attempted to resolve the inherent ambiguity of the phrase by providing a more precise definition. The court noted that when the term is applied in the context of attorney misconduct, it connotes a fraudulent⁵⁴ or dishonest intent.⁵⁵ Moreover, the court stated that moral turpitude includes fraud. Therefore, a crime in which an intent to defraud is an essential element involves moral turpitude. It further concluded that any offenses involving intentional dishonesty for personal gain are also crimes involving moral turpitude.⁵⁶ While the term's ambiguity was not entirely removed, the *Willcher* court at least narrowed its scope.⁵⁷

While the definition of moral turpitude was critical to the case, its more controversial aspect was the court's finding that the Disbarment Statute bars any consideration of reinstatement absent a pardon. The precedents on which this part of *Willcher* was decided are, however, by no means

50. D.C. CT. APP. R. 11 § 7.

51. See *supra* note 32.

52. *Colson*, 412 A.2d at 1168.

53. *Id.* (citing BLACK'S LAW DICTIONARY (4th ed. 1981)).

54. *Willcher*, 447 A.2d at 1200 (citing Iowa State Bar Ass'n v. Kraschel, 260 Iowa 187, 197, 148 N.W.2d 621, 627 (1967)).

55. *Willcher*, 447 A.2d at 1200 (citing Committee of Legal Ethics v. Scherr, 149 W. Va. 721, 726, 143 S.E.2d 141, 147 (1965)).

56. *Willcher*, 447 A.2d at 1200 (quoting *In re Hallinan*, 43 Cal. 2d 243, 247, 272 P.2d 768, 771 (1954), *appeal after remand*, 48 Cal. 2d 52, 307 P.2d 1 (1957)).

57. Prior to *Willcher*, there was also the question whether the term "moral turpitude" should receive the same construction under the statute and under the disciplinary code, i.e., whether conduct in commission of a crime in violation of DR 1-102(A)(3) would automatically be considered a violation of the statute. The answer appears to be that the statute and rule will be construed similarly in the same context. See *Willcher*, 447 A.2d at 1200 & n.8 (Newman, C.J., concurring).

In an unpublished memorandum opinion, the court confirmed that "the term 'moral turpitude' should receive the same construction under section 11-2503(a) and Disciplinary Rule 1-102(A)(3)." *In re Price*, No. M-119-82, slip op. at 1 (D.C. Nov. 3, 1982).

consistent with each another. In *Colson*, Judge Ferran noted that if permanent disbarment was found to be constitutional, the court would have to reconsider the reinstatement rule in light of the statute.⁵⁸ A few months after *Colson*, however, the court held in *Kerr* that although Kerr had been disbarred under section 11-2103, the predecessor section to 11-2503(a), her disbarment resulted from conviction of an offense involving moral turpitude. The court held, therefore, that it did not have the statutory authority to reinstate her.⁵⁹ In reaching this conclusion, the *Kerr* court thereby found the statute constitutional. Relying on *Kerr*, the *Willcher* court, which found no ambiguity in the language of the statute, held that respondent Willcher was permanently disbarred.

In reaching its conclusions, the *Willcher* court emphasized the clarity of the language of the statute. Yet several interpretations have been posited that appear to support a contrary result: (1) the pardon provision is not to be read as the sole method of reinstatement, but only as one method;⁶⁰ (2) disbarment and reinstatement are two separate and distinct procedures, and reinstatement is a new procedure for admission; (3) the conflict resulting from the reinstatement provisions in the court rule and the court's construction of the statute, given that the court rule was adopted subsequent to section 11-2503(a), indicates that the statute does not preclude reinstatement;⁶¹ and (4) Congress never intended such a narrow reading of the statute.⁶²

Even if the *Willcher* court were correct in finding the statute constitutional, the policy question remains whether mandated sanctions further the cause of justice. The major difference between the pre- and post-*Colson* decisions is not the court's ability to apply the appropriate sanction, but the court's discretion in weighing the facts and circumstances of each case. The court, by its own hand, has, in effect, abdicated this responsibility. Had *Foshee* been decided pursuant to the new statute, neither the court nor the Board would have been permitted to consider mitigating circumstances. Yet, it would be unjust to conclude that Foshee should have been disbarred, as was Willcher. Even without the statute, it is likely that Willcher's prior disciplinary record and his demand of money from an indigent client would have led to his disbarment. Nevertheless, the court's

58. *Colson*, 412 A.2d 1180 n.2 (Ferran, J., concurring).

59. *Kerr*, 424 A.2d at 98; *cf. id.* at 102 (Ferran, J., dissenting) (statutory language concerning reinstatement is ambiguous).

60. *Id.* at 98.

61. *Colson*, 412 A.2d at 1172, 1175 (Harris, J., dissenting).

62. *Id.* at 1177. *See also Kerr*, 424 A.2d at 102 (Ferran, J., dissenting). Unfortunately, there is no legislative history on § 11-2503(a) for the court or its critics to look in support of an alternative construction.

decision in *Willcher* is a signal that the court will not recognize degrees of moral turpitude, no matter how slight the offense or how strongly the facts and circumstances dictate a less severe result than disbarment. Under section 11-2503(a), the court will order permanent disbarment. If the court adheres strictly to this ruling, a case will not be decided on its particular facts and circumstances, but rather by a rigid rule which has a weak rational foundation.

There appear to be two ways to deal effectively and fairly with this situation. The first is to repeal the statute and simultaneously amend the court rules to address more directly the need for strict enforcement of attorney misconduct. The second is to amend the court rules to bring them into conformity with the statute. Avoiding conflicts between the rules and the statute would mitigate potentially harsh results.

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