UNITED STATES
PATENT AND TRADEMARK OFFICE
BEFORE THE ADMINISTRATIVE LAW JUDGE

HARRY I. MOATZ,	)	
Director, Office of	)	
Enrollment and Discipline,	)	
	)	
Complainant,	)	
	)	
v.	)	**Proceeding No. D99-12**
	)	
DAVID DUNCAN REYNOLDS,	)	
	)	
Respondent.	)	

INITIAL DECISION

DATED: April 4, 2001

JUDGE: SUSAN L. BIRO, CHIEF ADMINISTRATIVE LAW JUDGE, EPA[1]

APPEARANCES:

For Complainant:

Mark Nagumo, Esquire, Associate Solicitor
William LaMarca, Esquire, Associate Solicitor
Sidney O. Johnson, Jr., Associate Solicitor
U.S. Patent and Trademark Office
Office of Enrollment and Discipline
P.O. Box 16116
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For Respondent:

David Duncan Reynolds, *Pro Se*
P.O. Box 654
Court House Station
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[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the United States Department of Commerce, Patent and Trademark Office, pursuant to an Interagency Agreement effective for a period beginning March 22, 1999.

I. PROCEDURAL HISTORY

On December 21, 1999, Harry I. Moatz ("Director"), in his then official capacity as Acting Director, Office of Enrollment and Discipline, United States Patent and Trademark Office, Department of Commerce ("PTO"),[2] issued a Complaint against Respondent David Duncan Reynolds ("Respondent" or "Mr. Reynolds") pursuant to 37 C.F.R. §§ 10.134. The Complaint charges Respondent with professional misconduct sufficient to warrant exclusion from practice or suspension for a period of five years, by reason of violating the Regulations governing the Representation of Others Before the Patent and Trademark Office, 37 C.F.R. Part 10.[3] Specifically, Respondent is alleged to have violated 37 C.F.R. 10.23(b)(6) and (c)(1) by virtue of certain criminal convictions evidencing his engagement in conduct adversely reflecting upon his fitness to practice law, and 37 C.F.R. 10.24(a) by failing to report such violations to the PTO.[4]

After an extension of time having been granted, on March 15, 2000, Respondent, acting *pro se*, submitted an Answer to the Complaint, admitting to the convictions but denying that the convictions evidenced that he had engaged in conduct adversely reflected upon his fitness to practice and that he, therefore, had an obligation to report them to the PTO. In addition, in his Answer, Respondent raised certain affirmative defenses.

In accordance with a Prehearing Order issued on May 4, 2000, the Director submitted his Prehearing Exchange on June 21, 2000 and Respondent submitted his Prehearing Exchange on June 26, 2000. On July 7, 2000, a Supplemental Prehearing Order was subsequently issued.[5] The Director submitted his Supplemental Prehearing Exchange on July 25, 2000, within the time

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[2] On April 23, 2000, Mr. Moatz was formally appointed as the Director of the Office of Enrollment and Discipline.

[3] In his Post Trial Brief, the Director informally amends the *ad damum* clause in the Complaint to reduce the request for relief to a two year suspension with the further requirement that Respondent demonstrate fitness to practice before the PTO as a condition of reinstatement. Director's Post Trial Brief at 19, 20.

[4] More specifically, the Complaint alleges Respondent was convicted by the Circuit Court of Arlington County, Virginia, on June 15, 1998, of "hit and run" (Case No. CR98-465) and "eluding" (Case No. CR98-466) and, on June 16, 1998, of "driving while intoxicated" (Case No. CR98-463) and "driving while intoxicated" (Case No. CR98-467) and that these convictions involved criminal offenses involving "moral turpitude, dishonesty, or breach of trust."

[5] This case was originally assigned to Judge Andrew Pearlstein for adjudication. However, due to Judge Pearlstein's resignation from the Environmental Protection Agency's Office of Administrative Law Judges, the case was reassigned to the undersigned on July 21, 2000.

frame set by the Order; however, Respondent did not. On August 17, 2000, an additional Order was issued extending the time for Respondent to respond to the Supplemental Prehearing Order.[6] On September 8, 2000, Respondent submitted his Supplemental Prehearing Exchange.

A hearing was held in this matter before the undersigned on September 19, 2000, in Arlington, Virginia. The Director did not present any witnesses. Respondent testified on his own behalf at the hearing. The Director offered 13 exhibits into evidence of which 12 were admitted into the record (D's Exs. 1-9, 11-13). Respondent offered four exhibits into evidence, all of which were admitted (R's Exs. 1A-3). The record was subsequently left open for Respondent to submit additional records into evidence which were not in his possession at the time of the hearing. On October 23, 2000, Respondent filed a Motion to Introduce Additional Evidence Into the Record, which was unopposed by the Director, and thus, is hereby GRANTED. The document attached thereto, a Petition To Surrender License dated May 24, 1999, is hereby accepted into evidence and identified as "Respondent's Exhibit 4."

The transcript of the hearing was received by the undersigned on October 2, 2000.[7] The parties were given the opportunity to subsequently file post-hearing briefs. The Director filed his post-hearing brief on December 4, 2000; Respondent did not file a post-hearing brief. The record closed with the filing of the brief on December 4, 2000.

II. STANDARDS FOR IMPOSITION OF SANCTIONS

A. Disciplinary Rules

The Regulations governing the representation of others before the Patent and Trademark Office, provide at 37 C.F.R. § 10.130, in pertinent part, that "[t]he Commissioner may, after notice and opportunity for a hearing, (1) reprimand or (2) suspend or exclude, . . . any individual [or] attorney . . . shown to be incompetent or disreputable, who is guilty of gross misconduct, or who violates a Disciplinary Rule."[8]

The Director has alleged that Mr. Reynolds' criminal convictions evidence that he

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[6] The Order of August 17, 2000, the first upon reassignment of the case, in consideration of the Respondent's then existing residential circumstances, also withdrew the prior prohibition imposed by this tribunal against the filing of handwritten pleadings, and established a procedure for telephonic communications between the tribunal's staff and Respondent.

[7] Citation to the transcript of the hearing will be in the following form: "Tr."

[8] 37 C.F.R. §10.20 indicates those sections of the Code considered "Disciplinary Rules," which are defined as being "mandatory in character and state the minimum level of conduct below which no practitioner can fall without being subject to disciplinary action."

violated sections (b)(6) and (c)(1) of Disciplinary Rule 10.23, which provides that -

(b) A practitioner shall not:

* * *

(6) Engage in any other conduct that adversely reflects on the practitioner's fitness to practice before the Office.

(c) Conduct which constitutes a violation of paragraphs (a) and (b) of this section includes. *but is not limited to*:

(1) Conviction of a criminal offense involving moral turpitude, dishonesty, or breach of trust. (italics added)

In addition, the Director has alleged that Respondent's failure to report the convictions to the PTO constitutes a violation of Disciplinary Rule 10.24(a) which provides that -

(a) A practitioner possessing unprivileged knowledge of a violation of a Disciplinary Rule shall report such knowledge to the Director.[9]

37 C.F.R. §10.23 (b)(6) and (c)(1).

B. Standard of Proof

The Regulations governing the representation of others before the Patent and Trademark Office, provide at 10 C.F.R. § 10.149, that -

In a disciplinary proceeding, the Director shall have the burden of proving his or her case by clear and convincing evidence and a respondent shall have the burden of proving any affirmative defense by clear and convincing evidence.

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[9] Interestingly, on August 11, 1999, the PTO Committee on Discipline, found that there was probable cause to bring charges against Mr. Reynolds under sections 10.23(c)(1), 10.24(a) and 10.23*(b)(3)* (prohibiting a practitioner from "engag[ing] in illegal conduct involving moral turpitude."). It did not make a probable cause determination regarding the bringing of charges under subsection *(b)(6)* of §10.23, as alleged in the Complaint. D's Ex. 1. In that Respondent never raised this discrepancy as a defense, and the fact that subsection (c)(1) subsumes in all sections of 10.23(b) the examples given therein of prohibited conduct, the authority of the PTO to institute this action as pled is considered uncontested.

III. FINDINGS OF FACT

Respondent. David Duncan Reynolds, became licensed to practice law in the Commonwealth of Virginia in 1980 and in the District of Columbia in 1995. Ex. 13. Stip 1: Ex. 12. p.3; Tr. 73, 59-60; R's Ex. 4. During his legal career, Mr. Reynolds specialized in the practice of patent law and. at all times relevant hereto, was registered as an attorney practitioner before the U.S. Patent and Trademark Office, having been assigned Registration No. 29,273. Tr. 51; Ex. 13, Stips. 1, 2.

Mr. Reynolds admits to having had a long-term problem with alcohol and, as he characterizes it, having "had a little bit of [a] problem on the highway because of it." Tr. 34, 52. 80-81. He was first arrested for driving while intoxicated (DWI) in 1975 and was convicted of DWI in 1984, 1987, 1991, and 1995.[10] D's Ex. 12, p. 4; Tr. 56. This case involves Mr. Reynolds' succeeding and most recent convictions on DWI and other related charges. Specifically, on June 15th and 16th, 1998, Mr. Reynolds was found guilty after a bench trial held on May 1, 1998, before the Circuit Court of Arlington County, Virginia, of DWI, which arose from events which occurred on October 11, 1996, and of hit and run, eluding and DWI, as a result of events which occurred on September 29, 1997. D's Exs. 3-6, Ex. 13, Stip. 3. He was sentenced on each of these four misdemeanor charges to 12 months imprisonment. with the terms to run consecutively.[11] D's Exs. 3-6, Ex. 13, Stip 4.

Respondent's DWI arrest on October 11, 1996 occurred after Mr. Reynolds, driving a rented vehicle, struck a Metrobus which had stopped to let off passengers. Tr. 12; D's Ex. 9. Two riders were allegedly slightly injured in the collision. D's Ex. 9. At the time of the accident, Respondent denied that he had been drinking, but refused to submit to a blood or breath

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[10] There is an indication in the record that another DWI charge which had been pending against Respondent was dismissed the day after his 1995 conviction. D's Ex. 12, p.4. Further, the record indicates that Mr. Reynolds was not incarcerated after his first *three* DWI convictions but, *inter alia*, was required to receive alcohol abuse treatment. D's Ex. 12, p.4; Tr. 14. He was allegedly sentenced to one month in a "jail like facility" after his *fourth* DWI conviction in 1995. D's Ex. 9.

[11] In that these crimes were classified as "Class 1" misdemeanors, twelve months of confinement, terms to run consecutively (as opposed to concurrently) was the maximum length of incarceration which could be imposed. *See*, Va. Code Ann. § 18.2-11 (2000). At the hearing, Respondent testified that in December 1999, he completed his sentence on the four 1998 convictions. Tr. 83. He also testified that he was reincarcerated beginning in April 2000, and remained incarcerated at the time of the hearing, on an alleged parole violation having to do with his violating a rule of a treatment center he entered upon his release from jail. Tr. 35. In November 2000, Mr. Reynolds informally advised this tribunal that he had again been released from jail.

test to determine his alcohol level. Tr. 13; D's Ex. 12, p.4. Mr. Reynolds continued to deny he had been drinking at the time of this accident when the probation department interviewed him regarding it for its investigative report. D's Ex. 12, p.4-5. However, Respondent subsequently stipulated, that at the time of his arrest, the arresting officer noted about him a strong odor of alcohol, slurred speech, glassy eyes, and an inability to stand without support or recite the alphabet. There were also empty bottles of alcohol found in his car. Tr. 13; D's Ex. 12, p.4. Eventually, Mr. Reynolds pled guilty, without reservations, to this DWI charge. D's Ex. 11 at 49. At the hearing held in this matter, although Mr. Reynolds' attributed this accident to "faulty brakes," he did concede that he had a blood alcohol level above the legal limit at the time. Tr. 12-13.

Mr. Reynolds' arrest for the DWI violation on October 11, 1996 also caused Mr. Reynolds to be convicted of a probation violation stemming from his conviction the year before of DWI on federal property. Tr.13-15; D's Ex. 9. The terms of Mr. Reynolds' probation required him to receive alcohol abuse treatment, to drive only to and from work, and to install an interlock ignition device that would prevent anyone who had a blood alcohol level above .02% from starting his car. Tr. 14, 88. At the time of his sentencing on the probation violation, the Court allegedly found that Mr. Reynolds had not completed the alcohol treatment program and had driven a vehicle without an interlock device.[12] D's Ex. 12, p. 4; D's Ex. 9; Tr. 13. On April 15, 1997, Mr. Reynolds was sentenced to five months imprisonment for the probation violation by the U.S. District Court for the Eastern District of Virginia.[13] Tr. 15; Ex. 9. Mr. Reynolds was released from jail on this conviction on September 16, 1997, just 13 days before he committed his next DWI violation, as well as the eluding and hit and run violations, on September 29, 1997. Tr. 15-16; D's Ex. 11, p.48.

The facts surrounding the violations on September 29, 1997 are somewhat in dispute. A hearing to determine the effect of the violations on Mr. Reynolds' license to practice law in the District on Columbia was held on May 24, 1999, before a committee of the District of Columbia

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[12] At the hearing, Mr. Reynolds' contended that he had not violated the probation order, claiming that the alcohol abuse program agreed to his release and that the terms of his probation only required him to install an interlock device on his own car; it did not prohibit him driving another car without such a device. Tr. 14-15, 85-86, 92-93. He asserted that he rented a car that day because his vehicle was in for repairs and he and his wife were going out that evening. Tr. 88. He characterized his behavior on October 11, 1996 as being "*right in line*" with the probation order on the prior DWI because, *although he was admittedly driving drunk*, consistent with the restrictions on his driver's license, *he was driving home from work* at the time. Tr. 12-13, 88. There is no indication in the record that Mr. Reynolds ever appealed this conviction.

[13] Mr. Reynolds' sentencing on the October 1996 probation violation, and the start of his five month incarceration in connection therewith, was apparently delayed until April 1997, due to the fact that he suffered a stroke in January 1997 and was hospitalized as a result for several months. D's Ex. 12, p.5; Tr. 15.

Board of Professional Responsibility ("D.C. Board Committee"). D's Ex. 11. At that hearing, Doug Johnson, the arresting officer testified under oath, and in the presence of Mr. Reynolds, who was given an opportunity to cross-examine. *Id.* The hearing transcript (D's Ex. 11) indicates that Officer Johnson testified that on September 29, 1997, he heard and observed a light colored Porsche with a damaged tire or wheel driving on a ramp near the Sheridan Hotel in Virginia. D's Ex. 11 at 13-14. Officer Johnson stated that he responded by turning on his vehicle's emergency blue and red lights, driving up behind the Porsche, and then tapping on his sirens a couple of times to initiate a stop. *Id.* at 14. According to the Officer, as he was exiting his vehicle to approach the Porsche, which had come to a complete stop ahead of him on the regulation size shoulder, the driver, Mr. Reynolds, drove off at a high rate of speed. *Id.* at 14-15. Mr. Reynolds subsequently lost control of his car, drove off the roadway, and nearly hit two detectives who had stopped to assist Officer Johnson by pulling off the road at that point ahead. *Id.* at 15-16.

Officer Johnson further testified at the D.C. Board Committee hearing that at the time of his arrest, Mr. Reynolds "was 100 percent intoxicated." D's Ex. 11 at 33. He bore the strong odor of alcohol, his clothes were disheveled, his speech slurred, he had defecated on himself, he could not stand upright unaided, and he was unable to recite the alphabet. Miniature bottles of vodka and beer cans were found in the car. *Id.* at 17-18. At the scene of the arrest, Officer Johnson administered to Mr. Reynolds an ALCO breath sensor test, the results of which are not admissible in trials in the Commonwealth of Virginia on DWI, but are admissible on lesser offenses. *Id.* at 18-19. The test indicated that Mr. Reynolds had a blood alcohol level of .32%, or four times the legal limit in Virginia of .08%. *Id.* at 18. The Officer testified he remembered this incident so well because that was the highest reading on the ALCO sensor he had seen up to that point in his ten years as an Officer. *Id.* at 22-23, 10. As to the hit and run charges, Officer Johnson testified that while he was arresting Mr. Reynolds, another Officer was dispatched to respond to a call concerning a hit and run on a tour bus which had just occurred near the Sheridan Hotel by a vehicle matching the description and having a tag number almost identical to that of Mr. Reynolds' Porsche. *Id.* at 28-29.

Mr. Reynolds denied that he was intoxicated at the time of his arrest in September 1997 at the hearing held before the D.C. Board Committee in May 1999, and at the hearing held in this matter in September 2000. Tr. at 30; D's Ex. 11 at 48-49. He asserted at these hearings that his slurred speech and inability to stand unaided at the time were attributable to the effects of a stroke he had previously suffered. Tr. 32; D's Ex. 11 at 32. He claimed the ALCO test performed by the Officer was inaccurate and unreliable. Tr. 31-32; D's Ex. 11 at 27. Mr. Reynolds contended that the empty liquor bottles found in his car were not his, but had been left there by a passenger, although he acknowledged that he also preferred to drink from miniature bottles of alcohol. D's Ex. 11 at 65-66. He claimed that his vehicle could not have been the one which hit the tour bus because the damage to his vehicle was slight, and on the left side of the car, and the tour bus allegedly suffered $1,000 worth of damage by being hit by a vehicles' right side. D's Ex. 11 at 29-30, 36. Mr. Reynolds said he never intended to elude the officer, but merely "pulled off to the shoulder and moved about 200 feet further on because [he] had pulled into a part of the shoulder that was not very safe" and he was looking for an appropriate place to

stop on the road due to the damaged nature of his car from an accident earlier in the day. Tr. at 26. 28-29: D's Ex. 11 at 37-38.

Nevertheless, Mr. Reynolds admitted that, after consulting with retained counsel. he entered a guilty plea. allegedly without admitting guilt, under the aegis *of North Carolina v. Alford*. 400 U.S. 25 (1970), to the September 1997 charges of hit and run. eluding and driving while intoxicated. Tr. 27-30. 33; D's Ex. 11 at 41.[14] Moreover. the record evidences that. as part of a supplement to a pre-sentencing report prepared in connection with these charges (and the 1996 DWI). Respondent stipulated to a lengthy series of facts essentially corroborating the accuracy of Officer Johnson's subsequent testimony as to what had occurred. D's Ex. 12, p. 4.

Additionally, Mr. Reynolds admitted at the hearing held in this matter that he never reported any of these convictions to the PTO. Tr. 34.

On July 30, 1998, based upon the Virginia convictions, the District of Columbia Court of Appeals suspended Mr. Reynolds from practicing law in the District, on an interim basis, pending the institution of a formal disciplinary proceeding. Tr. 59, D's Ex. 12, p. 3. On May 8, 2000. after a committee hearing, the D.C. Court of Appeals Board of Professional Responsibility. determined that Mr. Reynolds had violated its disciplinary rules prohibiting a lawyer from committing "a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects," and "engaging in conduct which seriously interferes with the administration of justice." However, it held that he had not committed a crime of "moral turpitude." The Board recommended to the D.C. Court of Appeals that Respondent be suspended for six months, *nunc pro tunc* to June 28, 1999, and that he show fitness as a condition of reinstatement.[15] D's Ex. 12. On December 14, 2000, the D.C. Court of Appeals accepted the Board's Report and Recommendation, and entered the suspension order recommended by the Board. *See, In re Reynolds*, 763 A.2d 713 (D.C. App. 2000). In its decision, the Court noted that Respondent's actions constituted misconduct adversely reflecting on his honesty, trustworthiness or fitness as a lawyer warranting the proposed sanction. The Court accepted for the purposes of that decision and without further discussion, the Board's finding that Mr. Reynolds' criminal convictions were not characterized by moral turpitude,

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[14] At the hearing, Mr. Reynolds asserted that he pled guilty in 1998 to the charges of hit and run, eluding and DWI, as part of a plea bargain, because the prosecutor threatened to add additional fictitious charges such as "driving under a suspended license" and "failure to yield." Tr. 33; Ex. 11, p. 40. Respondent asserted that he "took an 'Alfred plea'" which he understood as pleading guilty in light of the evidence, but did not establish as a legal matter the accuracy of each element of the offenses. Tr. 27, 33-34, R's Ex. 1B.

[15] The date of June 28, 1999 was apparently chosen because this was the effective date for Respondent's filing of an Affidavit under D.C. Bar Rule XI § 14 (g). This date is approximately ten days after Mr. Reynolds' sentencing on the four 1998 crimes.

noting that Bar Counsel had acquiesced in that finding. *Id.* at 713-714.[16]

Under investigation for ethical violations in connection with the same 1998 convictions. Mr. Reynolds voluntarily resigned from the Virginia Bar on May 25, 1999.[17] R's Exs. 2, 4; Tr. 46-47, 56-57; D's Ex. 7; D's Ex. 13, Stips. 5-7.

IV. ANALYSIS

A. Whether Respondent has engaged in conduct that adversely reflects on his fitness to practice before the PTO such as being convicted of a criminal offense involving moral turpitude, dishonesty, or breach of trust

The threshold issue in this case is whether Mr. Reynolds has engaged in conduct adversely reflecting on his fitness to practice before the U.S. Patent and Trademark Office. Disciplinary Rule 10.23 indicates that such conduct includes, *but is not limited to*, being convicted of a criminal offense involving "moral turpitude, dishonesty, and/or breach of trust." Tr. 8.

The Rules of the Patent and Trademark Office do not define the phrase "conduct adversely reflecting on fitness to practice," nor the terms "moral turpitude," "dishonesty," "breach of trust."

It has been observed that:

> Fitness to practice law requires more than acquiring the knowledge and mastering the technical skills needed to advise or represent clients. Professional competence is only one element in determining whether an individual is 'fit' to practice law. Professional competence demonstrated by education and examination *and* good moral character are required for admission to practice.

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[16] In the past, D.C. Court of Appeals has not always upheld the D.C. Board's rather narrow view of crimes involving moral turpitude. *See e.g., In re Wolff*, 490 A.2d 1118 (D.C. App. 1985)(overturning D.C. Board of Professional Responsibility's opinion that felony conviction of distributing child pornography is a *not* crime of moral turpitude.)

[17] In his "Petition to Surrender License" filed with the Virginia State Bar Disciplinary Board, Mr. Reynolds' acknowledged that "the Petition shall be deemed an admission only for the purposes of the Virginia State Bar of all charges of misconduct pending against him before this Board, or a District Committee, or a Court." R's Ex. 4. Mr. Reynolds testified that he voluntarily surrendered his license in Virginia because he did not feel at the time that he was capable of defending the Virginia and District of Columbia disciplinary actions simultaneously. Tr. 53-54.

* * *

> Good moral character includes traits of 'honesty, fairness, candor, trustworthiness. observance of fiduciary responsibility, respect for and obedience to the laws of the state and the nation and respect for the rights of others and for the judicial process.'
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> * * *
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> "The commission of any act involving moral turpitude. dishonesty or corruption. whether the act is committed in the course of relations as an attorney or otherwise. and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."[quoting Calif. Bus & Prof. Code § 6106]
> (Italics and quotes in original).

In re Lesansky. 17 P.3d 764 (Cal. 2001) (attorney convicted of lewd act with minor disbarred even though private act committed in nonprofessional setting).

Black's Law Dictionary defines "moral turpitude" as "conduct that is contrary to justice, honesty or morality" and quotes American Jurisprudence 2nd to the effect that:

> Moral turpitude means, in general, shameful wickedness - so extreme a departure from ordinary standards of honesty, good morals, justice, or ethics as to be shocking to the moral sense of the community. It has also been defined as an act of baseness, vileness, or depravity in the private and social duties which one person owes to another or to society in general, contrary to the accepted and customary rule of right and duty between people."

BLACK'S LAW DICTIONARY 1026 (7th ed. 1999) citing 50 AM. JUR. 2D *Libel and Slander* §165 (1995).

Distinguishing between crimes involving "moral turpitude *per se*" and those that do not, it has been observed that --

> Commission of some crimes establishes moral turpitude on its face. These include crimes that necessarily involve an intent to defraud, intentional dishonesty for personal gain, or behavior particularly repugnant to accepted moral standards. Commission of other offenses may or may not involve moral turpitude, and thus conviction of other offenses is not grounds for discipline without additional proof of circumstances surrounding the offense.

In re Oliver, 493 N.E.2d 1237, 1240 (Ind. 1986) (holding under the circumstances presented, DWI was not a crime of moral turpitude). *See also, Jordan v. De George*, 341 U.S. 223, 227 (1951) wherein the Supreme Court, noted that while the phrase "moral turpitude" has never been precisely defined, it has been in use for over 100 years, including in statutory provisions disbarring attorneys, and that "fraud has ordinarily been the test to determine whether crimes not of the gravest character involve moral turpitude."(citing *United States v. Reimer*, 113 F.2d 429

(1940)).

Similarly, the other terms - "dishonesty" and "breach of trust," used in conjunction with "moral turpitude" in the PTO rule also lack exact definition, but seemingly encompass illegal activity of a less severe nature then crimes involving moral turpitude. For example, "dishonesty," has been defined as the "disposition to lie, cheat or defraud; untrustworthiness: lack of integrity." BLACK'S LAW DICTIONARY 421 (5th ed. 1979) "Breach of trust" has been defined as "the violation of duty that equity imposes on a trustee, whether the violation was willful, fraudulent, negligent, or inadvertent." BLACK'S LAW DICTIONARY 183 (7th ed. 1999).

As noted above, faced with Mr. Reynolds' criminal record, the D.C. Court of Appeals found that his four misdemeanor convictions did constitute evidence that he had committed criminal acts that reflected adversely on his "honesty, trustworthiness, or fitness" as a lawyer and warranted his suspension. However, the Court accepted, without discussion, the finding of the Board of Professional Responsibility that Mr. Reynolds' had not engaged in crimes involving "moral turpitude," as that finding had not been challenged by Bar Counsel. *See, In re Reynolds*, 763 A.2d 713 (D.C. App. 2000).

After due consideration, I find that Mr. Reynolds has engaged in conduct that adversely reflects upon his fitness to practice before the PTO, in violation of Disciplinary Rule 10.23(b), including being convicted of crimes involving dishonesty or breach of trust as well as moral turpitude.

1. Respondent's Hit and Run Conviction

The offense of "hit and run" is defined by Va. Code Ann. § 46.2-894 which provides in pertinent part that:

> The driver of any vehicle involved in an accident . . . in which an attended vehicle or other attended property is damaged shall immediately stop as close to the scene of the accident as possible . . . and report his name, address, driver's license number and vehicle registration number forthwith to the State Police . . ., to the driver or some other occupant of the vehicle collided with or to the custodian of other damaged property. . . .
>
> The Virginia Court of Appeals has stated that --
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> The purpose of [this section] is to prevent motorists involved in accidents *from evading civil or criminal liability* by leaving the scene of an accident and to require drivers involved in an accident to provide identification information and render assistance to injured parties. (Emphasis added).

Smith v. Commonwealth, 379 S.E.2d 374 (Va. App. 1989) (citing the statute as previously codified at Va. Code Ann. § 46.1-176).

In *People v. Bautista*, 265 Cal. Rptr. 661 (Cal. App. 1990), the California Court of Appeals, in holding that a felony conviction for hit and run involves a crime of moral turpitude, observed that:

> Appellant argues that it is preposterous to find *moral turpitude* on the part of a driver involved in an accident causing injury because of failure to give his name, or any other requirements . . . . Appellant postulates that failing to give one's name to the victim of an accident could simply be the result of neglect without evil intent and therefore is morally innocent behavior. We disagree.
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> * * *
>
> The [hit and run] statute is designed to prevent the driver of a car involved in an accident from leaving the scene without furnishing information as to his identity and to prevent him from escaping liability. '<u>One of the duties that accompanies the right and privilege of driving a vehicle on a public thoroughfare is to give such information.</u>'
>
> * * *
>
> It is more than likely that one who is involved in an injury-accident and leaves the scene before giving the required information is seeking to evade civil or criminal prosecution. At the very least then, a person convicted of [hit and run], has exhibited an intent and purpose of concealing his identity and also his involvement in an injury-accident. <u>One can certainly infer that such a mental state indicates a 'general readiness to do evil' or moral turpitude</u>. (Emphasis added).

Id. 265 Cal. Rptr. at 664 (quoting *People v. Monismith*, 81 Cal. Repr. 879 (Ca. App.1969)).

A number of other courts have also held that hit and run is a crime involving dishonesty, breach of trust, moral turpitude, and/or adversely reflects on an attorneys fitness to practice. *See, State v. Horton*, 248 S.E.2d 263 (S.C. 1978)("An act in which fraud is an ingredient involves moral turpitude. One who leaves the scene of an accident is fraudulently attempting to relieve himself of any liability. We conclude the offense of 'hit and run' is contrary to justice, honesty and good morals. It involves moral turpitude. . . ."); *In re Anonymous*, 24 Pa. D. & C. 4th 354 (1994)("Fleeing the scene of an accident and attempting to conceal one's involvement in vehicular homicide obviously reflects adversely upon one's honesty, trustworthiness and fitness to practice law"); *Ziegler v. City of South Pasadena*, 86 Cal. Rptr. 2d 424 (Cal. App. 1999) (appellant's involvement in misdemeanor hit and run accident after drinking and subsequently lying about his involvement was conduct showing lack of honesty and a breach of trust). *But see, State v. Thomas*, 715 P.2d 1299 (Kan.1986)(hit and run conviction unexplained, does not meet the admissibility for impeachment as a crime involving dishonesty or false statement).

Respondent has offered no exculpatory rationale in connection with his hit and run conviction, contending, instead, that the physical evidence of the damage sustained by his car, as evidenced by certain photographs, and that sustained by the tour bus, does not support the fact that he was involved in the accident underlying the conviction. D's Ex. 11 at 29, 36. However,

Mr. Reynolds' contention in this regard is directly contradicted by the stipulations he entered into in connection with his sentencing on the hit and run charge: that he was "arrested on September 29, 1997, after striking a bus while making a U-turn. Respondent did not stop after striking the bus." D's Ex. 12, p.4.

Respondent further argues, more generally, that the PTO cannot rely upon his hit and run, or his other convictions arising out of the events of September 29, 1997, to prove he engaged in criminal acts involving moral turpitude, dishonesty or breach of trust because he entered an "*Alford* plea" in those cases. Mr. Reynolds asserts that a guilty plea entered under the case of *North Carolina v. Alford*, 400 U.S. 25 (1970) only establishes that he pled guilty to the crime and does not establish the truth of each and every element of the offense. Tr. 33-34.[18]

As a preliminary matter, it is noted that there is no evidence in the record besides Mr. Reynolds' uncorroborated testimony that he entered an *Alford* plea to the charges arising out of the events of September 29, 1997. *Compare* D's Ex. 3, 4 and 6 (sentencing orders on the three 1997 charges) to D's Ex. 5 (sentencing order on 1996 charge as to which Respondent admitted he entered a unconditional guilty plea). However, that is of no real significance since Respondent is simply wrong as to the law in this regard. The case of *North Carolina v. Alford, supra*, dealt with the issue of whether a guilty plea could be accepted by a court as being "voluntarily made" by a defendant who continued to maintain his innocence despite offering the plea. The Supreme Court held it could, especially where the defendant was represented by competent counsel and where the great weight of evidence implied guilt. *Id.* Case law following that decision has not changed the significance of guilty pleas entered pursuant thereto. As it was held in *In re Untalan*,

> Respondent['s] . . . arguments that his Plea Agreement was tantamount to an Alford plea is of no real assistance to his position. First, an Alford plea is indistinguishable from a guilty plea in result for the purposes of the disciplinary process. Second, a valid guilty plea acts as a conviction of the crime charged, as well as an admission of all the material facts alleged by the government. (citations omitted)

619 A.2d 978 (D.C. App. 1993) *citing In re Kerr*, 424 A.2d 94, 96 n.12 (D.C. 1980)(*en banc*)(despite protestations of innocence after an *Alford* plea, the hearing committee was correct not to revisit the issue of guilt) and *In re Colson*, 412 A.2d 1160, 1164 (D.C. 1979)(en banc). *See also*, Note The *Alford* Plea: A Necessary but Unpredictable Tool for the Criminal Defendant, 72 Iowa L. Rev. 1063, 1083 (1987)(noting that the major difference between *Alford* pleas and routine guilty pleas is that, before accepting an *Alford* plea, the judge must be careful to establish a factual basis of guilt of the crime, independent of the defendant's statements through witnesses, presentencing reports, prosecutors summations, *etc.*, and further observing, that "courts have tended to treat *Alford* pleas like any other guilty pleas with respect to preclusive effect,"citing

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[18] The transcript, unfortunately, refers to the case as "Alfred." Tr. 27, 33, 34.

numerous cases at n. 196, *et al.*); and Report of D.C. Board of Professional Responsibility (stating that a conviction under *Alford* establishes each element of the offense and quoting the extensive stipulations made by Respondent in the pre-sentencing report prepared in connection with these convictions which would have provided the judge with independent factual bases of Respondent's guilt on the charges in support of the acceptance of an *Alford* plea), D's Ex. 12, p.4, p.5 note.

Thus, it is not required nor appropriate here, in this forum, to relitigate the issue of Mr. Reynolds' guilt or innocence on the charges of hit and run or the other charges of eluding or DWI arising from the 1997 events. The convictions entered on those charges based upon Mr. Reynolds' guilty plea establishes his guilt of the crimes and the elements thereof. Therefore, the Director may rely on those convictions to meet its burden of proof in this disciplinary proceeding.[19]

Mr. Reynolds' prior stipulations and conviction on the charge of "hit and run" evidences, at the very least, that he breached the trust imposed by the State, and by one licensed driver upon another, to act appropriately and responsibly when a collision with resultant damage occurs. More than that, as indicated in *Smith* and *Bautista*, from such a conviction one can reasonably infer an intent on the part of Mr. Reynolds to evade civil and criminal liability for the accident, and perhaps, evade yet another adverse determination on his sobriety at the time as well, by concealing his identity. Concealing one's identity to avoid liability is undoubtably an act of dishonesty, if not an act of fraud. *See, United States v. Eighty-Five Hogsheads of Sugar*, 25 F. Cas. 991, 995 (C.C.D.N.Y. 1830)("The obtaining or withholding wrongfully from another that which is his right, either by deception or artifice, or without his knowledge or consent, is defrauding him of his right.").[20] As indicated above, by definition, crimes that entail an intent to defraud or intentional dishonesty for personal gain, involve moral turpitude. Thus, I find Mr. Reynolds' conviction of hit and run constitutes a crime involving moral turpitude, dishonesty,

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[19] Respondent may be confusing the effect of an *Alford* plea with a plea of *nolo contendere*, the latter of which cannot be used in a subsequent civil action to prove guilt. *See*, 1 Charles A. Wright & Kenneth A. Graham, Jr., Federal Practice and Procedure §177 (1982); *Ziegler v. City of South Pasadena*, 86 Cal. Rptr. 2d 424 (Cal. App. 1999) (plea of *nolo contendere* to misdemeanor hit and run is unavailable for use as an admission in a subsequent administrative proceeding).

[20] The record suggests that Mr. Reynolds had a number of reasons why he might attempt to conceal his identity at the time of the 1997 collision. In addition to his multiple prior convictions and prior high insurance rates, he acknowledged that at the time of this collision with the tour bus he did not have motor vehicle insurance, nor was he covered under Virginia's uninsured motorist fund, although he claimed that he was unaware of it until after the fact. Mr. Reynolds said he was covered by insurance at the time of the prior 1996 accident with the Metrobus. Tr. 77-79.

breach of trust and/or engagement in conduct adversely reflecting on his fitness to practice.[21]

2. Respondent's Eluding Conviction

Eluding is defined by Va. Code Ann. § 46.2-817 as:

> Any person who, having received a visible or audible signal from any law enforcement officer to bring his motor vehicle to a stop, drives such motor vehicle in a willful or wanton disregard of such signal so as to interfere with and endanger the operation of the law enforcement vehicle or endanger other property or a person. or who increases his speed and attempts to escape or elude such law enforcement officer, shall be guilty of a Class 1 misdemeanor. (Emphasis added).

Eluding statutes proscribe unreasonable conduct in resisting law enforcement activities. *State v. Trowbridge*, 742 P.2d 1254, 1256 (Wash. App. 1987). As such, it has been held that eluding is a crime involving dishonesty, breach of trust, moral turpitude and/or adversely reflecting on an attorneys' fitness to practice. *See, People v. Dewey*, 49 Cal. Rptr. 2d 537 (Cal. App. 1996) (felony conviction of eluding was a crime of moral turpitude); *In re Eddingfield*, 572 N.E. 2d 1293, 1296 (Ind. 1991)(DWI and resisting law enforcement indicates a reckless disregard for the laws of the state and his duty to the officers that must enforce them and adversely reflects on honesty, trustworthiness and fitness as a lawyer).

As to the charge of eluding, at the hearing, Mr. Reynolds asserted that his actions were misunderstood and mischaracterized by the police officer, that what the Officer interpreted as eluding was merely an effort on Mr. Reynolds' part to better situate his vehicle. Tr. at 26, 28-29; D's Ex. 11 at 37-38. Nevertheless, the record shows that, in 1998, Mr. Reynolds stipulated that on September 29, 1997, after he "initially slowed his car and pulled toward the shoulder after Officer Johnson . . . activated his patrol car's emergency equipment . . . . [he] then sped away losing control of his car and coming to a stop. Respondent nearly hit the car of a second police officer." D's Ex. 12. p.4. Further, Mr. Reynolds entered a plea of guilty to this charge, albeit allegedly an *Alford* plea, and was convicted of eluding. As is the case with the hit and run charge, from Mr. Reynolds' stipulations and conviction on this charge of eluding it can reasonably be inferred that, in fact, Mr. Reynolds engaged in conduct in an attempt to elude or evade the police and thereby evade civil and criminal liability for his conduct that would follow

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[21] Although Mr. Reynolds was convicted of *misdemeanor*, rather than *felony*, hit and run, and there is no evidence in the record that any personal injury occurred in the accident on September 29, 1997, I find the rationale in *Bautista*, *Horton*, and the other cases cited, for inferring moral turpitude on the part of Respondent nevertheless applicable and persuasive. It must be noted that due to his act of hit and run, Mr. Reynolds had no way of knowing whether or not someone was injured in the collision with the bus, or the extent of personal injury, before he left the scene. Thus, to infer a less nefarious intent to Mr. Reynolds seems undeserved.

from his being apprehended. Moreover, by engaging in such reckless conduct. Mr. Reynolds placed the safety of himself and his property as well as the safety of others and their property, at risk. Such actions clearly evidences a breach of the trust imposed by the State upon drivers with regard to acting reasonably in response to law enforcement officers, and a dishonest and fraudulent intent.[22] Thus, I find Mr. Reynolds' conviction on this charge also falls within those crimes involving moral turpitude, dishonesty, breach of trust and/or engagement in conduct adversely reflecting on his fitness to practice.

3. Respondent's DWI convictions

A DWI conviction in Virginia results from a violation of Va. Code. Ann. §18.2-266 (2000) which, at all times relevant hereto, prohibited anyone with a blood alcohol concentration of .08% from driving.

Courts have been divided as to whether DWI is a crime involving dishonesty, breach of trust, moral turpitude, or otherwise involving conduct adversely reflecting on an attorney's fitness to practice. *See e.g., People v. Forster*, 35 Cal Rptr. 2d 705 (Cal. App. 1994) (prior DWI felony conviction, constituting a violation of recidivist statute, is a crime of moral turpitude which can be used for impeachment in trial on fourth DWI charge); *Florida Bar v. Milin*, 517 So. 2d 20 (Fla. 1987)(without discussion court approves referee's finding that attorney's DWI conviction violated disciplinary rule against engaging in illegal conduct involving moral turpitude); *Coombs v. State Bar of California*, 779 P.2d 298 (Cal. 1989) (DWI conviction with resultant injury to another and prior convictions of alcohol related driving offenses constitutes act of moral turpitude); *In re Jones*, 464 N.E.2d 1281 (Ind. 1984)(conviction on misdemeanor DWI and facts evidencing possession at time of marijuana and hashish demonstrates attorney is morally unfit to continue to practice law); *In re Kelley*, 801 P.2d 1126 (Cal. 1990)(although DWI not crime of moral turpitude *per se*, it does constitute other misconduct warranting discipline of attorney); *In the Matter of Coleman*, 569 N.E. 2d 631 (Ind. 1991)(DWI convictions show disregard of fellow citizens on the highway; that coupled with court appearance only on threat of arrest, adversely reflects on attorneys' fitness to practice law); *In re Carr*, 761 P.2d 1011 (Cal. 1988)(while attorney's two misdemeanor DWI convictions did not involve moral turpitude, they did involve "other misconduct" warranting discipline); *People v. Fahselt*, 807 P.2d 586 (Colo. 1991)(misdemeanor DWI conviction, vehicular assault, and failure to maintain insurance adversely reflects on the attorney's fitness to practice law); *Attorney Griev. Comm'n v. Garland*, 692 A.2d 465 (Md. 1997)(attorney indefinitely suspended for DWI even though conviction overturned on appeal); *In re Eddingfield*, 572 N.E. 2d 1293 (Ind. 1991)(discipline imposed on attorney convicted of DWI based on conduct evidencing a reckless disregard of state law which

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[22] *See, In re Hallinan*, 272 P.2d 768 (Cal. 1954) ("We see no moral distinction between defrauding an individual and defrauding the government, and an attorney, whose standard of conduct should be one of complete honesty, who is convicted of either offense is not worthy of trust and confidence of his clients, the courts, or the public . . . since his conviction of such crime would necessarily involve moral turpitude.")(referring to tax evasion).

adversely reflects on the lawyer's honesty, trustworthiness and fitness); *In re Walker*. 254 N.W. 2d 452 (S.D. 1977)(DWI is not an offense involving moral turpitude, but shows lack of fitness); *But see*. *In re Oliver*, 493 N.E. 2d 1237 (Ind. 1986)(attorney's first misdemeanor charge of DWI did not involve moral turpitude or conduct adversely reflecting on fitness to practice law, noting that the attorney was not a multiple offender, had no alcohol problem, and caused no damage other than to himself; *but note* dissent holding that DWI is crime of moral turpitude); *Singh v. Waters*. 87 F.3d 346 (9th Cir. 1996) (misdemeanor DWI is not crime of moral turpitude for immigration purposes); *State of Vermont v. Busley*, 457 A.2d 279 (Vt. 1983)(DWI is not crime of moral turpitude for impeachment purposes); *State v. Deer*, 129 N.E.2d 667 (Ohio C.P. 1955)(DWI is not crime of moral turpitude for purposes of habitual offender statute); *Fee v. State*. 497 S.W. 2d 748 (Tenn. Ct. App. 1973)(DWI not crime of moral turpitude for impeachment purposes); *Slider v. Myers*, 557 So. 2d 1111 (La. App. 1990)(misdemeanor DWI and hit and run convictions do not involve dishonesty or false statement). *See generally*, Danny R. Veilleux, Annotation, *Misconduct Involving Intoxication as Ground for Disciplinary Action Against Attorney*, 1 A.L.R.5th 874 § 6-9 (1992 & Supp. 1995) (collecting cases involving discipline of lawyers convicted of drunk driving).

In determining whether DWI is a crime of moral turpitude, dishonesty, breach of trust or otherwise adversely reflecting upon fitness to practice, the courts have looked to the facts surrounding the violation and their nexus to fitness to practice. Included among the factors considered are whether the attorney is a multiple offender, has a chronic alcohol problem, the severity of the crime, whether any personal or property damage resulted, and the judgment of the community upon the conduct. *See, In re Oliver*, 493 N.E. 2d 1237, 1241 (Ind. 1986)(considering those factors and attorneys' conduct "in toto").

In *Oliver*, the Supreme Court of Indiana found that an attorney's first DWI misdemeanor incident did not involve moral turpitude or conduct adversely reflecting on his fitness to practice, noting that the attorney was not a multiple offender, had no on-going alcohol problem, caused no personal or property damage to others by his conduct, and received on the DWI charge, *inter alia*, 50 hours of community service, *in lieu of entry of conviction*, evidencing the "judgment of the community upon [his] conduct . . . ." *Id.* at 1241.[23]

Sadly this case does not involve the same circumstances as those in *Oliver*. As indicated above, Mr. Reynolds has been *convicted* of DWI, not once or even twice, but six times in the span of 14 years. D's Ex. 12, p.4; Tr. 56. The last three convictions for events that occurred

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[23] *Oliver* is the only disciplinary case that was found where DWI was held *not* to adversely reflect on an attorney's fitness to practice generally and clearly such holding was based on the unusual facts of the case. The Court in *Oliver* did, however, find that the DWI conviction constituted conduct "prejudicial to the administration of justice" because the attorney was serving as a special prosecutor at the time and, as such, he had a special duty to not engage in conduct "prejudicial to public esteem" of those charged with enforcing the law. 493 N.E. 2d at 1242.

annually (in 1995, 1996 and 1997) and the very last such instance, on September 29, 1997, occurred only two weeks after Mr. Reynolds was released from prison for violating his probation on a prior DWI charge. *Id.*, Tr. 15-16. Evidence in the record and common sense suggest that Mr. Reynolds engaged in drunk driving on other occasions also, but was able to avoid arrest or convictions in connection therewith. *See*, Tr. 56 (noting first DWI charge was in 1975); D's Ex. 12, p.4. (noting additional DWI charge dismissed in 1995). The empty bottles of alcohol found in his car suggest that Respondent not only drinks *before* he drives, he drinks *while* he drives. D's Ex. 12, p.4. He has driven under the influence of alcohol even after the courts have attempted to protect him (and others) by restricting his driver's license, sending him repeatedly to alcohol treatment programs, requiring an interlock device be installed on his car, and incarcerating him. D's Ex. 12, p.4; D's Ex. 9. The judgment of the community as to Mr. Reynolds' conduct, as evidenced by the degree of criminal punishment imposed upon him, is clear and contemptuous - he was ordered incarcerated for the maximum length of time allowed by law and his driver's license was revoked. D's Ex. 3-6; Va. Code Ann. §18.2-11 (2000); Tr. 77. Further, Respondent's conduct has been so abhorrent to the moral sense of the community that it has been the subject of a number of newspaper and magazine articles. Tr. 11, 17-18; R's Ex. 1A; D's Ex. 9.[24]

Faced with a similar set of facts to those here, the California Court of Appeals in *People v. Forster*, 35 Cal. Rptr. 2d 705 (Cal. App. 1994) noted, with regard to the offender, before it that:

> Having suffered at least three previous convictions for driving under the influence . . . a person is presumptively aware of the life-threatening nature of the activity and the grave risks involved. Continuing such activity despite the knowledge of such risks is indicative of a "conscious indifference or 'I don't care attitude' concerning ultimate consequences" of the activity from which one can infer a "'depravity in the private and social duties which a man owes his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.'" [citations omitted, emphasis added].

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[24] To his credit, Mr. Reynolds admits to having had a blood alcohol level above the legal limit at the time of his arrest in October 1996. Tr. 12-13. However, he denies being under the influence of alcohol at the time of his arrest in September 1997. Tr. 30. Respondent attributes his symptoms of being drunk, such as slurred speech and inability to stand, as observed by Officer Johnson at the time of his 1997 arrest to a stroke he previously suffered. Tr. 32. However, I note that the record evidences that he suffered his stroke in January 1997 and that these symptoms of intoxication were the same symptoms Respondent stipulated the Officer observed when he was arrested in 1996, before his stroke occurred. D's Ex. 12, p.4. In addition, Mr. Reynolds previously stipulated that on both occasions the police officers noted a "strong smell of alcohol" and the presence in his vehicle of empty miniature bottles of vodka, from which Respondent acknowledged he preferred to drink. D's Ex. 12, p.4; D's Ex.11 at 66.

35 Cal. Rptr. 2d at 712.

Similarly, I find that Mr. Reynolds' fifth and sixth instances of being convicted of DWI evidence a "shameful wickedness," a "depravity in the private and social duties which one person owes to another or to society in general," and "so extreme departure from ordinary standards of honesty, good morals, justice, or ethics as to be shocking to the moral sense of the community," which define "moral turpitude."

Even assuming *arguendo*, that Mr. Reynolds' fifth and sixth DWI convictions do not rise to the level of moral turpitude, they clearly represent his engagement in conduct adversely reflecting on his fitness to practice law, in that these repetitive convictions show a lack of trustworthiness and a disrespect of and disobedience to the laws of the state and the rights of others. "A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation." *Oklahoma Bar Ass'n v. Armstrong*, 791 P.2d 815 (Okla. 1990)(Citing Comment to Rules of Professional Conduct, 5 O.S.Supp.1988, Ch. 1, App. 3-A, Rule 8.4); *In re Haith*, 742 N.E.2d 940 (Ind. 2001)(multiple convictions of misdemeanor DWI or similar offenses "may indicate a willingness to ignore the law. . . [and] implicates a lawyer's fitness as one who can be trusted to keep his client's secrets, give effective legal advice, and fulfill his obligations to the courts") As an attorney, Mr. Reynolds stood as an officer of the court, sworn to uphold the law. Nevertheless, he has engaged in a seemingly endless series of DWI offenses in violation of the law. *See, Office of Disciplinary Counsel v. Casety*, 512 A.2d 607, 610 (Pa. 1986) ("Where one who has sworn to uphold the law actively breaches it, his fitness to practice is unquestionably destroyed . . . We cannot condone such conduct because it destroys public confidence in the legal profession. An attorney who [has] such disrespect for the law has forfeited his privilege to be numbered as an attorney and is not competent to represent members of the public or to appear before courts.").

In conclusion, I find the Director has shown, by clear and convincing evidence, that Respondent has engaged in conduct that adversely reflects on his fitness to practice before the PTO, including, but not limited to, his conviction on four criminal charges involving breach of trust, dishonesty and/or moral turpitude.[25]

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[25] Furthermore, as indicated above, Mr. Reynolds' arrest in 1996 on a DWI charge resulted in his conviction for violating the terms of an order of probation entered by the U.S. District Court for the Eastern District of Virginia, arising from his 1995 DWI conviction. Tr. 11; D's Ex. 9. Although the Complaint does not allege this conviction as a violation of its Rules, the issue was raised at the hearing (Tr. 8, 90) and it is clear that such a conviction would be a violation of the PTO rules, and perhaps a violation of even more significance than that of the others alleged. "Disobedience of a court order, whether as a legal representative or as a party, demonstrates a lapse of character and a disrespect for the legal system that directly relate to an attorney's fitness to practice law and serve as an officer of the court." *Attorney Griev. Comm'n v. Garland*, 692 A.2d 465, 472 (Md. 1997)(attorney indefinitely suspended for violating court order to report for incarceration, even though DWI conviction overturned on appeal). *See also, In re*

B. Whether Respondent failed to report his knowledge of a violation of a Disciplinary Rule to the Director

Mr. Reynolds has acknowledged that he never reported any of his 1998 convictions to the Director of the PTO. Tr. 34.[26] At the hearing Respondent explained that he did not believe hewas required to report the violations because he believed that none of the convictions reflected on his honesty, trustworthiness, moral turpitude or fitness to practice before the PTO. Tr. 9, 53-55.

However, case law existing prior to Mr. Reynolds' most recent convictions clearly established that convictions on crimes, even misdemeanor crimes of hit and run, eluding and DWI, have been the basis for disciplinary actions against attorneys on the basis that those types of convictions can involve dishonesty, breach of trust and/or moral turpitude and otherwise bring into question an attorney's fitness to practice law. *See e.g., In re Anonymous,* 24 Pa. D. & C. 4th 354 (1994) (fleeing scene of an accident and attempting to conceal one's identity in vehicular homicide reflects adversely on one's honesty, trustworthiness and fitness to practice law); *In re Eddingfield*, 572 N.E. 2d 1293 (Ind. 1991)(discipline imposed on attorney convicted of DWI and resisting law enforcement officer misdemeanors based on conduct adversely affecting fitness as lawyer); *In re Carr*, 46 Cal 3d 1089, 252 Cal. Rptr. 24, 761 P.2d 1011 (1988) (discipline imposed on attorney twice convicted of DWI); and *Attorney Griev. Comm'n v. Garland*, 692 A.2d 465 (Md. 1997)(attorney subject to discipline for DWI even though conviction overturned on appeal). *Cf. State of Oklahoma v. Armstrong*, 791 P.2d 815 (Okla. 1990) (evidentiary hearing required before discipline imposed on attorney convicted of DWI).

Thus, Mr. Reynolds, an attorney, could not have had a good faith basis for believing that his conduct and his resulting convictions on hit and run, eluding and DWI would not constitute violations of PTO Disciplinary Rule 10.23. Therefore, I find, by clear and convincing evidence, that Mr. Reynolds violated 37 C.F.R. §10.24(a) when he failed to report these convictions in a timely manner to the Director.

C. Affirmative Defenses

Mr. Reynolds has raised two affirmative defenses to his liability for the violations of the disciplinary rules. The first is legal disability and the second, *res judicata*/collateral estoppel.

Kelley, 801 P.2d 1126 (Cal. 1990)(noting attorney's second DWI conviction constituted violation of terms of court ordered probation on first DWI conviction evidencing disrespect for the legal system and conduct adversely reflecting on fitness to practice). Thus, Respondent's 1996 conviction for violating the terms of the court ordered probation evidences another instance of conduct evidencing his lack of fitness to practice.

[26] The record suggests that the convictions came to the attention of the Director through his receipt of two 1997 newspaper articles provided by some unknown source. *See*, R's Ex. 1A.

1. Legal Disability

In his Answer filed in this case, Mr. Reynolds raised as an affirmative defense that he "was legally disabled under Virginia statute [sic] at the time of the aforementioned convictions and was not able or required to take further action." No citation to the statute being relied upon was provided. Therefore, further inquiries were made of Mr. Reynolds at the hearing regarding this defense. In response, Mr. Reynolds testified at the hearing to the effect that "there is a statute in Virginia that says a person who is incarcerated is legally disabled during the time of incarceration and you cannot be forced to respond to things in lawsuits or otherwise that are required until he is released from the jail facility." Tr. 85.

Although Mr. Reynolds has never provided a specific citation to the statutory provision he is relying upon for this defense, it appears that he is referring to Va. Code Ann. § 53.1-223 (2000). That provision provides as follows:

> No action or suit on any claim or demand . . . shall be instituted against a prisoner after judgment of conviction and while he is incarcerated, except through his committee.

This case was instituted on December 21, 1999 against Mr. Reynolds personally and directly. Mr. Reynolds was not incarcerated at that time, as he testified that he completed the term of his incarceration on the four 1998 convictions and was released on December 9, 1999. Tr. 83. Thus, this provision on its face would not apply to this case.

Moreover, the Virginia Court of Appeals held in *Ruffin v. Commonwealth*, 393 S.E. 2d 425 (Va. App. 1990) that Section 53.1-223 applies only to actions or claims for payment of an amount due. It does not apply to protect a prisoner's intangible rights, such as the right to drive. *Id.* Thus, it would not bar this action to limit Mr. Reynolds' intangible right to practice law before the PTO, even if he was incarcerated at the time of the issuance of the Complaint.

2. Res Judicata/Collateral Estoppel

In his Answer, Respondent also raised as an affirmative defense that "[t]he allegations of moral turpitude, dishonesty, or breach of trust are barred under the doctrines of res judicata and/or collateral estoppel due to the proceeding before the Court of Appeals for the District of Columbia Proceeding No. 506-97."

The doctrine of *res judicata* bars the same parties from relitigating the same claim or other claims arising from the same transaction. The elements of an affirmative defense under this doctrine are "(1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties or parties in privity with the original parties." BLACK'S LAW DICTIONARY 1312 (7th ed. 1999)(citing Restatement (Second) of Judgments §§ 17, 24 (1982). Similarly, the doctrine of collateral estoppel bars a party from relitigating an issue determined against that party in an earlier action. BLACK'S LAW DICTIONARY 256 (7th ed.1999).

While it is true that an action to discipline Mr. Reynolds was instituted in the District of Columbia before this action was instituted and that action concluded before this case, these doctrines are simply inapplicable here. Although Mr. Reynolds has been a party both to this disciplinary proceeding and to that brought by the District of Columbia Board of Professional Responsibility, the Director of the Patent and Trademark Office has not. Moreover, the issue in the District of Columbia action was whether Mr. Reynolds had, by his conduct, violated the disciplinary rules imposed by the *District of Columbia* on the members of its bar. The issue in this case involves the disciplinary rules imposed by the *United States Patent and Trademark Office* on those individuals who practice before it. Thus, although the basis for disciplinary action in the Complaint and in the District of Columbia Court derive from the same set of facts, the claims and issues before the tribunals are distinct.

In sum, Mr. Reynolds has not proven any affirmative defense to liability for the violations by clear and convincing evidence.

D. Sanctions

The remaining issue in this case is the type of sanction to be imposed. The Director is currently requesting suspension for a period of two years with the further requirement that Respondent demonstrate fitness to practice before the PTO as a condition of reinstatement. D's Brief at 19, 20. Respondent has not offered an alternative sanction he would deem appropriate if found liable. Instead he has argued throughout this proceeding that professional discipline is not warranted because the crimes for which he was convicted do not directly "reflect on [his] ability as a practitioner before the Patent and Trademark Office." Tr. 9, 55, 58.

In responding to an identical argument as that made by Respondent here, *i.e.* that there was no "nexus" between the conduct and the attorney's professional practice, the court in *In re Kelly*, when presented with facts which closely parallel those at issue here, explained -

> This nexus is established in two ways. First, petitioner's most recent conviction [on DWI] was in violation of a court order directed specifically at petitioner following her first conviction [on DWI]. Petitioner demonstrated a complete disregard for the conditions of her probation, the law, and the safety of the public. Disobedience of a court order, whether as a legal representative or as a party, demonstrates a lapse of character and a disrespect for the legal system that directly relate to an attorney's fitness to practice law and serve as an officer of the court.
>
> Second, petitioner's two convictions, and the circumstances surrounding them as described above, are indications of a problem of alcohol abuse. The review department concluded that petitioner's contrary evidence [denying alcoholism] was "strongly impeached" by petitioner's two drunk driving convictions occurring within a short period of time. We agree. Her repeated criminal conduct, and the circumstances surrounding it, are indications of alcohol abuse that is adversely affecting petitioner's private life. We cannot and should not sit back and wait

> until petitioner's alcohol abuse problem begins to affect her practice of law. Although it is true that petitioner's misconduct caused no harm to her clients, this fact alone does not insulate her from discipline aimed at ensuring that her potentially harmful misconduct does not recur. Lack of past or present adverse impact on an attorney's practice or clients is an appropriate consideration in assessing the amount of discipline warranted in a given case, but it does not preclude imposition of discipline as a threshold matter.
>
> We have previously ordered discipline based on two convictions of drunk driving, even when no moral turpitude was found. We agree with petitioner that it would be unreasonable to hold attorneys to such a high standard of conduct that every violation of law, however minor, would constitute a ground for professional discipline. But that is not the case here. Petitioner's behavior evidences both a lack of respect for the legal system and an alcohol abuse problem. Both problems, if not checked, may spill over into petitioner's professional practice and adversely affect her representation of clients and her practice of law. Our task in disciplinary cases is preventative, protective and remedial, not punitive. (Emphasis added).

In re Kelly, 801 P. 2d 1126 (Cal. 1990)(citations omitted); *In re Hoare*, 155 F.3d 937, 940 (8th Cir. 1998)(attorney convicted of DWI with resulting homicide disbarred noting "[o]ffending conduct need not involve direct questions of honesty or trustworthiness, nor have an immediate relation to the daily business conducted by an attorney, in order to warrant sanction."); *In re Brown*, 674 So. 2d 243, 246 (La. 1996) ("Conviction of a crime may warrant disbarment, even though the crime was not directly connected with the practice of law."). *See also*, *People v. Senn*, 824 P.2d 822, 824-825 (Colo. 1992)("It is preeminently the business of the criminal justice system to punish violations of the laws. While respondent's misconduct did not directly arise from the practice of law, disciplinary proceedings supplement the work of the criminal courts to maintain respect for the rule of law and protect the public. . . . The respondent's conduct [amounting to a charge of domestic felony menacing with a firearm while intoxicated which was later dismissed] was the result of a very critical failure of judgment and we believe it evinced a contempt for the law which was at odds with the respondent's duty to uphold the law.").

Thus, the fact that Respondent's unlawful conduct did not arise out of, or occur in connection with, his work as a practitioner before the Patent and Trademark Office does not serve as a bar to the imposition of sanctions therefor.

Respondent has also argued that sanctions are not appropriate here because he is afflicted with the disease of alcoholism and as such, should not be penalized for his conduct. Tr. 52-53.

Responding to a similar argument, the Court in *In re Walker*, 254 N.W. 2d 452 (S.D. 1977), stated:

> This court cannot, however, under the guise of support of this policy [that

> alcoholics be afforded treatment rather than being subjected to criminal prosecution] condone misconduct on the part of an attorney on the grounds that he is an alcoholic anymore than it can condone misappropriation of clients' funds on the grounds of financial problems. To hold otherwise would wreak havoc with the process of disciplinary proceedings for not infrequently misconduct by attorneys appears to be attributable at least in part to the factor of alcoholism.

Id. at 455. Thus, the fact that Mr. Reynolds is suffering from the disease of alcoholism also does not prevent the imposition of a sanction affecting his entitlement to practice law before the PTO.

"We must keep in mind that the real and vital issue to be determined in disbarment proceedings is whether or not the accused, from the whole of the evidence as submitted, is a fit and proper person to be permitted to continue in the practice of law." *In re Walker*, 254 N.W. 2d 452 (S.D. 1977) *citing In re Van Rushen*, 160 N.W. 1006 (S.D. 1917). "We start from the premise that protection of the public and bar, not punishment, is the primary purpose of attorney discipline and that we must accordingly consider relevant mitigating and aggravating circumstances." *Coombs v. State Bar of California*, 779 P.2d 298, 306 (Cal. 1989).

As to factors for determining a sanction, the Rules governing this proceeding provide at 37 C.F.R. § 10.154(b) that, "In determining any penalty, the following should normally be considered: (1) The public interest; (2) The seriousness of the violation of the Disciplinary Rule; (3) The deterrent effects deemed necessary; (4) The integrity of the legal profession; and (5) Any extenuating circumstances."

In arriving at an appropriate sanction to be imposed in disciplinary cases, courts have considered a variety of factors in mitigation and aggravation of the violation, including, *inter alia*, motive, number of offenses, history of discipline, existence of emotional or psychological problems, chemical dependency, and demonstrated remorse and, based upon these factors, have imposed sanctions along a wide spectrum. *See e.g., Coombs v. State Bar of California, supra* (attorney disbarred for one DWI conviction and 13 instances of professional misconduct considering DWI caused injury, prior alcohol related driving offenses, inconsistent cooperation with investigation, no prior history of discipline, misconduct did not involve trust funds, possession of excellent legal skills, personal circumstances, community involvement and alleged rehabilitation); *In re Carr*, 761 P.2d 1011 (Cal. 1988)(attorney twice convicted of DWI given 2 year suspension, all but 6 months of execution stayed, with 5 years of probation, reinstatement conditioned upon satisfactory proof of rehabilitation, fitness to practice, and passing of professional responsibility examination); *People v. Rosenberg*, 911 P.2d 642 (Colo. 1996)(considering two DWI convictions and other alcohol related traffic offenses, prior history of discipline, 2 years of abstinence, attorney given public censure with conditions including continued Antibuse therapy and random urine testing for three years); *People v. Myers*, 969 P.2d 701 (Colo. 1998)(attorney convicted of DWI with prior history of discipline, who failed to appear in court pursuant to order, suspended for 1 year and a day); *People v. Hughes*, 966 P.2d 1055 (Colo. 1998)(attorney convicted thrice of DWI and arrested for driving under suspended license suspended for 3 years, reinstatement conditioned on pending criminal matters and alcohol abuse

being under control); *Florida Bar v. Milin*, 517 So. 2d 20 (Fla. 1987)(attorney convicted of DWI and professional errors given 90 day suspension and 1 year probation with continuing psychological counseling); *In re Eddingfield*, 572 N.E.2d 1293 (Ind.1991) (considering substance problem, assumption of responsibility for actions, completion of alcohol abuse program, service in schools on substance abuse, and sobriety without relapse for 2 years, attorney convicted of DWI and resisting a law enforcement officer suspended for 30 days); *In re Oliver*, 493 N.E.2d 1237 (Ind. 1986)(considering lack of history of alcohol abuse, first offense, and good reputation in the community, attorney charged with DWI involving 1 car accident publically reprimanded); *In re Jones*, 464 N.E.2d 1281 (Ind. 1984)(attorney convicted of DWI, where facts evidence his possession of illegal drugs at time, given 3 year suspension, noting the attorney's young age and inexperience in mitigation and in aggravation that others were endangered); *Attorney Griev. Comm'n v. Garland*, 692 A.2d 465 (Md. 1997)(attorney whose DWI conviction overturned, but who failed to report in interim to treatment facility, indefinitely suspended, noting that this was the third DWI conviction, he has a serious alcohol problem and lack of respect for legal system, which if not addressed may injure his professional practice and the public); *In re Lewelling*, 417 P.2d 1019 (Or. 1966)(alcoholic attorney neglectful of client matters given 2 year suspension, stayed, pending 5 years of probation under terms of no alcohol use, considering no client suffered financial loss, integrity, honesty and respect by the legal bar and bench, and that he has ceased drinking and pledged not to drink in the future); *In re Anonymous*, 24 Pa. D. & C. 4th 354 (1994)(considering shock of incident, remorse, lack of prior discipline, attorney convicted of felony hit and run resulting in double homicide, who attempted to conceal his involvement, given 4 year suspension); *In re Walker*, 254 N.W. 2d 452 (S.D.1977) (attorney convicted of DWI, who failed to file tax return and was the subject of 6 client complaints, given 2 year suspension, stayed, upon condition that attorney refrain from alcohol use and not commit any further violations, noting mitigating evidence of bonafide commitment to treatment with 2½ years of sobriety).

There are a number of mitigating and aggravating factors in play in this case.

In aggravation, it is clear that Respondent had a dishonest and selfish motive in committing the acts of hit and run, eluding, and driving while intoxicated. The hit and run and eluding convictions, committed within moments of each other, represent two separate attempts on the part of Respondent to avoid civil and criminal liability for his own wrongful actions. The two DWI convictions, coming in consecutive years, and *after four prior similar convictions*, represent what can only be described as an extremely reckless disregard for his safety and property and that of others. *In re Jones*, 464 N.E. 2d 1281, 1282 (Ind. 1984) ("it is readily apparent to this Court that the operation of an automobile while intoxicated endangers the physical well-being of every occupant of the highway; Respondent chose to ignore such danger. In short, Respondent placed his own wants, desires and pleasures above the law and his duties owed to his fellow man."). Respondent has caused property damage and personal injury to others by his unlawful conduct. Over time, he has a demonstrated pattern of alcohol related misconduct in that, to his discredit, he has been convicted of *eight* misdemeanors in 14 years. Mr. Reynolds violated a court order regarding his probation. He drove without automobile insurance or complying with the Virginia uninsured motorist fund. He has exhibited a tendency, as seen in

regard to the1996 conviction, of initially denying his intoxication only to later recant his denial and admit guilt. His testimony in this case and at prior hearings has been fraught with rationalizations, inconsistencies, and perversions. Mr. Reynolds himself characterizes his conduct "reprehensible." Tr. 9. Given his record, no one could argue with the accuracy of that conclusion.

In mitigation. I am impressed by the fact that, despite his long standing alcoholism. in some twenty years of practicing law, Respondent has never been sued for malpractice nor does he have any prior history of having any complaints filed against him nor discipline imposed upon him. Tr. 51, 73-74. This is clearly a credit to his intelligence and competence as a patent attorney. Mr. Reynolds participated in these proceedings to the best of his ability. No one was seriously hurt in any of the accidents and the property damage incurred by others was relatively minor. He has demonstrated some remorse and taken some responsibility for his actions. No clients or other members of the bar were affected by his conduct. Other sanctions have been imposed upon Respondent by the criminal justice system and state bar associations. Mr. Reynolds was an alcoholic at the time these violations occurred and alcohol was principally responsible for his conduct. He has recognized and admitted that he is an alcoholic, a first step towards recovery. Tr. 80. Respondent credibly testified at the hearing in September 2000, that he had not had a drink in over three years, albeit, admittedly, most of that time he was under confinement where he acknowledged "it's not as hard to stay sober." Tr. 57-58; D's Ex.11, p. 63.

I note that, for the same four violations, the D.C. Court of Appeals has imposed a six month suspension, *nunc pro tunc*, to June 28, 1999 and requiring he show fitness as a condition of reinstatement.[27] *See*, *In re Reynolds*, 763 A.2d 713, 715 (D.C. App. 2000). However, with all due respect to that Court, upon consideration of all of the factors in this case, I find such a penalty too lenient.

First, the crimes at issue here are not insignificant. In addition to DWI, this case also involves convictions for both hit and run and eluding, which are serious crimes, involving specific bad intent, and which warrant a severe penalty. Further, as to DWI, it has been observed that:

> It is not a matter of speculation that driving while under the influence of intoxicating liquors, more commonly referred to in our society [as] 'drunken driving,' is one of the most serious problems in our society today that accounts for countless numbers of injuries, deaths, and property damage. The gravity of the problem is common knowledge, to be found in the daily records of police files, court records, and on the pages of our daily newspapers. Though I have no actual numbers before me, statistical research indicates more people suffer loss of life,

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[27] By virtue of its decision, the District of Columbia actually effectively suspended him from practice in the District for a period of 18 months, beginning June 28, 1999 until the D.C. Court of Appeals decision was issued on December 14, 2000.

> limb. and/or property damage from drivers under the influence of alcohol than those who commit purposeful, serious crimes. such as murder. robbery. rape. and the other well known violent acts readily described as involving moral turpitude.

In re Oliver. 493 N.E.2d at 1244 (Pivarnik, J., dissenting).

The case law suggests that the courts often use the extent of injury caused by driving while intoxicated to determine the severity of the sanction to be imposed, reserving the most severe discipline for those instances where the drunk driving has caused serious injury. Although no one was seriously injured in Mr. Reynolds most recent DWI incidents. in light of all the facts of this case. I think a sanction on the higher end of the spectrum is nevertheless warranted. Mr. Reynolds has driven under the influence of alcohol, *a lot of alcohol*, at least six times.[28] It is sheer serendipity that someone has not been killed or seriously injured by virtue of Mr. Reynolds rash of drunk driving incidents. Many other attorneys who have driven under the influence of alcohol have not been so lucky. *See e.g., In re Hoare*, 155 F.3d 937 (8th Cir. 1998)(attorney disbarred after causing death of 17 year old boy by drunk driving where court notes "[a]ctions produce consequences; reckless actions sometimes beget tragic consequences. The consequences of Hoare's reckless actions, though unintended, were in no sense unforeseeable."); *Kentucky Bar Association v. Jones*, 759 S.W.2d 61 (Ky. 1988)(attorney caused the death of two when driving under the influence of alcohol); and *Office of Disciplinary Counsel v. Micaela*, 527 N.E. 2d 299 (Ohio 1988)(attorney fatally injures one and seriously injures two others while driving drunk). To reward Mr. Reynolds for this lucky happenstance, when he has acted with such callous indifference to the possible consequences of his actions, seems to me untenable.

Furthermore, the record shows that *five* instances of being *convicted* of DWI did not stop Mr. Reynolds from driving drunk at least a *sixth* time. As early as 1984, and perhaps even earlier, the court system has repeatedly shown Mr. Reynolds mercy and sent him for treatment of his alcoholism in lieu of a stiff penalty. Even his law partners responded to his alcoholism with compassion, sending him to a residential detoxification facility, in lieu of simply voting him out of the firm. Tr. 74-76. Still, Mr. Reynolds shrugged off all these benevolent efforts and continued to drink to excess and drive. All this shows that Mr. Reynolds is clearly not a man who learns easily from his mistakes or even takes advantage of the charitable chances he has been given. Thus, to forbear from imposing a stiff penalty on Mr. Reynolds for his multiple convictions because no one was fatally injured seems unmerited. A penalty with a serious deterrent effect is necessary in this case.

Finally, considering Mr. Reynolds' extremely long struggle with alcohol, his attendance

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[28] It is observed that in none of the dozens of cases reviewed in connection with this decision did any of the attorneys have a history of *six* DWI convictions, nor in any cases did the attorneys' alcohol levels at the time of arrest reach anything approaching the level of .32%, which was the level Mr. Reynolds allegedly reached on the ALCO breath sensor at the time of his arrest in September 1997.

at numerous treatment programs and his repeated relapses, it is simply too soon to tell whether Respondent has recovered from his addiction or whether recurrence of his misconduct is likely.[29] Tr. 34, 80-81, 85. The record is void of evidence as to what adequate, affirmative measures Respondent is currently undertaking to deal with his alcohol dependency outside of confinement and to protect his clients in the event he starts to practice law again.[30] Tr. 81-82. *See. Coombs v. State Bar of California*, 779 P.2d 298 (Cal. 1989) (reduction in severity of sanctions is not warranted by incomplete or short-term efforts at rehabilitation; only reliable evidence that a longstanding addition is permanently under control or demonstration of a meaningful and sustained period of successful rehabilitation warrant mitigation of recommended discipline, noting 18 months of sobriety insufficient to demonstrate control of addiction); *compare In re Walker*, 254 N.W.2d 452 (S.D. 1977)(evidence of completion of 28 day inpatient program, active participation in alcoholics anonymous, and 2 ½ years of abstention, warrant leniency in sanction). Mr. Reynolds is not being characterized herein as an evil person, and if his chronic alcohol abuse could be arrested on an on-going, sustained basis, he could be restored to a contributing and worthy member of the PTO bar. At this time, however, he is not fit to practice patent and trademark law. As Mr. Reynolds acknowledged at the hearing, when he last practiced patent law he was doing so as a solo practitioner, with no supervision, and had been such since 1996. Tr. 60-61, 66. He admits timeliness is "very much" a factor in patent work, for example, failing to respond timely to official actions from the Patent Office can result in a case going "abandoned." Tr. 64. Respondent has also acknowledged that "absolute precision" is also crucial in patent work and that patent work is "detailed." Tr. 63, 65. While he has been able to avoid having his alcoholism affect his practice in the past, that luck cannot continue indefinitely for a man who admitted he started to drink in the morning, and drank throughout day, drinking "easily a quart of liquor and a couple of six packs a day [and] [t]hat was not even a hard day." Tr. 82. The public and the patent and trademark bar is entitled to protection from the practice of patent and trademark law by a person with such a recent and severe history of alcohol abuse and related extensive criminal history as that of Respondent.[31]

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[29] In *In re Walker*, 254 N.W.2d 452 (S.D. 1977), the Court noted that "[a]lcoholism is now widely recognized as being a disease and as such is susceptible to treatment." However, the Court had been presented with expert testimony at that trial to the effect that after successfully completing one treatment program 48% of patients relapse, but half of those patients attend subsequent treatment and then about 75% maintain continued abstinence. After successfully completing a 28 day inpatient program, participating in alcoholics anonymous, and maintaining sobriety for 2 ½ years, the expert witnesses gave the attorney in that case "a better than 80% chance of continued abstinence." *Id* at. 455-56.

[30] Mr. Reynolds has testified that his relapses have been triggered by, among other things, a reduction in his attendance in alcoholics anonymous meetings due to business commitments. D's Ex. 11, p.60-61.

[31] It must be noted that based upon the decision of the D.C. Court of Appeals in *In re Reynolds*, 763 A.2d 713 (D.C. App. 2000), since December, 2000, Mr. Reynolds has been

ORDER

After careful and deliberate consideration of the above facts and conclusions as well as the factors identified in 37 C.F.R. § 10.154(b), it is concluded that a two year suspension with the additional requirement that Respondent prove fitness prior to reinstatement, is appropriate.

THEREFORE, IT IS HEREBY ORDERED that Respondent **David Duncan Reynolds,** PTO Registration No. 29,273, is hereby **SUSPENDED** for two years with the **FURTHER REQUIREMENT** that Respondent demonstrate fitness to practice before the Patent and Trademark Office as a condition of reinstatement.

The Respondent's attention is directed to 37 C.F.R.§ 10.158 regarding responsibilities in the case of suspension or exclusion, and 37 C.F.R. § 10.160 concerning petitions for reinstatement.

The facts and circumstances of this proceeding shall be fully published in the Patent and Trademark Office's official publication.

Susan L. Biro
Chief Administrative Law Judge

Date: April 4, 2001
Washington, D.C.

Pursuant to 37 C.F.R. § 10.155, any appeal by the Respondent from this Initial Decision, issued pursuant to 35 U.S.C. § 32 and 37 C.F.R. § 10.154, must be filed in duplicate with the Director, Office of Enrollment and Discipline, U.S. Patent and Trademark Office, P.O. Box 16116, Arlington, Va. 22215, within 30 days of the date of this Decision. Such appeal must include exception to the Administrative Law Judge's Decision. Failure to file such an appeal in accordance with § 10.155, above, will be deemed to be both an acceptance by the Respondent of the Initial Decision and that party's waiver of rights to further administrative and judicial review.

In the Matter of Harry I. Moatz v. David Duncan Reynolds, Respondent
Proceeding No. D99-12

CERTIFICATE OF SERVICE

I hereby certify that a true copy of **Initial Decision**, dated April 4, 2001 was sent this day in the following manner to the addressees listed below:

Certified Mail Return Receipt Requested.

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Dated: April 4, 2001