

# FOREIGN CRIMINAL JUDGMENTS, ISSUE PRECLUSION, AND ATTORNEY DISCIPLINE: THE D.C. COURT OF APPEALS' SKEPTICISM OF FOREIGN CRIMINAL COURT OUTCOMES

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## I. INTRODUCTION

The case of *In re Wilde*<sup>1</sup> centered on professional disciplinary proceedings against an American attorney, Jinhee Kim Wilde, who was barred in the District of Columbia and allegedly<sup>2</sup> stole \$1,100 U.S. dollars from a fellow passenger on a flight from the United States to the Republic of Korea (South Korea).<sup>3</sup> Wilde was convicted of theft in a district court in South Korea.<sup>4</sup> In 2010, the D.C. Office of Bar Counsel (Bar Counsel) began formal disciplinary proceedings against Wilde.<sup>5</sup> However, the Board on Professional Responsibility (Board) automatically precluded the issue of the South Korean criminal conviction, giving it the same treatment as a criminal judgment in a U.S. court.<sup>6</sup> Wilde argued that foreign criminal judgments were outside the scope of the rule that imposed discipline on attorneys convicted of crimes.<sup>7</sup> On appeal, the D.C. Court of Appeals reached a middle ground, holding that the foreign criminal judgments could not be

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1. 68 A.3d 749 (D.C. 2013).

2. The word “allegedly” appears throughout the article to avoid opining on Wilde’s purported guilt. Despite the conviction of theft in South Korea, Wilde has repeatedly disputed the conviction, the translation of the judgment, and the fairness of the South Korean proceedings, and, as such, no discipline has been imposed. Report and Recommendation of the Board of Professional Responsibility at 10–11, *In the Matter of Wilde*, 68 A.3d 749 (D.C. 2013) (No. 244-09), available at [http://www.dcbar.org/discipline/bpr\\_report/JinheeKimWilde24409.pdf](http://www.dcbar.org/discipline/bpr_report/JinheeKimWilde24409.pdf) [hereinafter Board Report]. In fact, in separate disciplinary proceedings in Maryland, Wilde was cleared of any misconduct. *Id.* at 3–4. Furthermore, in the D.C. proceedings, the Board was persuaded enough to comment that the proceedings and translation were “suspect.” *Id.* at 2. Moreover, the actual guilt of Wilde is not pertinent for the purposes of this paper.

3. Board Report, *supra* note 2, at 1.

4. *In re Wilde*, 68 A.3d at 751. Wilde disputes the translation of the conviction records proffered by Bar Counsel because it characterizes the South Korean charge as “theft.” Board Report, *supra* note 2, at 2.

5. 68 A.3d at 751.

6. *Id.*

7. *Id.* at 755–56.

*automatically* precluded.<sup>8</sup> However, the conviction could be precluded provided that the Bar Counsel shows it would be fair.<sup>9</sup>

This paper analyzes the court's decision in *In re Wilde* as part of the broader question of how states may discipline attorneys convicted of crimes abroad. Part I briefly introduces the problems this question confronts. Part II introduces the reader to bar disciplinary proceedings in general, using D.C. as a model. Part III analyzes the court's decision in *In re Wilde* to provide a baseline response to the question presented. Part IV begins to address the tools bar counsels have to prosecute attorneys for foreign criminal convictions—specifically the use of issue preclusion and the fairness of precluding the issue of Wilde's South Korean conviction. Part V analyzes the tools available to bar counsels aside from issue preclusion, namely, the admissibility of the foreign conviction and related documents in disciplinary proceedings.

Ultimately, this paper concludes that, under the current regime of offensive issue preclusion and the recognition of foreign judgments, issue preclusion can be a powerful tool in a bar counsel's arsenal in disciplinary proceedings against attorneys convicted of crimes in foreign courts. However, due to often-limited resources and difficulties procuring evidence of the fairness of foreign proceedings, bar counsels may opt for an alternative. Instead, it may be easier for bar counsels to bring original proceedings and use the foreign conviction as evidence of the underlying facts of the alleged wrongful conduct. This is a better alternative because many state bar disciplinary proceedings have less stringent rules of evidence compared to criminal or civil proceedings.<sup>10</sup> Furthermore, even in states in which the disciplinary proceedings are governed by the traditional rules of evidence, foreign criminal convictions and related documents may fit comfortably into hearsay exceptions.<sup>11</sup> However, bar counsels still face the challenge of obtaining such documents necessary to prosecute the case. But while bar counsels face challenges, *In re Wilde* is not a license for attorneys to commit crimes abroad.<sup>12</sup> Moreover, while globalization has impacted, and will continue to impact, the regulation of the legal profession,<sup>13</sup> an increase in criminal convictions in foreign courts can be dealt with quickly and efficiently under existing regulatory frameworks when the issues arise.

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8. *Id.* at 751.

9. *Id.* at 765.

10. Nancy J. Moore, *Mens Rea Standards in Lawyer Disciplinary Codes*, 23 GEO. J. LEGAL ETHICS 1, 12–13 (2010).

11. See *infra* notes 268–78 and accompanying text for an explanation of alternatives available to bar counsels other than issue preclusion.

12. See Rocky Boussias, *D.C. Circuit Ethics Decision is Tantamount to a License to Steal*, PACE INT'L L. REV. BLOG (July 7, 2013), <http://pilr.blogs.law.pace.edu/2013/07/07/d-c-circuit-ethics-decision-tantamount-to-license-to-steal/> (explaining that the decision was less dramatic than the headline would lead one to believe because there are still other means to discipline Wilde).

13. See *In re Wilde*, 68 A.3d at 754 (stating that because lawyers more frequently deal with and practice in foreign countries, the issue of foreign convictions will affect the legal profession).

## II. DOMESTIC ISSUE PRECLUSION IN DISCIPLINARY PROCEEDINGS

The legal profession prides itself on its ability to self-regulate. State courts, charged with regulating its officers, are vested with power to decide who is fit to enter the profession as well as who is fit to continue practicing law.<sup>14</sup> State attorney disciplinary proceedings decide questions of continued fitness to practice law.<sup>15</sup> State courts often follow rules proffered by their respective bar associations and the American Bar Association (ABA).<sup>16</sup> Despite some minor variations, all state-run attorney discipline proceedings operate in a similar fashion. The bar investigates a complaint lodged against an attorney, and if needed, they bring formal charges and prosecute the attorney in front of an impartial tribunal.<sup>17</sup>

A criminal judgment against an attorney is normally grounds for discipline.<sup>18</sup> All jurisdictions treat criminal judgments from domestic courts as proof of the wrongful conduct underlying the judgment.<sup>19</sup> The attorney is automatically estopped from attacking and re-litigating those underlying facts under the doctrine of issue preclusion.<sup>20</sup>

State law governs issue preclusion and has the same essential elements in all states: when an issue in litigation is “actually litigated” in a “full and fair” proceeding that was necessary to a “valid and final judgment on the merits,” that issue may not be re-litigated in subsequent litigation.<sup>21</sup> It is justified by principles of federalism and the Full Faith and Credit Clause of the United States Constitution.<sup>22</sup> It is designed to promote judicial economy and to definitively end litigation.<sup>23</sup> The judicial economy promoting function of issue preclusion is especially useful in disciplinary proceedings because the state court appointed bodies that handle the proceedings are often woefully underfunded and therefore

14. STEPHEN GILLERS, REGULATION OF THE LEGAL PROFESSION: THE ESSENTIALS 389 (2009); Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209, 210 (2011).

15. Curtis, *supra* note 14, at 210.

16. James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 95–96 (2006). For historical background and explanation, see Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1, 10–17 (2007).

17. See Levin, *supra* note 16, at 17–19 (observing the current general disciplinary proceedings of lawyers).

18. MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (2013) (“It is professional misconduct for a lawyer to: commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.”).

19. James Christopher Plaster, *When Lawyers Go Bad: The Evidence Considered in the Disciplinary Proceedings of Convicted Attorneys*, 25 J. LEGAL PROF. 219, 219 (2001).

20. *Id.*

21. Cent. Hudson Gas & Elec. Corp. v. Empresa Naviera Santa S.A., 56 F.3d 359, 368 (2d Cir. 1995).

22. U.S. CONST. art. IV, § 1; Full Faith and Credit Act, 28 U.S.C. § 1738 (1948); see *Alfadda v. Fenn*, 966 F. Supp. 1317, 1329 (S.D.N.Y. 1997) (observing that federalism and the Full Faith and Credit Clause require courts to acknowledge and give deference to judgments from other state or federal courts).

23. *Alfadda*, 966 F. Supp. at 1328.

need to conserve resources.<sup>24</sup>

Issue preclusion for criminal judgments in attorney disciplinary proceedings differs from common law issue preclusion in that it is automatic upon receipt of the judgment—the traditional elements are presumed, and there is no chance to attack the use of issue preclusion. Most states follow the ABA Model Rules for Lawyer Disciplinary Enforcement, which state that when an attorney is convicted of a “serious crime” in any state, the judgment is conclusive.<sup>25</sup> Upon receipt of a judgment, the issue, then, is whether the crime the subject-attorney was convicted of was a “serious crime.”<sup>26</sup> This is often easily resolved, either on its face when the crime is a felony, or by precedent or common law when a lesser crime “reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer.”<sup>27</sup> Once resolved, this leaves punishment as the final remaining issue to be litigated in the disciplinary proceedings. Some jurisdictions, like New York and D.C., go further by precluding the issue of punishment and automatically disbarring an attorney in certain circumstances upon receipt of the judgment.<sup>28</sup>

Under common law and independent of disciplinary proceedings, courts concerned with fairness to defendants will add extra layers of scrutiny and treat issue preclusion differently depending on the context of the suit. The treatment is different depending on whether the proceeding is criminal or civil and whether the doctrine is being used offensively—by the party bringing the action—or defensively—against the party bringing the action. In the civil context, offensive issue preclusion may only be used provided that it is fair to the defendant.<sup>29</sup> In the criminal context, where stakes are even higher, courts are split as to whether the government may ever offensively use issue preclusion against a defendant.<sup>30</sup> On a visceral level, this makes sense; due process is concerned with protecting the rights of defendants. Offensively precluding issues from litigation denies defendants the right to defend themselves, and therefore, the added level of scrutiny is warranted.

The ability to automatically and offensively preclude an issue in attorney discipline proceedings exceeds the common law use of issue preclusion because attorneys are not afforded the opportunity to attack the use of issue preclusion itself. Despite the stark departure from common law, it is fair for two main

24. GILLERS, *supra* note 14, at 390; Moore, *supra* note 10, at 6–7.

25. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 19(e) (2002).

26. *Id.*

27. *Id.* R. 19(c).

28. Automatic disbarment occurs in New York for any felony conviction and in D.C. for any conviction of a crime involving “moral turpitude.” Plaster, *supra* note 19, at 225–26; Alexandra Sorota & Shelley Lambert, *Driving on the Wrong Side of the Road: How Lawyers are Sanctioned for Vehicular Homicide in New York and the District of Columbia*, 15 GEO. J. LEGAL ETHICS 865, 867–68 (2002); *see also* Rhonda Richardson Caviedes, *Remnants of an Attorney Disciplinary Sanction: Which Jurisdictions Impose Automatic Disbarment? What Offenses Warrant the Imposition of an Automatic Disciplinary Sanction?*, 26 J. LEGAL PROF. 195, 195 (2001) (explaining and documenting the decline in the number of jurisdictions that automatically disbar attorneys upon a criminal conviction).

29. *Parklane Hosiery Co., v. Shore*, 439 U.S. 322, 332 (1979).

30. Anne Bowen Poulin, *Prosecution Use of Estoppel and Related Doctrines in Criminal Cases: Promoting Consistency, Tolerating Inconsistency*, 64 RUTGERS L. REV. 409, 419 (2012).

reasons. First, the issues are the same—the conduct that led to the criminal conviction is the same that led to the disciplinary proceedings. Re-litigating those events is unnecessary. This follows from the second reason: we trust domestic courts and the protections afforded by due process to reach a fair result. Against this backdrop, the preclusion of criminal judgments in attorney discipline proceedings reflects a value judgment regarding the integrity of the American criminal justice system. Attorney disciplinary proceedings are expressing their confidence in the fairness of criminal court outcomes by automatically precluding domestic criminal convictions.

*In re Wilde* asks whether the justification exists to offensively and automatically preclude litigation of *foreign* criminal judgments in the same manner that litigation of a domestic judgment is precluded. Should disciplinary proceedings express similar confidence in foreign criminal court outcomes? If not, how can bar counsels adequately prepare evidence and prosecute an attorney convicted abroad using their limited resources?

The regulation of the legal profession—like the regulation of almost everything else—has struggled to keep pace with the changes brought about by globalization. What was once provincial turned national, and then global. The American legal profession, with its state-based licensing and disciplinary systems, faces particular challenges in the new global landscape. Indeed the ABA is still struggling to reconcile these state-based systems with the practice of law on the national level.<sup>31</sup> States' regulation of the practice of law on the international level is still largely in its infancy.<sup>32</sup> Whether or not the ABA's or a given state's regulatory framework is prepared, technology and capital have begun, and will continue, to flow internationally, creating demand for American legal services abroad. The strong demand for American legal services worldwide<sup>33</sup> is leading to higher numbers of American attorneys practicing abroad in various contexts and roles. One consequence of the increase in American attorneys abroad will be the regulation of American attorneys that run afoul of the criminal laws of the foreign countries in which they reside.

### III. THE D.C. DISCIPLINARY SYSTEM

Unlike most jurisdictions, D.C. has not officially adopted the ABA's Model Rules for Lawyer Disciplinary Enforcement, although many similarities exist.<sup>34</sup>

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31. See generally *Commission on Multijurisdictional Prac.*, ABA, [http://www.americanbar.org/groups/professional\\_responsibility/committees\\_commissions/commission\\_on\\_multijurisdictional\\_practice.html](http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisdictional_practice.html) (last visited Feb. 11, 2015) (offering various reports and documents of the ABA Commission on Multijurisdictional Practice).

32. For example, nineteen states currently have no rules regarding the licensing of foreign legal consultants. *Foreign Legal Consultant Rules*, ABA CENTER FOR PROF. RESP. POL'Y IMPLEMENTATION COMMITTEE (Oct. 28, 2013), [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/foreign\\_legal\\_consultants.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/foreign_legal_consultants.authcheckdam.pdf).

33. Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 880–81 (2010).

34. Sorota & Lambert, *supra* note 28, at 866.

However, like all other jurisdictions, D.C. vests the power to discipline attorneys barred or practicing in the District in its judiciary.<sup>35</sup> The D.C. Court of Appeals promulgated the rules that govern disciplinary proceedings for all members of the D.C. Bar and anyone appearing *pro hac vice* or as a licensed Special Legal Consultant.<sup>36</sup> The legal profession prides itself on its ability to self-regulate. D.C. is no exception, spelling out the meaning of bar membership and the duties imposed on members:

The license to practice law in the District of Columbia is a continuing proclamation by this Court that the holder is fit to be entrusted with professional and judicial matters, and to aid in the administration of justice as an attorney and an officer of the Court. It is the duty of every recipient of that privilege at all times and in all conduct, both professional and personal, to conform to the standards imposed upon members of the Bar as conditions for the privilege to practice law.<sup>37</sup>

An attorney fails to uphold that duty by committing any “[a]cts or omissions . . . which violate the attorney’s oath of office or the rules or code of professional conduct currently in effect in the District of Columbia,” and such may result in discipline.<sup>38</sup> The purpose of disciplinary proceedings is administrative in nature, focusing not on punishing the wrongdoing, but on protecting the public by addressing the fitness of the lawyer to continue serving the public.<sup>39</sup> The general goals of attorney discipline include: “(1) to protect the public; (2) to protect the administration of justice; and (3) to preserve confidence in the legal profession.”<sup>40</sup> However, the purpose and goals are often achieved by imposing a punishment on the offending attorney.<sup>41</sup>

#### ***A. D.C. Bar Rule XI, Section 8: Investigation of a Complaint***

The D.C. Court of Appeals appointed the Board to oversee disciplinary proceedings<sup>42</sup> and all other matters related to the administration of the legal profession in D.C.<sup>43</sup> As part of the regulatory framework concerning attorney discipline, the Board appoints Bar Counsel.<sup>44</sup> The Board entrusts the Bar Counsel with investigatory and prosecutorial duties once it discovers facts of alleged attorney misconduct from “any source whatsoever . . . [that] if true, may warrant

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35. See *id.* at 868 (explaining that the D.C. Court of Appeals is given a recommendation for disciplining the attorney, but ultimately it will make the final decision in the disciplinary process).

36. D.C. BAR R. XI, § 1(a) (2010).

37. *Id.* § 2(a).

38. *Id.* § 2(b).

39. Moore, *supra* note 10, at 14.

40. Sorota & Lambert, *supra* note 28, at 865.

41. See Moore, *supra* note 10, at 14 (explaining that sometimes punishing an attorney, even if he is without fault, can induce other attorneys to make a greater effort to comply with the rules).

42. D.C. BAR R. XI § 4(e)(1).

43. For the rest of the Board’s responsibilities, see *id.* § 4(e)(1)–(10).

44. *Id.* § 4(e)(2).

discipline.”<sup>45</sup> Bar Counsel encourages members of the public to file any complaints they may have against attorneys, even offering downloadable complaint forms in Chinese, Italian, Spanish, Farsi, Korean, and Vietnamese, in addition to English, on Bar Counsel’s website.<sup>46</sup> Bar Counsel then investigates complaints to determine if the conduct alleged violates the District’s Rules of Professional Conduct, also referred to as D.C. Bar Rule XI, Section 8 (Section 8).<sup>47</sup> The attorney under investigation must respond to and assist in the investigation.<sup>48</sup>

After a Section 8 investigation, Bar Counsel must secure the agreement of a designated member of a Hearing Committee referred to as a “contact member” to bring formal charges.<sup>49</sup> If an agreement is secured, Bar Counsel must file a petition to institute formal proceedings with the Executive Attorney.<sup>50</sup> The Executive Attorney, appointed by the Board, acts as legal representative of the Board and, in general, as a conduit between all the various parties and components of the disciplinary process.<sup>51</sup> The Executive Attorney then refers the petition to a Hearing Committee.<sup>52</sup> The Hearing Committee, appointed by the Board, consists of two lawyers and one non-lawyer.<sup>53</sup> The Board appoints one of the lawyer committee members as the committee’s chairperson.<sup>54</sup>

After bringing charges, the Executive Attorney notifies the defendant-attorney about the filed petition<sup>55</sup> and requires the attorney to submit an answer.<sup>56</sup> Failing to answer can result in a default judgment against the attorney.<sup>57</sup> Discovery then follows, with the chairperson of the Hearing Committee serving as judge for all discovery proceedings.<sup>58</sup> Objections to the Chairperson’s rulings are appealable, but the proceedings continue regardless.<sup>59</sup>

The Hearing Committee then conducts a hearing,<sup>60</sup> during which Bar Counsel

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45. *See id.* § 6(a)(2) (providing investigatory power); *see also id.* § 6(a)(4) (providing prosecutorial power); *id.* § 8(a) (“All investigations, whether upon complaint or otherwise, shall be conducted by Bar Counsel.”).

46. D.C. Bar, *File an Attorney Complaint*, DC ATTORNEY DISCIPLINE SYSTEM, <http://www.dcbbar.org/attorney-discipline/for-the-public/file-an-attorney-complaint.cfm> (last visited Feb. 11, 2015).

47. D.C. BAR R. XI § 10(d)–(e).

48. *Id.* § 8(a).

49. *Id.* § 8(b).

50. *Id.* § 8(c).

51. *See generally id.* § 7(a) (explaining the powers and duties of the Executive Attorney).

52. *Id.* § 8(c).

53. D.C. BAR R. XI § 5(a).

54. *Id.*

55. *Id.* § 8(c)–(d).

56. *Id.* § 8(e).

57. *Id.* § 8(f).

58. *Id.* § 8(g).

59. D.C. BAR R. XI § 8(g).

60. *Id.* § 5(c)(1).

must prove the misconduct by clear and convincing evidence.<sup>61</sup> Afterwards, the Hearing Committee submits its findings and recommendations, based on a two-person quorum,<sup>62</sup> to the Board.<sup>63</sup> The Board also conducts a full review of the Committee's findings and recommendations and will similarly prepare its own findings and make recommendations to the court.<sup>64</sup> If Bar Counsel disagrees with the Board's findings, a three-party proceeding occurs. The Executive Attorney argues on behalf of the Board's recommendations and the Bar Counsel and accused attorney argue on behalf of themselves.<sup>65</sup>

***B. D.C. Bar Rule XI, Section 10: Investigation for an Attorney Convicted of a Crime***

When an attorney has been convicted of a crime, the proceedings are similar to a complaint and investigation under Section 8, but abbreviated. Upon receipt of the conviction, the D.C. Court of Appeals must first determine whether the crime constitutes a "serious crime" under D.C. Bar Rule XI, Section 10 (Section 10).<sup>66</sup> The ABA and jurisdictions that have adopted the ABA's Model Rules for Lawyer Disciplinary Enforcement follow the same process.<sup>67</sup> A serious crime in D.C. is defined as "any felony" or

any other crime a necessary element of which . . . 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."<sup>68</sup>

If the court determines that the conduct is not a "serious crime" within the meaning of the rule, Bar Counsel may proceed if the attorney's conduct would be a violation under Section 8.<sup>69</sup> However, even when the crime is not serious, Bar Counsel retains the benefit of precluding the issue of the attorney's conviction.<sup>70</sup> In that case, the proceedings instead focus on whether the actions of the attorney that led to the conviction constitute misconduct.<sup>71</sup>

If a crime is deemed serious, and appeals of the conviction of that crime have been exhausted,<sup>72</sup> the Court of Appeals temporarily suspends the attorney, pending

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61. *In re Wilde*, 68 A.3d 749, 760–61 (2013); Moore, *supra* note 10, at 12–13. In the majority of jurisdictions, the burden of proof is clear and convincing evidence, while a minority applies a preponderance of the evidence standard. *Id.* at 13, 22.

62. D.C. BAR R. XI § 5(b).

63. *Id.* § 5(c)(2).

64. *Id.* § 4(e)(7).

65. *Id.* § 7(a)(11).

66. See D.C. BAR R. XI § 10(b) (outlining the determination of serious crimes).

67. MODEL RULES OF PROF'L CONDUCT R. 19(c).

68. D.C. BAR R. XI § 10(b)(2).

69. *Id.* § 10(d)–(e).

70. D.C. BAR R. XI. § 10(f).

71. *Id.*

72. *Id.* § 10(d).



the outcome of the disciplinary proceedings.<sup>73</sup> Then, Bar Counsel formally brings charges against the attorney and follows the same procedure as a Section 8 violation, except that the sole issue to be decided is punishment.<sup>74</sup> Hence, the facts and circumstances related to the conduct underlying the serious crime are precluded from re-litigation in the disciplinary proceedings.<sup>75</sup>

Bar Counsel may also, under certain circumstances, preclude the issue of punishment or sanctions entirely. The Court of Appeals automatically disbars an attorney convicted of “an offense involving moral turpitude.”<sup>76</sup> Moral turpitude is a term of art that has two distinct meanings. Moral turpitude per se means that the attorney will be automatically disbarred because the crime in question, by statutory definition, involves “[c]onduct contrary to justice, honesty, modesty, or good morals.”<sup>77</sup> Furthermore, a crime involves moral turpitude per se when “the actions of the attorney [are] motivated by personal gain or manifest intentional dishonesty for the purpose of personal gain.”<sup>78</sup> Therefore, theft is generally considered a crime of moral turpitude. Note that a misdemeanor cannot constitute a crime involving moral turpitude per se.<sup>79</sup>

The second meaning of moral turpitude, moral turpitude on the facts, involves an appraisal of the facts and circumstances surrounding the misconduct.<sup>80</sup> Thus, if this meaning applies, the attorney is not precluded from litigating the issue of moral turpitude and sanctions.<sup>81</sup> Misdemeanors may be considered crimes involving moral turpitude on the facts.<sup>82</sup>

After proceedings pass through the contact member, the Hearing Committee, and the Board, the D.C. Court of Appeals will “adopt the Board’s

73. *Id.* § 10(c).

74. *Id.* § 10(d).

75. *See id.* § 10(f) (“A certified copy of the court record or docket entry . . . shall be conclusive evidence of the commission of that crime in any disciplinary proceeding based thereon.”).

76. D.C. CODE § 11-2503(a) (1994) (“When a member of the bar of the District of Columbia Court of Appeals is convicted of an offense involving moral turpitude . . . the court shall . . . suspend the member of the bar from practice . . . [strike] from the roll of the members of the bar and such person shall thereafter cease to be a member.”).

77. *In re Allen*, 27 A.3d 1178, 1184 (D.C. 2011) (quoting BLACK’S LAW DICTIONARY 1160 (4th ed. 1951)). Note, however, this definition has never been precise. *Id.* at 1183–84 (quoting BOUVIER’S LAW DICTIONARY 2247 (Rawle’s Third Revision)) (“An act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man.”); *see also In re Johnson*, 48 A.3d 170, 172–74 (D.C. 2012) (using definitions from BLACK, *supra*, and BOUVIER, *supra*); *In re Rehberger*, 891 A.2d 249, 251–53, (D.C. 2006) (incorporating definitions from BLACK, *supra*, and BOUVIER, *supra*).

78. *Id.* at 1184.

79. *In re Allen*, 27 A.3d at 1183 (citing *In re McBride*, 602 A.2d 626, 629 (D.C. 1992) (en banc)).

80. *Id.* (citing *In re Sims*, 844 A.2d 353, 365–66, *vacated*, 861 A.2d 1 (D.C. 2004)).

81. *Id.* at 1184.

82. *Id.* at 1183.

recommendations regarding sanction [for serious crimes or non-serious crimes] ‘unless to do so would foster a tendency toward inconsistent dispositions for comparable conduct or would otherwise be unwarranted.’”<sup>83</sup> Consistency is measured “between cases by comparing the gravity and frequency of the misconduct, any prior discipline, and any mitigating factors such as cooperation with Bar Counsel, remorse, illness, or stress.”<sup>84</sup>

In sum, two tracks exist for attorney misconduct. Section 8 governs when there is a complaint and a subsequent investigation. Section 10 governs when Bar Counsel is notified that the attorney has been convicted of a crime. Under Section 10 procedures, an attorney may be barred from litigating two issues: the underlying facts surrounding a conviction of a crime and the proper sanction for crimes involving moral turpitude per se. Thus, in D.C. disciplinary proceedings, the question of the preclusive effect of a conviction for theft in a foreign court, like *In re Wilde*, has two distinct aspects: 1) can the foreign conviction constitute a “conviction” and automatically preclude the issue of facts underlying the conviction and; 2) can the conviction by a foreign court constitute a crime involving moral turpitude per se, leading to automatic disbarment?

#### IV. IN RE WILDE

On November 2, 2010, the D.C. Court of Appeals received a letter from Bar Counsel stating that a judgment had been entered against an attorney in South Korea and that it planned to initiate disciplinary proceedings.<sup>85</sup> Pursuant to Section 10, Bar Counsel sought a temporary suspension, arguing that theft is a “serious crime.”<sup>86</sup> The Court of Appeals granted the temporary suspension and ordered formal proceedings to determine the nature of the discipline to be imposed.<sup>87</sup> Bar Counsel recommended that the Board request that the D.C. Court of Appeals disbar the attorney for committing a crime of moral turpitude per se.<sup>88</sup> Prior to the moral turpitude determination, under its own motion, the Board requested that the Court of Appeals set aside its temporary suspension order<sup>89</sup> and determine whether a foreign conviction was a conviction “in a court outside the District of Columbia or in any federal court” within the meaning of Section 10(a)—the rule that governs Section 10’s jurisdiction.<sup>90</sup>

In regard to that motion, Bar Counsel recommended that the South Korean judgment be considered a conviction within the meaning of the rule because a

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83. *In re Steele*, 630 A.2d 196, 199 (D.C. 1993) (quoting D.C. BAR R. XI § 9(g)(1992)).

84. *Id.* at 199 (citing, among others, *In re Kennedy*, 605 A.2d 600, 604 (D.C. 1992) (per curiam)).

85. *In re Wilde*, 68 A.3d 749, 751 (2013).

86. D.C. BAR R. XI § 10(b)–(c).

87. *In re Wilde*, 68 A.3d at 752.

88. *See id.* (“Bar Counsel recommended to the Board that respondent be disbarred pursuant to § 11–2503(a) on the basis of her conviction in South Korea.”).

89. *Id.* at 753. Wilde also submitted a motion to reconsider, which was pending when the Board made its own motion. Board Report, *supra* note 2, at 2.

90. *In re Wilde*, 68 A.3d at 751.

foreign court is by definition “a court outside the District of Columbia.”<sup>91</sup> Bar Counsel further contended that the policy behind disciplinary proceedings would be frustrated if attorneys were given a “free pass” to commit crimes in foreign countries.<sup>92</sup> Bar Counsel was also concerned that, although this was an issue of first impression, given the globalizing nature of the legal profession, the issue would become increasingly more common in the future.<sup>93</sup> Bar Counsel argued that the rules of discovery, particularly subpoena power, were inadequate to enable Bar Counsel to fulfill its role as investigator if it were forced to litigate the underlying facts of the foreign conviction.<sup>94</sup>

The Board recommended that the Court of Appeals find that a foreign conviction was not within the meaning of the rule, arguing that the rule implicitly assumes “a court outside the District of Columbia” to mean that of another U.S. state, rather than that of a foreign country.<sup>95</sup> The Board reasoned that, under Bar Counsel’s interpretation, the inclusion of “or any federal court” in the rule would be superfluous because federal courts would already be included in a broad reading of the phrase “a court outside the District of Columbia.”<sup>96</sup> The Board also voiced concerns about the fundamental fairness of using foreign convictions, adjudicated with different laws and procedures, to form the basis of an issue to be precluded.<sup>97</sup> Additionally the Board noted that Bar Counsel had considerably more subpoena power than it argued and that “treaties and executive agreements may facilitate the taking of testimony of U.S. citizens abroad and that liberal standards of admissibility of evidence can make pursuit of an original action more feasible.”<sup>98</sup>

Therefore, the Board recommended the Court of Appeals find that the conviction in South Korea was outside the scope of Section 10(a) and neither a serious crime nor a crime involving moral turpitude per se.<sup>99</sup> The Board also recommended against evaluating claims of issue preclusion on a case-by-case basis under Section 10, because the language of Section 10 did not appear to allow that and because of inherent difficulties in comparing foreign criminal proceedings.<sup>100</sup> However, the Board did note that Bar Counsel was free to pursue the matter under Section 8—the section concerning non-serious crimes and other violations that involve issue preclusion.<sup>101</sup>

Wilde further argued that the court should not give preclusive effect to the

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91. Board Report, *supra* note 2, at 6.

92. *In re Wilde*, 68 A.3d at 754 (referencing Bar Counsel’s cite to D.C. BAR R. XI § 2(a)).

93. *Id.*

94. *See id.* at 755 (noting the difficulty in investigating foreign crimes, specifically given factors like the twenty-five mile limit on subpoenas and limits on depositions).

95. Board Report, *supra* note 2, at 6.

96. *Id.*

97. *See id.* at 7 (noting differences in criminal proceedings in other countries, such as Singapore, that would make it unfair to apply foreign decisions in the United States).

98. *In re Wilde*, 68 A.3d at 755.

99. Board Report, *supra* note 2, at 10.

100. *Id.* at 7–8.

101. *Id.* at 11.

conviction because of perceived shortcomings in the South Korean criminal procedure and due process.<sup>102</sup> Wilde also took issue with the translation of the conviction record itself, arguing that she was not convicted of “theft.”<sup>103</sup> Rather, she argued it was a lesser offense that would not constitute a Section 10 serious crime or a crime of moral turpitude per se, thus barring the conviction from being precluded.<sup>104</sup>

The Court of Appeals adopted the Board’s recommendation that a court could not automatically preclude a foreign conviction for Section 10 serious crime or moral turpitude per se purposes.<sup>105</sup> Instead, it decided that the court could preclude foreign convictions on a case-by-case basis under Section 8.<sup>106</sup> Thus, the court dismissed Bar Counsel’s disciplinary action without prejudice.<sup>107</sup> By not answering whether South Korean criminal procedure affords litigants proper protection of due process, the court left that issue for another day, affording Bar Counsel another opportunity to bring formal charges against the attorney.

The Court of Appeals adopted the Board’s recommended reading of Section 10’s jurisdictional rule, finding that “a court outside the District of Columbia” was only meant to include domestic courts.<sup>108</sup> The court also noted the specificity of Section 10 as a whole and that nowhere in Rule XI—the rule covering the entirety of disciplinary proceedings—was there any mention of convictions from foreign courts.<sup>109</sup>

The Court of Appeals further relied on the 2005 United States Supreme Court case *Small v. United States*<sup>110</sup> as precedent for excluding foreign convictions.<sup>111</sup> In *Small*, the defendant was charged with unlawful possession of a firearm by a person who had been “convicted in any court” of a crime with a punishment exceeding one year.<sup>112</sup> A Japanese court previously convicted the defendant of a crime with a punishment exceeding one year.<sup>113</sup> The Supreme Court ruled that there was a “presumption that Congress ordinarily intends its statutes to have domestic, not extraterritorial, application[.]”<sup>114</sup> The Court of Appeals reasoned that because Congress enacted D.C. Code § 11-2503—the statutory basis for disbarment in response to convictions for crimes involving moral turpitude—and “the primary reason for the adoption of [Section 10] was to implement D.C. Code § 11-2503,”

102. *In re Wilde*, 68 A.3d at 755–56.

103. *See* Board Report, *supra* note 2, at 2–3.

104. *See id.* (discussing the debate over a misdemeanor versus felony theft charge and its effect on a determination of moral turpitude per se).

105. *In re Wilde*, 68 A.3d at 751; Board Report, *supra* note 2, at 2–3.

106. *Id.*

107. *In re Wilde*, 68 A.3d at 766.

108. *See id.* at 757 (“We do not agree with Bar Counsel that . . . the ‘broad language’ of § 10 should be read to include convictions of crimes in the courts of foreign nations.”).

109. *Id.* at 758.

110. 544 U.S. 385 (2005).

111. *In re Wilde*, 68 A.3d at 756.

112. *Small*, 544 U.S. at 387.

113. *Id.*

114. *Id.* at 388–89.

the presumption of domestic application must also apply to Section 10.<sup>115</sup>

The D.C. Court of Appeals then concluded that under a Section 8 proceeding, the foreign judgment could still be given preclusive effect on a case-by-case basis. This was justified by recognizing that the “District of Columbia generally permits the use of offensive issue preclusion” when doing so would be fair, on a case-by-case basis.<sup>116</sup> Further, it noted that in disciplinary proceedings specifically, offensive issue preclusion is commonly employed<sup>117</sup> to preclude arguments regarding punishment for crimes of per se moral turpitude,<sup>118</sup> the facts related to serious crimes<sup>119</sup> and non-serious crimes,<sup>120</sup> as well as judgments in disciplinary proceedings from other jurisdictions to enforce reciprocal punishment.<sup>121</sup> Other jurisdictions’ use of issue preclusion, in general, in bar disciplinary proceedings also persuaded the court.<sup>122</sup>

Like issue preclusion, the court recognized that under principles of comity, courts in the United States and D.C. recognize foreign judgments on a case-by-case basis.<sup>123</sup> The court relied on precedent to conclude that offensive use of issue preclusion could be applied to foreign judgments,<sup>124</sup> including criminal convictions.<sup>125</sup> Further, the court found persuasive precedent from Minnesota for giving offensive preclusive effect to foreign criminal convictions in disciplinary proceedings. In what is apparently the only other similar case published,<sup>126</sup> an attorney’s criminal conviction in Canada was precluded in Minnesota Bar disciplinary proceedings in 1978. In that case, according to the *In re Wilde* court:

[t]he Minnesota court was satisfied that [the attorney’s] trial in Canada before a jury of twelve was fundamentally fair by American standards. It noted the common ancestry of the Canadian and American systems of justice, and that such matters as burden of proof, rules of evidence, and manner of conducting the trial were all identical or substantially similar

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115. *In re Wilde*, 68 A.3d at 757.

116. *Id.* at 759 (citing *K.H., Sr. v. R.H.*, 935 A.2d 328, 333 (D.C. 2007); *Ali Baba Co. v. Wilco, Inc.*, 482 A.2d 418, 423 (D.C. 1984)).

117. *See id.* at 761 (“It appears that the majority of other jurisdictions apply offensive collateral estoppel, generally, in bar discipline cases.”).

118. D.C. CODE § 11-2503(a) (1994).

119. D.C. BAR R. XI § 10(c) (2010).

120. *Id.* § 10(f).

121. *Id.* § 11(c).

122. *See In re Wilde*, 68 A.3d at 761–62 (providing a wide-overview of courts applying offensive collateral estoppel in bar discipline cases).

123. *See id.* at 762–63 (discussing broadly the recognition of foreign judgments in U.S. courts).

124. *Id.* at 764 (citing *Bata v. Bata*, 163 A.2d 493, 507 (Del. 1960), *cert. denied*, 366 U.S. 964 (1961); *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 905 F. Supp. 169, 178–79 (S.D.N.Y. 1995); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 481, comment (b) (1987)).

125. *Id.* at 764 (citing *Hurst v. Socialist People’s Libyan Arab Jamahiriya*, 474 F. Supp. 2d 19, 32–33 (D.D.C. 2007)).

126. *Id.* at 765 (*In re Scallen*, 269 N.W.2d 834, 840 (Minn. 1978)).

to American counterparts.<sup>127</sup>

Thus, the court adopted a two-part test for the use of offensive issue preclusion for foreign criminal judgments in a disciplinary proceeding: the standard test for issue preclusion<sup>128</sup> and a fundamental fairness test.<sup>129</sup> The court emphasized its discretionary power and the caution that must be utilized to ensure the fairness of the foreign proceeding.<sup>130</sup> To guide the fairness test, the court provided a long list of factors:

- (1) whether the first suit was for a trivial amount while the second was for a large amount;
- (2) whether the party asserting the estoppel could have effected joinder between himself and his present adversary, but did not do so;
- (3) whether the estoppel is based on one of conflicting judgments, another of which is in defendant's favor;
- (4) whether there are significantly different procedural advantages available to the defendant in the second suit which could affect the outcome. . . .
- [5] whether application of the doctrine would be unfair to the defendant under the circumstances;
- [6] whether the defendant had a full and fair opportunity to litigate;
- [7] whether the defendant had the incentive to defend vigorously in the first suit;
- [8] whether the defendant had the ability to foresee additional litigation. . . .
- [9] Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved . . .
- [10] The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;
- [11] Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;
- [12] The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;
- [13] Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.<sup>131</sup>

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127. *Id.*

128. *In re Wilde*, 68 A.3d at 759 (quoting *Modiri v. 1342 Rest. Group, Inc.*, 904 A.2d 391, 394 (D.C. 2006) (quoting *Davis v. Davis*, 663 A.2d 499, 501 (D.C. 1995)).

129. *Id.* at 759 (citing *Parklane Hosiery Co., v. Shore*, 439 U.S. 322, 331 (1979)).

130. *Id.* at 760 (citing *K.H., Sr. v. R.H.*, 935 A.2d 328, 333 (D.C. 2007)).

131. *Id.* at 760–61 (quoting *K.H.*, 935 A.2d at 334) (citations omitted); 18 MOORE'S FEDERAL PRACTICE § 132.04[2][c] (3d ed. 2007) (factors 5-8); RESTATEMENT (SECOND) OF JUDGMENTS, § 29 (1982) (factors 9-13).

It was recognized that “some of the listed factors are overlapping, and many have no application to bar discipline cases, [however,] their breadth serves to emphasize the care that a tribunal must use in exercising discretion regarding the use of [issue preclusion].”<sup>132</sup>

After this ruling, Bar Counsel bringing formal charges against an attorney convicted by a foreign court may move to preclude the issue. It must show that doing so would be fair to the attorney under the factors enumerated by the court. The court charged the hearing committee with two tasks under the fairness test: “(1) ascertaining the relevant laws and procedures of the foreign country, and (2) also determining what procedures were actually followed in the respondent attorney’s proceedings.”<sup>133</sup> If it is fair, like the automatic preclusion under Section 10, the only relevant issues that remain are whether the underlying conduct constitutes misconduct and the issue of punishment. If preclusion is not fair or if Bar Counsel does not attempt to preclude the issue, Bar Counsel may still initiate an investigation and attempt to prove the underlying facts through evidence gathered under Section 8.<sup>134</sup>

## V. SETTING THE STANDARD: NON-MUTUAL OFFENSIVE ISSUE PRECLUSION FOR FOREIGN JUDGMENTS

Issue preclusion is context specific. There are different tests and different requirements ascribed to issue preclusion based on the type of proceeding, whether it is being used offensively or defensively, whether the parties in the first and second litigation are the same—a requirement often referred to as “mutuality”—and whether the judgment being precluded was a foreign judgment. The D.C. Court of Appeals dealt with the non-mutual, offensive use of issue preclusion on a foreign judgment in attorney disciplinary proceedings. While a test for this specific context had never been formulated prior, the Court of Appeals’ response to the particular context was largely consistent with what one would have predicted using prior case law. Due to the rarity of such a context, the court consulted a patchwork of borrowed requirements and tests and then chose to mash them together into one test. This section analyzes the case law, in ascending order of complexity that formed the basis for the patchwork test.

### A. Issue Preclusion

As part of the Fifth Amendment’s guarantee against double jeopardy, the government may not retry the criminal same defendant for the same crime twice.<sup>135</sup> Put another way, a criminal defendant has a constitutional right to defensively assert issue preclusion against the government. For example, in *Ashe v. Swenson*, the defendant was charged with multiple counts of robbery stemming from a single

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132. *In re Wilde*, 68 A.3d at 761.

133. *Id.* at 765–66.

134. *Id.*

135. *Ashe v. Swenson*, 397 U.S. 436, 445 (1971).

incident.<sup>136</sup> Missouri had previously tried the defendant for a single count of robbery in which the only element in dispute was the defendant's identity—i.e., whether the defendant was one of the robbers.<sup>137</sup> The jury concluded that the defendant was not one of the robbers.<sup>138</sup> Accordingly, the Supreme Court ruled that Missouri was barred by double jeopardy from retrying the defendant for the remaining counts of robbery because the issue of the defendant's identity had already been litigated.<sup>139</sup>

Similarly, in the civil context, issue preclusion may also be used defensively to preclude an issue resolved in another domestic judgment, provided the traditional elements are met.<sup>140</sup> For example, in *Blonder-Tongue Laboratories v. University of Illinois Foundation*, the Supreme Court abolished the traditional mutuality requirement and remanded the case to allow the defendant to affirmatively plead an issue preclusion defense.<sup>141</sup> In that case, the University of Illinois Foundation, the plaintiff and patent owner, sued Blonder-Tongue, the defendant, for patent infringement.<sup>142</sup> However, one of the patents in question was determined to be invalid in a previous proceeding.<sup>143</sup> After the Court's ruling abolishing the traditional mutuality requirement, Blonder-Tongue was able to bar the plaintiff from continuing to assert the validity of the patent.<sup>144</sup>

The use of issue preclusion offensively is a more contentious issue. As previously mentioned, it is contentious because it deprives defendants of the ability to defend themselves, which may be perceived as unfair. In criminal proceedings, the federal courts are split on whether the government may ever offensively use issue preclusion against a defendant.<sup>145</sup> Courts ruling against its use have found offensive issue preclusion in the criminal context to be incompatible with the Sixth Amendment's right to a jury.<sup>146</sup> However, other courts have found that because defendants have every opportunity to defend themselves vigorously in the initial proceedings, the use of offensive issue preclusion is not patently unfair.<sup>147</sup>

Courts have similar reservations about using issue preclusion offensively in civil proceedings and generally only allow it on a case-by-case basis when doing so would be fair to the party the doctrine is used against.<sup>148</sup> This principle was enunciated in *Parklane Hosiery Co. v. Shore* (*Parklane*).<sup>149</sup> In 1976, in an action

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136. 397 U.S. 436, 437–38 (1971).

137. *Id.* at 438–39.

138. *Id.* at 446.

139. *Id.*

140. Michelle S. Simon, *Offensive Issue Preclusion in the Criminal Context: Two Steps Forward, One Step Back*, 34 U. MEM. L. REV. 753, 764 (2004).

141. 402 U.S. 313, 350 (1971).

142. *Id.* at 314–16.

143. *Id.*

144. *Id.*

145. Poulin, *supra* note 30, at 419.

146. *Id.* at 458.

147. *Id.* at 459.

148. Simon, *supra* note 140, at 764.

149. 439 U.S. 322 (1979).



brought by the Securities and Exchange Commission (SEC), the United States District Court for the Southern District of New York found that the defendant, a corporation, issued a materially false and misleading proxy statement.<sup>150</sup> In a subsequent suit, the plaintiffs brought a stockholder class action suit against the corporation and thirteen of its officers.<sup>151</sup> The U.S. Supreme Court held that the defendants were precluded from re-litigating whether the proxy was misleading and materially false.<sup>152</sup>

The Court, however, cautioned against the use of offensive issue preclusion when there is a lack of mutuality among parties—i.e. the parties in the initial suit are not the same as the parties in the subsequent suit. Granting courts broad discretion to use the doctrine only when doing so would be fair to the defendant, the Court identified several factors to weigh the fairness of non-mutual, offensive issue preclusion.<sup>153</sup> These factors include the ability of the nonmutual party in the subsequent suit to have joined the initial suit, procedural shortcomings available to the precluded party in the initial suit, the foreseeability of the subsequent suit by the precluded party, and changes in law subsequent to the initial suit.<sup>154</sup>

Using these factors, the Court found that it was fair to use issue preclusion against the defendant. First, the plaintiffs were unable to join the proceedings brought by the SEC.<sup>155</sup> Second, the defendant had sufficient motivation to vigorously litigate the first suit given the seriousness of the SEC's allegations and the foreseeability of future shareholder actions.<sup>156</sup> Third, the inability of the defendant to have a trial by jury in the first proceeding was not a significant procedural difference.<sup>157</sup> And finally, there were no changes in law that would have rendered the use of issue preclusion unfair.<sup>158</sup>

So, while most courts in both the criminal and civil contexts protect defendants against the use of offensive issue preclusion, under the D.C. Bar regulations, in disciplinary proceedings the D.C. Court of Appeals has no qualms about automatically using offensive issue preclusion against an attorney. This is because disciplinary proceedings are neither criminal nor civil, but rather are sometimes referred to as *sui generis*, special civil, or quasi-criminal.<sup>159</sup> Disciplinary proceedings must comport with certain minimum levels of due process including notice of charges, the right to counsel, the right of the accused to present evidence,

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150. *Id.* at 324–25 (citing SEC v. Parklane Hosiery Co., 422 F. Supp. 477 (1976)).

151. *Id.* at 324.

152. The Court went further to state that this holding was true regardless of the lack of mutuality of parties between the two actions and the defendant's lack of opportunity for a trial by jury in the initial proceeding. *Id.* at 337.

153. *Id.* at 332.

154. *Id.*

155. *Parklane Hosiery Co.*, 439 U.S. at 332.

156. *Id.*

157. *Id.*

158. *Id.*

159. Joseph Frank Strength, *Attorney Disciplinary Proceedings: Civil or Criminal in Nature?*, 19 J. LEGAL. PROF. 257, 257 (1995).

and the right to cross-examine witnesses in front of an impartial tribunal.<sup>160</sup> However, unlike criminal trials, disciplinary proceedings do not entitle a defendant to a jury trial and have a lesser burden of proof.<sup>161</sup> Having fewer due process protections afforded to a defendant in attorney discipline proceedings is justified because the goal of such proceedings is focused not on punishment, but on protecting the public through ensuring an attorney's fitness.<sup>162</sup>

### ***B. The Recognition of Foreign Judgments***

The D.C. Court of Appeals declined to allow Bar Counsel to automatically offensively preclude the attorney's criminal conviction because it was from a foreign court. However, in U.S. courts, preclusive effect has been given to foreign judgments. Foreign judgments are upheld for the same reasons domestic judgments are—judicial economy and the need for a definitive end to litigation.<sup>163</sup> Foreign judgments, both civil and criminal, have been used to preclude the litigation of issues both offensively and defensively.

Domestic judgments of a U.S. court are recognized and enforced in other U.S. courts under the Full Faith and Credit Clause of Article IV, Section One of the Constitution.<sup>164</sup> However, no such constitutional requirement exists with respect to foreign judgments.<sup>165</sup> Rather, foreign judgments may be upheld, at the discretion of the judge, under the principle of comity:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.<sup>166</sup>

In *Hilton v. Guyot*, the Supreme Court described how comity is used to give conclusive effect on foreign judgments:

When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens, to recover a sum of money adjudged by a court of that country to be due from the defendant to the plaintiff, and the foreign judgment appears to have been rendered

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160. *Id.* at 261–62.

161. Moore, *supra* note 10, at 12–13. In the majority of jurisdictions, the burden of proof is clear and convincing evidence while a minority applies a preponderance of the evidence standard. *Id.* at 13.

162. *Id.* at 14.

163. See Luke J. Umstetter, *Enforcing Foreign Judgments: In Search of a Treaty to Locate Assets Abroad*, 3 S.C. J. INT'L L. & BUS. 85, 90–91 (2007) (stating that U.S. courts traditionally are liberal in recognizing and enforcing foreign judgments absent major violations of due process, policy, or justice).

164. U.S. CONST. art. IV, § 1.

165. See Matthew H. Adler, *If We Build It, Will They Come? The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgments*, 26 L. & POL'Y INT'L BUS. 79, 91 (1994) (discussing failures by the United States to enter treaties to resolve this issue).

166. *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895).

by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given full credit and effect.<sup>167</sup>

Thus, while foreign judgments are conclusive, because of fairness concerns, a precluded party is afforded the ability to attack the judgment if they can show the foreign court system that rendered the judgment was unfair, lacked jurisdiction, or reached a judgment based on fraud. For example, in *Van Den Biggelaar v. Wagner*, the United States District Court for the Northern District of Indiana recognized and enforced a judgment from a Dutch appeals court that required the defendant to pay damages related to a dispute over a contract to board and sell horses in the Netherlands.<sup>168</sup> The judgment was upheld under the principle of comity<sup>169</sup> after the court found that the defendant had been subjected to a full and fair trial in a court of competent jurisdiction.<sup>170</sup> Jurisdiction was proper because the defendant voluntarily appeared before a court.<sup>171</sup> The court reasoned that the defendant—who in the first proceeding was the plaintiff—was given a full and fair trial because the contract dispute was adjudicated in “a process very similar to our courts,” with an opportunity to appear before a judge and later appeal the ruling.<sup>172</sup> However, the court noted, “the fairness of the Dutch court procedures does not depend on its similarity or dissimilarity with U.S. court procedure but only upon its basic fairness.”<sup>173</sup> The court also noted that nothing in the record suggested any fraud or prejudice in the Dutch proceedings.<sup>174</sup>

Comity is a protective measure that gives the court discretion to make a value judgment as to the integrity of the foreign proceeding and the validity of the judgment. Comity is substantially similar to the test for offensive issue preclusion in civil proceedings as discussed in *Parklane* in that both desire to impart to a trial court the discretion to deny preclusive effect for judgments where such would be unfair to a party.

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167. 159 U.S. 113, 205–06 (1895).

168. 978 F. Supp. 848 (N.D. Ind. 1997).

169. *Id.* at 860; *see also* UNIFORM FOREIGN MONEY JUDGMENT RECOGNITION ACT §§ 1–9, 13 (1962) (providing additional support for upholding the judgment).

170. *Van Den Biggelaar*, 978 F. Supp. at 859.

171. *Id.*

172. *Id.*

173. *Id.* at 856.

174. *Id.*

***C. Precluding Foreign Judgments: Two Tests or One? Does it Matter?***

In theory, when a party seeks to defensively preclude an issue in a civil proceeding based on a foreign judgment, the party should be required to show the traditional elements of issue preclusion and the fairness of the foreign proceeding under comity. For example, in an administrative proceeding, the United States Court of Appeals for the Tenth Circuit upheld the use of an Iranian murder conviction to bar an American citizen from claiming Social Security benefits related to the death of her husband, the murder victim.<sup>175</sup> Under applicable law, Social Security benefits cannot be disbursed to a claimant upon the death of an individual the claimant caused to die by intentional homicide.<sup>176</sup> While the court did not invoke comity by name, it did address the issue of whether to accept the judgment of the Iranian court, which it answered in the affirmative.<sup>177</sup> Despite not comporting with U.S. guarantees of due process, the court found that it was not “shocking to the forum community that it cannot be countenanced.”<sup>178</sup> “[A]fter listening to [the claimant’s] version of events, and after consideration of the opinion of the Iranian appellate tribunal, the statements made by [claimant’s] Iranian lawyer, and other documentary evidence,” the court concluded that the process and trial were fair.<sup>179</sup>

Likewise, in a civil proceeding, when one seeks to *offensively* preclude the issue of a foreign judgment against a non-mutual party, the court should require the precluding party prove (1) the elements of issue preclusion; (2) the fairness of foreign proceeding—required by comity; and (3) the fairness of offensively precluding the issue against the defendant—required by *Parklane*.

However, because the comity and *Parklane* issue preclusion elements substantially overlap, most courts do not necessarily distinguish their analysis in two separate parts. For example, in *Hurst v. Socialist People’s Libyan Arab Jamahiriya*,<sup>180</sup> the United States District Court for the District of Columbia used such a test<sup>181</sup> to offensively preclude the issue of the defendant’s responsibility for the deaths of the 259 passengers killed in the bombing of Pan Am Flight 103.<sup>182</sup> The plaintiffs, who were descendants of those killed, sued Abdel Basset Ali Al-Megrahi, a Libyan intelligence officer who was previously convicted by the Scottish High Court of Justiciary for his role in the bombing.<sup>183</sup> Instead of arguing that the process afforded was unfair, Al-Megrahi argued the specific trial was unfair and prejudicial.<sup>184</sup> In doing so, he relied on the statements of a U.N. observer and a Scottish law professor who criticized the ruling because of contradictory

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175. *Cooley v. Weinberger*, 518 F.2d 1151 (10th Cir. 1975).

176. *Id.* at 1152.

177. *Id.* at 1154–57.

178. *Id.* at 1155.

179. *Id.*

180. 474 F. Supp. 2d 19 (D.D.C. 2007).

181. *Id.* at 31–35.

182. *Id.* at 36.

183. *Id.* at 22–23.

184. *Id.* at 35.

evidence.<sup>185</sup> However, the court noted that “[t]he ultimate inquiry . . . is not whether this court or any other court would have reached the same conclusion as the trial court here, but rather, whether the process was adequate for purposes of recognition and preclusion by a U.S. court . . . .”<sup>186</sup> Further, the court was satisfied that the trial was fair because it was established by principles of international law under an agreement between the United States and Libya.<sup>187</sup>

#### ***D. Will the Attorney’s South Korean Conviction Stand?***

The court in *In re Wilde* provided a similar three-part test that encompasses all that is required under traditional elements of issue preclusion, comity, and *Parklane*. Comity and *Parklane* were condensed into a general fairness test. The D.C. Court of Appeals tasked the Board with “ascertaining the relevant laws and procedures of the foreign country, and . . . determining . . . what procedures were actually followed in the respondent attorney’s proceedings” and then judging the fairness of offensively precluding the issue against the enunciated factors.<sup>188</sup>

The test can be viewed as taking a pro-defendant stance. As a legal construct, comity grew out of the recognition and enforcement of monetary judgments.<sup>189</sup> Under the Uniform Foreign Money-Judgments Recognition Act,<sup>190</sup> when judging the fairness of recognizing the foreign judgment, it is the system that renders the judgment that is scrutinized, as opposed to the actual proceeding that rendered the judgment.<sup>191</sup>

By specifically tasking the Board to find the actual procedures that occurred during the attorney’s conviction, the court potentially adds a significant burden to Bar Counsel. It is less difficult to research and find the laws of a specific country. It is substantially harder to obtain court documents or track down potential witnesses to present evidence sufficient to sustain Bar Counsel’s burden of proof concerning the actual procedures used to render the judgment. However, this is consistent with the *Parklane* factors, as focus is on the actual circumstances of the initial proceedings, such as the procedures available in the first suit to determine

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185. *Id.*

186. *Hurst*, 474 F. Supp. 2d. at 35.

187. *Id.* at 36 (D.D.C. 2007).

188. *In re Wilde*, 68 A. 3d 749, 765–66 (D.C. 2013).

189. *See generally* *Hilton v. Guyot*, 159 U.S. 113 (1895) (declining to enforce a foreign monetary judgment).

190. The Uniform Foreign-Money Judgment Recognition Act applies to any foreign judgment that is final, conclusive, and enforceable where rendered. This requires an impartial tribunal, with procedures similar to the requirements of due process, render the judgment. This includes such concerns as personal jurisdiction, subject matter jurisdiction, and notice, as well as public policy concerns. For a complete look at the requirements, see UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT (2005), available at <http://www.kentlaw.edu/perritt/courses/civpro/ufmjra62.pdf>.

191. Montre D. Carodine, *Political Judging: When Due Process Goes International*, 48 WM. & MARY L. REV. 1159, 1169 (2007) (citing UNIFORM FOREIGN MONEY-JUDGMENTS RECOGNITION ACT § 4a (1962)).

the fairness of precluding the issue in the subsequent suit.

Under the test enunciated in *In re Wilde*, the first prong—whether the traditional elements of the issue preclusion test is met—is not likely to be challenged. Instead, the enunciated test's analysis will focus on the fairness of the foreign system and the fairness of the actual proceedings using the condensed comity and *Parklane* factors.

### 1. The Fairness of South Korea's Criminal Justice System

The second prong of the test calls for the Board to, in its discretion, rule on the fairness of the foreign criminal justice system. Some commentators have likened this analysis to a question of politics, arguing that it calls for a label of either “good” or “bad,” or “civilized” or “uncivilized”—despite the inherent dangers in painting a country's entire legal system in such broad, all-encompassing strokes.<sup>192</sup> These commentators argue that courts may make such a distinction because of “political conflicts” or “internal turmoil” within the country,<sup>193</sup> or as retaliation against the country for political conflicts with the United States.<sup>194</sup> The decision ultimately is a value judgment, where judgments from allies are upheld and judgments from nations like Cuba, North Korea, Iran, Iraq, and Congo are not.<sup>195</sup>

Although an analysis of a country and its court system using terms like “good” or “bad” and “civilized” or “uncivilized” may find motivation for a ruling one way or the other, modern courts, sensitive to international relations, will not likely utilize such characterizations outright. Instead, the courts will focus on the level of due process available to the litigants in the foreign system. Under comity, such protections do not have to equal protections afforded under the American system, but rather must include, at minimum, the basic right of notice and an opportunity to be heard.<sup>196</sup> However, because one of the *Parklane* factors for offensive issue preclusion looks to the procedures available to the litigant in determining the fairness of precluding the issue, the standard will likely be higher than traditional comity.

The D.C. Court of Appeals will likely recognize the protections afforded by the South Korean legal system and criminal convictions generally as sufficient for two reasons. First, South Korea will be found to be one of the “good” or

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192. *See id.* at 1220–25 (arguing that such a determination is unfairly subjective because the fairness of a system is a matter of perspective and every legal system has its own flaws).

193. *Id.* at 1166–77 (citing *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (declining to enforce an Iranian judgment); *Bridgeway Corp. v. Citibank*, 201 F.3d 134, 137–38 (2d Cir. 2000) (declining to enforce a Liberian judgment)).

194. *Id.* at 1214–16.

195. *Id.* (employing the example of Judge Posner's listing of Cuba, North Korea, Iran, Iraq, and Congo as countries whose systems might fail to fulfill proper standards in *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)). Note that *Cooley*, which recognized an Iranian murder conviction, occurred before the current, U.S.-ideologically opposed regime came to power. *See generally* *Cooley v. Weinberger*, 518 F.2d 1151 (10th Cir. 1975).

196. *Samyang Food Co. v. Pneumatic Scale Corp.*, No. 5:05-CV-636, 2005 U.S. Dist. LEXIS 25374, at \*17 (N.D. Ohio 2005).

“civilized” countries. South Korea is a “good” country because it has been a U.S. ally for almost a century. The United States and South Korea fought together against communism in the Korean War, the United States was instrumental in South Korea’s subsequent rebuilding process, and both countries have maintained close ties both politically and economically ever since.

Further, it is a “civilized” country because it is stable and democratic. Although the period between the Korean War and the late 1980s saw South Korea run by a series of military dictatorships,<sup>197</sup> it has since enjoyed stable democracy backed by three balanced branches of government and a constitution guaranteeing rights American courts view as fundamental, like freedoms of speech,<sup>198</sup> religion,<sup>199</sup> and occupation<sup>200</sup> and the rights to vote,<sup>201</sup> hold property,<sup>202</sup> hold office,<sup>203</sup> and form political parties.<sup>204</sup> Also, the South Korean Constitution grants the judiciary the power to rule independently from the legislative and the executive branch.<sup>205</sup> Thus, there are no overarching political issues that may influence the discretion of a trial judge and cast doubt on the validity of the court system.

Second, South Korea affords litigants with what an American court would probably find to be fundamentally fair due process. Few U.S. courts have been tasked with the specific issue of rendering an opinion on the fairness of the South Korea legal system. Moreover, those that have were concerned with the civil legal system. In one instance a plaintiff sought to enforce a judgment obtained by the Supreme Court of South Korea against the defendant for damages relating to a breach of contract.<sup>206</sup> The District Court for the Northern District of Ohio refuted the defendant’s claim that the South Korean legal system was unfair, stating:

The Korean procedures provided a fair hearing, irrespective of whether Korea offers a right to a jury trial. The Korean judicial system provides substantially the same substantive and procedural due process protections as those afforded by Ohio. In Korea, parties receive notice, the right to the legal counsel, the right to present evidence and witnesses and to examine evidence offered against them, and a right to appeal to a higher court.<sup>207</sup>

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197. Kuk Cho, *The 2007 Revision of the Korean Criminal Procedure Code*, 8 J. KOREAN L. 1, 91–92 (2008) [hereinafter Cho, *The 2007 Revision of the Korean Criminal Procedure Code*] (describing the regimes of Presidents Park and Chun, cumulatively spanning the 1960s through 1980s, as those of militarism and dictatorship).

198. DAEHANMINKUK HEONBEOB [HEONBEOB] [CONSTITUTION] art. 21(1), available at <http://eng.scourt.go.kr/eboard/NewsListAction.work?gubun=44&pageSize=15>.

199. *Id.* art. 20.

200. *Id.* art. 15.

201. *Id.* art. 24.

202. *Id.* art. 23.

203. *Id.* art. 25.

204. HEONBEOB, art. 8(1).

205. *Id.* art. 103.

206. Samyang Food Co., 2005 U.S. Dist. LEXIS 25374 at \*17–18.

207. *Id.*

Other courts have held similarly.<sup>208</sup>

However, in at least one instance, an American court declined to enforce a South Korean judgment.<sup>209</sup> In that instance, a South Korean court granted a creditor the right to enforce the execution of a deed upon a debtor's promissory note.<sup>210</sup> The court found that because Korean law did not provide the debtor notice of the execution or a chance to challenge the validity of its order, it could not enforce the judgment because it lacked minimum standards of due process.<sup>211</sup>

While these cases are illustrative of the South Korean legal system as a whole, a proper analysis will focus on South Korean criminal procedure. Despite the lack of precedent, it is doubtful a court would find that South Korean criminal procedure as a whole does not comport with due process or is incapable of rendering an impartial opinion.

Since 1987, South Korea has undertaken numerous steps towards increasing the rights of the accused in its criminal procedure.<sup>212</sup> In addition to the right to notice of charges<sup>213</sup> and the right to a trial before an impartial panel,<sup>214</sup> as required by comity, criminal defendants are granted a significant amount of rights similar to U.S. standards of due process, thus satisfying the stricter *Parklane* fairness requirements. Under the South Korean Constitution, people have the right to not be arrested for acts that were not crimes at the time the act occurred.<sup>215</sup> Furthermore, a warrant granted by a judge is generally required before any arrest, detainment, search, or seizure.<sup>216</sup> Upon arrest, a defendant has the right to be informed of his or her right to remain silent and right to counsel.<sup>217</sup> If he or she cannot afford counsel, one is appointed.<sup>218</sup> Those arrested are entitled to have counsel during interrogation,<sup>219</sup> and, by law, interrogations must be videotaped.<sup>220</sup> Those detained

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208. See, e.g., *Otos Tech Co. v. Ogc Am., Inc.*, No. 03-1979, 2010 U.S. Dist. LEXIS 133107, \*7 (D.N.J. 2010) ("He received notice of the proceeding, was represented by a lawyer, asserted a counterclaim, presented evidence and appealed the judgment. While defendants also note that the Korean action proceeded before a judge instead of before a jury, the lack of a jury trial does not result in a due process violation.").

209. In *Sik Choi v. Hyung Soo Kim*, 50 F.3d 244 (3rd Cir. 1995).

210. *Id.* at 246.

211. *Id.* at 248–50.

212. Kuk Cho, *The Ongoing Reconstruction of the Korean Criminal Justice System*, 5 SANTA CLARA J. INT'L L. 100, 100–02 (2006) [hereinafter Cho, *The Ongoing Reconstruction of the Korean Criminal Justice System*].

213. HEONBEOB, art. 12(5).

214. *Id.* art. 27(1).

215. *Id.* art. 13(1).

216. *Id.* art. 12(3).

217. Hyeongsasosongbeob [Criminal Procedure Act], Act No. 8730, Dec. 21, 2007, art. 244-3, available at <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46816481.pdf>.

218. HEONBEOB, art. 12(4).

219. Hyeongsasosongbeob Gyuchik [Regulations on Criminal Procedure], art. 16(1) (2007) (rules promulgated by the Supreme Court of Korea to be codified under the Criminal Procedure Act), available at <http://eng.scourt.go.kr/eboard/NewsViewAction.work?gubun=42&seqnum=2&currentPage=&searchWord=&pr=>; Cho, *The Ongoing Reconstruction of the Korean Criminal Justice System*, *supra* note 212, at 102–04 (citing Korean Supreme Court Decisions of June 23,



or arrested have the right to request a court review the legality of their arrest or detention.<sup>221</sup> All citizens have the right to not be tortured.<sup>222</sup> Confessions obtained by torture or coercion are inadmissible at trial.<sup>223</sup> During trial, defendants have the right to a speedy trial,<sup>224</sup> the right to testify on their own behalf,<sup>225</sup> the right against self-incrimination,<sup>226</sup> and a presumption of innocence.<sup>227</sup> Finally, those acquitted are not to be tried again under the principle of double jeopardy.<sup>228</sup>

The D.C. Court of Appeals will also likely find that in addition to the constitutionally prescribed rights of a defendant, Korean criminal procedure, while differing from traditional American criminal procedure, is still likely to secure an impartial decision. Trials are scheduled in advance and open to the public.<sup>229</sup> To begin, both the prosecutor and defense counsel are entitled to make an opening statement.<sup>230</sup> The parties then present evidence, including the introduction of documents or the testimony of a witness.<sup>231</sup> The presiding judge may also question the witness to aid in the judge's fact-finding duty.<sup>232</sup> The presiding judge also regulates examinations of witnesses and examinations may not be insulting or intimidating, or ask for opinions.<sup>233</sup> Further, parties may only present testimony concerning matters not experienced directly by the witness or duplicitous testimony when the presiding judge deems such testimony reasonable.<sup>234</sup> The prescribed rules of evidence, which regulate the introduction of evidence, protect against hearsay and empower the presiding judge to render decisions regarding the probative value of evidence.<sup>235</sup> After the introduction of evidence, the prosecution then calls and questions the defendant,<sup>236</sup> subject to the defendant's right to remain silent.<sup>237</sup> Next, defense counsel may question the defendant.<sup>238</sup> Finally, both the

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1992 and Decision of Nov. 11, 2003).

220. Criminal Procedure Act, art. 244-2.

221. HEONBEOB, art. 12(6).

222. *Id.* art. 12(2).

223. *Id.* art. 12(7).

224. *Id.* art. 27(3).

225. *Id.* art. 27(5).

226. *Id.* art. 12(2).

227. HEONBEOB, art. 27(4).

228. *Id.* art. 13(1).

229. *Proceedings: Criminal Case*, SUPREME COURT OF KOREA, [http://eng.scourt.go.kr/eng/proceedings/criminal\\_case.jsp](http://eng.scourt.go.kr/eng/proceedings/criminal_case.jsp) (last visited Feb. 17, 2014) (providing overview of criminal procedure in English).

230. Criminal Procedure Act, art. 285–86.

231. Regulations on Criminal Procedure, art. 132–34 (2007).

232. *Id.* art. 24(1)

233. *Id.* art. 74.

234. *Id.*

235. Criminal Procedure Act, art. 318-3.

236. *Proceedings: Criminal Case*, *supra* note 229.

237. Criminal Procedure Act, art. 283-2.

238. *Proceedings: Criminal Case*, *supra* note 229.

prosecution<sup>239</sup> and the defense<sup>240</sup> are entitled to closing statements before judgment is rendered.<sup>241</sup> A defendant may file an appeal of a district court judgment to a high court,<sup>242</sup> or in some instances, directly to the Supreme Court.<sup>243</sup> A defendant may also appeal a decision of a high court to the Supreme Court.<sup>244</sup>

With all the protections afforded to defendants in South Korean criminal proceedings, attorneys seeking to block the preclusive effect of a South Korean judgment will have a difficult time. Nonetheless, they may make three main arguments about the fairness of South Korean criminal procedure. The first relates to the practices and roles of the prosecutor. The prosecutor in South Korea has historically occupied a unique role—which has been likened to that of a “quasi-judge,”—“each prosecutor has independent authority free from any pressure in exercising his/her power” in both controlling the entirety of a criminal investigation and having the sole discretion to bring charges.<sup>245</sup> Historically, South Korean prosecutors have faced accusations of corruption and coerced confessions. However, former President Roh Moo-Hyun took significant steps to address deficiencies in criminal procedure that culminated in several revisions of the Korean Criminal Procedure Act in 2007.<sup>246</sup> These revisions include the right of a defendant to be notified of the right to remain silent<sup>247</sup> and the right to have an attorney present during interrogation.<sup>248</sup> Furthermore, interrogations are now videotaped and events such as arrival time, interrogation length, defendant’s statements, and others are recorded and read back to the defendant to prevent abuse and may, in certain circumstances, be used as secondary evidence.<sup>249</sup>

During the course of an investigation, the prosecutor will compile collected information and statements made by the defendant during interrogation into a dossier.<sup>250</sup> Prior to 2007 such evidence was not considered hearsay and was freely admissible in court.<sup>251</sup> This had significant impact on defendants who made

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239. Criminal Procedure Act, art. 302.

240. *Id.* art. 303.

241. For statutes governing judgment and sentencing, see *id.* art. 318–4–337.

242. *Id.* art. 338, 357.

243. *Id.* art. 372.

244. *Id.* art. 371.

245. Jung-Soo Lee, *The Characteristics of the Korean Prosecution System and the Prosecutor’s Direct Investigation*, at 83–85 (United Nations Asia and Far East Inst. for the Prevention of Crime and the Treatment of Offenders, Resource Material Series No. 53, 1999), available at [http://www.unafei.or.jp/english/pdf/RS\\_No53/No53\\_13VE\\_Soo.pdf](http://www.unafei.or.jp/english/pdf/RS_No53/No53_13VE_Soo.pdf) (describing the historical role of the prosecutor, which has since slightly evolved).

246. Cho, *The 2007 Revision of the Korean Criminal Procedure Code*, *supra* note 197, at 2.

247. Criminal Procedure Act, art. 244-3.

248. *Id.* art. 243-2.

249. Cho, *The 2007 Revision of the Korean Criminal Procedure Code*, *supra* note 197, at 7–9.

250. *Id.* at 18.

251. Criminal Procedure Act, art. 338 (deleting a provision that allowed admission of prosecutors’ compilation of a defendant’s statements made during interrogation); see also *id.* art. 316 (providing limited conditions under which statements made by persons other than the defendant are admissible as evidence).

incriminating statements to prosecutors prior to the ability to be counseled, and it turned the focus of the trial to the dossier, rather than the live presentation of evidence.<sup>252</sup> However, in an effort to cut back on the importance of confessions and to scale back prosecutorial power to combat overreach, the 2007 revisions imposed stricter requirements on the dossier's admissibility.<sup>253</sup> Now, the dossiers are only admitted either when a defendant adopts a statement made in a legal and reliable manner as their own or when an objective method, like audio recording, can prove a statement made in a legal and reliable manner.<sup>254</sup> Thus, the 2007 revisions to the Criminal Procedure Act took substantial steps to combat the historic overreach of South Korean prosecutors and will likely, in a U.S. court's view, cure any of the perceived unfairness of the South Korean criminal procedure concerning prosecutorial power.

The second possible issue with fairness of the South Korean criminal proceedings is the prosecutor's ability to appeal a ruling,<sup>255</sup> which differs from American notions of double jeopardy.<sup>256</sup> Almost every country has a rule against double jeopardy, under which a defendant may not be tried twice for the same crime.<sup>257</sup> However, while double jeopardy in the United States bars the prosecution from seeking appellate review, in many other countries, both under civil and common law, the concept of double jeopardy does not include the same asymmetric right to appeal.<sup>258</sup> Therefore, it is unlikely the court would consider the prosecutor's ability to appeal a court's ruling as rendering the entire system devoid of fairness as it would set a broad precedent that encompasses many foreign jurisdictions.

Third, one may argue that the South Korean criminal justice system's denial of a trial by jury is unfair to the defendant. However, *Parklane* specifically rejected this argument about a domestic proceeding,<sup>259</sup> and further, two separate cases similarly rejected the argument about South Korean civil proceedings specifically.<sup>260</sup> Of note, South Korea is currently experimenting with criminal trials

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252. Cho, *The 2007 Revision of the Korean Criminal Procedure Code*, *supra* note 197, at 18.

253. *Id.* at 20 (citing Criminal Procedure Act, art. 312(1)).

254. *Id.* (citing Criminal Procedure Act, art. 312(1)).

255. Criminal Procedure Act, art. 338.

256. See generally James A. Strazzella, *The Relationship of Double Jeopardy to Prosecution Appeals*, 73 NOTRE DAME L. REV. 1, 1–9 (1997).

257. David S. Rudstein, *Retrying the Acquitted In England Part III: Prosecution Appeals Against Judges' Rulings of "No Case to Answer,"* 13 SAN DIEGO INT'L L.J. 5, 27 (2011).

258. Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeal Rights: What Purpose Do They Serve?*, B.U.L. REV. 341, 352–55 (2002); see also Rudstein, *supra* note 257, at 38–47 (providing commentary on the rule relating to double jeopardy in England and other European countries, as well as Argentina, Israel, Mexico and South Africa, to name a few).

259. *Parklane Hosiery Co.*, 39 U.S. at 331 & n.15 (holding that there is no risk of unfairness on the part of the petitioner in an offensive collateral estoppel contest, even though the defendant against whom estoppel is asserted did not choose the forum of the first action).

260. See, e.g., *Otos Tech Co.*, 2010 U.S. Dist. LEXIS 133107 at \*7 (“While defendants also note that the Korean action proceeded before a judge instead of before a jury, the lack of a jury

by a mixed jury.<sup>261</sup>

## 2. The Fairness of the Actual Proceedings

Next, the D.C. Court of Appeals tasked the Board with making a factual finding with respect to the actual procedures afforded to the attorney in the foreign proceeding. This has two purposes: looking for the absence of fraud requirement of comity and the absence of procedural shortcomings requirement of *Parklane*. This part of the determination is extremely significant given the high level of protections afforded to criminal defendants in South Korea by law. Unfortunately, whether in the United States or in a foreign country, the justice afforded on paper is not always the same justice afforded in real life. This analysis places the burden on Bar Counsel, the party seeking preclusion, to show that the proceedings were in fact fair and allows defendants to attack the integrity of the actual proceeding.<sup>262</sup>

Whether Bar Counsel can realistically or sufficiently show that the proceedings were fair may prove challenging. It is hard to imagine either side locating an impartial witness, much less bringing them in front of the hearing committee or even taking a statement from him or her. Out of professional courtesy, Bar Counsel may be able to take a statement or convince a prosecutor or presiding judge to testify via videophone,<sup>263</sup> but it is hard to imagine a scenario in which the testimony would refute the notion that the proceedings are fair.

Rather than require Bar Counsel to show the proceedings were fair or not fraudulent, it might make sense for the court to flip the burden of proof. The court could create a rebuttable presumption that, provided a convicting nation's procedures are fair, the actual proceeding was fair absent evidence to the contrary. This puts the onus on the defendant-attorney to provide evidence of fraud or unfair proceedings in the convicting nation and is more in line with comity's presumption of validity.

As the Court of Appeals did not make factual determinations about the actual proceedings, an analysis of *In re Wilde* is entirely speculative. However, as indicated by the Board Report, the attorney alleged procedural shortcomings significant enough—or persuasive enough—to make the Board take notice.<sup>264</sup>

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trial does not result in a due process violation.”); *Samyang Food*, 2005 U.S. Dist. LEXIS 25374 at \*17–18 (“Pneumatic complains that it did not receive a jury trial. In affording jury trials in civil cases, the United States is the exception, not the rule. Many justice systems do not offer a jury in criminal, let alone civil matters.”).

261. A mixed jury is typically a combination of a common law jury along with professional judges, but each country has its own twist on it. Ryan Y. Park, *The Globalizing Jury Trial: Lessons and Insights from Korea*, 58 AM. J. COMP. L. 525, 532 (2010). South Korea has experimented with jury trials and made an effort to integrate domestic innovations with best practices from abroad. *See generally id.*

262. *In re Wilde*, 68 A.3d 749, 765 (D.C. 2013).

263. *See* D.C. COURT OF APPEALS BOARD ON PROF'L RESPONSIBILITY Rule 11.4 (2011), available at <http://www.dcbar.org/attorney-discipline/board-on-professional-responsibility/bpr-rules.cfm> (permitting remote testimony in D.C. disciplinary proceedings).

264. Board Report, *supra* note 2, at 10 (“The translation of the judgment and other paperwork is suspect, and [the Board is] not confident that Respondent received the procedural safeguards in South Korea necessary to ensure a fair and impartial hearing.”).

Further, Maryland disciplinary proceedings cleared Wilde of wrongdoing stemming from the same foreign conviction.<sup>265</sup> If the Court of Appeals used the rebuttable presumption, Wilde would have the burden of proving that the procedural safeguards of South Korea were not followed, while Bar Counsel could then present evidence that the proceedings were fair.

Finally, as required by the principle of comity, in order to recognize the foreign judgment, the precluding party also must establish that the court rendering the judgment had proper jurisdiction.<sup>266</sup> This fits neatly under an analysis of the fairness of the proceedings because a court operating without jurisdiction is not fair to the defendant. Fortunately, for Bar Counsel, the South Korean penal code casts a wide jurisdictional net. Under the code, South Korea has jurisdiction over all acts committed in South Korean territory,<sup>267</sup> all acts by Korean nationals committed outside the territory,<sup>268</sup> all acts committed on Korean vessels or aircrafts,<sup>269</sup> and all acts by aliens committed against Korea or its nationals.<sup>270</sup> More information is needed to know for sure whether South Korea properly exercised jurisdiction in order to recognize a foreign judgment.<sup>271</sup> However, it is likely that the presiding South Korean judge was competent in South Korean jurisdictional law and did not overstep its bounds, and lack of jurisdiction has not yet been argued.

### 3. The Overall Fairness: The Final Analysis

After considering the fairness of the system and the fairness of the proceeding, the next step is to determine whether it is fair to preclude the issue by examining the factual findings against the enunciated factors. The Court of Appeals exhaustively listed as many factors as it could to leave no stone unturned,<sup>272</sup> but it is doubtful each factor will be a part of every analysis. Likely, the factors' relevance will be determined by the facts of each individual case. Here, the court's analysis will most likely boil down to the fairness of the original proceedings, the attorney's motivation to litigate vigorously, and the foreseeability of the attorney disciplinary proceedings based on the South Korean conviction. As

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265. *Id.* at 2–3. The ground on which the ruling was made is unavailable. Maryland maintains confidentiality of attorney discipline proceedings when complaints are dismissed. *See* Frequently Asked Questions, ATTORNEY GRIEVANCE COMMISSION, <http://www.courts.state.md.us/attygrievance/faqs.html> (last visited Feb. 17, 2014).

266. *See* *Hilton v. Guyot*, 159 U.S. 113, 205–06 (1895) (stating that a court must reflect on a number of considerations, including whether a foreign judgment was rendered by a competent court having jurisdiction over the cause and over the parties, when adjudicating a claim brought by a citizen of a foreign country against a citizen of the court's country).

267. Hyeongbeob [Criminal Act], Art. No. 2 (2005) (S. Kor.).

268. *Id.* art. 3.

269. *Id.* art. 4.

270. *Id.* art. 5–6.

271. *See In re Wilde*, 68 A.3d 749, 763 (D.C. 2013) (describing the standards to accept a foreign judgment).

272. *See supra* notes 130–32 and accompanying text for a discussion of the factors enumerated by the *In re Wilde* court.

per parts one and two of the analysis, the fairness of the proceedings may be a contentious issue if Bar Counsel resubmits a complaint against the defendant-attorney in *In re Wilde*.

Furthermore, foreseeability remains a critical issue. On one hand, this was an issue of first impression for the D.C. Court of Appeals—there is no precedent putting D.C. barred attorneys on notice that criminal convictions in foreign countries will result in discipline. This is tied to the attorney's motivation to litigate vigorously. Without notice, an attorney who primarily lives and works in the United States may be tempted to forego a vigorous defense if the potential foreign penalty is minimal.<sup>273</sup> Likewise, it is unlikely that an attorney or anyone who travels—be it for work, pleasure, familial obligations, etc.—plans a trip for the length of time sufficient to prepare a proper defense for trial and subsequent appeals.<sup>274</sup>

On the other hand, attorneys know they are subject to discipline for violating the rules of professional responsibility, be it for criminal or non-criminal conduct. An attorney arrested either domestically or in a foreign jurisdiction is likely to motivate themselves and contest such charges vigorously based on the importance of protecting one's reputation. Any prospect of jail time would only provide further motivation to litigate.

As such, foreseeability is a malleable construct that could be used to deflect the focus of the analysis away from the fairness of the process or proceedings. Given the potential political implications of declaring criminal processes or particular proceedings unfair, a court may act on other grounds if it does not want to preclude the issue. A convenient method to avoid rendering judgments with political implications is inquiring whether the attorney could foresee disciplinary proceedings or had the motivation to defend himself or herself vigorously.

## VI. ALTERNATIVES TO PRECLUSION

A big criticism of the D.C. Court of Appeals' ruling is that Bar Counsel has limited means in which to prove its case against a defendant without the benefit of issue preclusion.<sup>275</sup> However, the usefulness of the foreign criminal conviction is not limited to its potential preclusive effect. Foreign criminal and civil judgments have been admitted into evidence to prove such a judgment was made and as prima facie evidence of the underlying facts adjudicated under standard rules of evidence.<sup>276</sup> While the ABA Model Rules for Lawyer Disciplinary Enforcement

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273. Because of the allegations over the adequacy of the South Korean judgment's translation, this article refrains from speculating about the punishment Wilde faced in the Korean proceedings and her subjective motivation to defend.

274. There is no indication whether Wilde appealed the judgment or not.

275. *In re Wilde*, 68 A.3d 749, 754 (D.C. Cir. 2013).

276. See *Ennis v. Smith*, 55 U.S. 400 (1852) (adopting a Lithuanian determination of next of kin in a will contest); *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398 (6th Cir. 2006) (admitting into evidence documents from related civil and criminal actions in South Korea between the parties to resolve a trade misappropriation action); *United States v. Garland*, 991 F.2d 328 (6th Cir. 1993) (allowing defendant to admit a Ghanaian criminal conviction of two business partners to corroborate a defense to the charge of fraud); *Lloyd v. Am. Ex. Lines, Inc.*, 580 F.2d

call for state evidentiary laws,<sup>277</sup> some jurisdictions relax evidentiary standards, while others, including D.C.,<sup>278</sup> do not specifically employ any.<sup>279</sup>

Under the ABA Model Rules, a foreign criminal conviction could be used to establish evidence of the underlying facts. For example, in *Donnelly v. Federal Aviation Administration*, an airman's certification was revoked after the airman was convicted of importing a controlled substance by a Japanese court.<sup>280</sup> The United States Court of Appeals for the District of Columbia Circuit upheld "the collateral use of a criminal judgment as evidence" to revoke the airman's certification under the principle of comity.<sup>281</sup> The statute used to revoke the airman's certification required the Federal Aviation Administration to show that the airman's conduct would have violated U.S. law.<sup>282</sup> Because the Japanese criminal procedure comported with due process and the airman failed to argue otherwise, the court accepted the Japanese conviction as evidence of the facts leading to the conviction and found that the conduct would also have violated U.S. law.<sup>283</sup>

Furthermore, courts have relied on hearsay exceptions to admit the foreign convictions. In one case, a defendant counter-claimed against his employer for negligence and unseaworthiness—stemming from an altercation between the defendant and another crew-member—while docked in Japan.<sup>284</sup> The United States Court of Appeals for the Third Circuit ruled that the defendant's Japanese assault conviction (from the same altercation) was admissible.<sup>285</sup> The Third Circuit relied on the principle of comity and concluded that the judgment met the hearsay exception for previous convictions.<sup>286</sup> The court was satisfied both with the defendant's access to counsel during the Japanese proceeding and the "thoroughness" of the report that accompanied the judgment.<sup>287</sup> However, the court did not further decide the admissibility of evidence besides the fact that the

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1179, 1187–90 (3d. Cir. 1978) (admitting a Japanese criminal conviction into evidence to bolster employer's claim that an employee was the aggressor in an altercation at sea).

277. MOD. RULES FOR LAW. DISPL. ENFORCE. R. 18(b) (2002).

278. See D.C. COURT OF APPEALS BOARD ON PROF'L RESPONSIBILITY R. 11.3 (2011), available at <http://www.dcbbar.org/attorney-discipline/board-on-professional-responsibility/bpr-rules.cfm> ("Evidence that is relevant, not privileged, and not merely cumulative shall be received, and the Hearing Committee shall determine the weight and significance to be accorded all items of evidence upon which it relies. The Hearing Committee may be guided by, but shall not be bound by, the provisions or rules of court practice, procedure, pleading, or evidence, except as outlined in these rules or the Rules Governing the Bar.").

279. Moore, *supra* note 10, at 12–13.

280. *Donnelly v. FAA*, 411 F.3d 267, 268–69 (D.C. Cir. 2005).

281. *Id.* at 271.

282. *Id.* at 269.

283. *Id.* at 271.

284. *Lloyd v. Am. Ex. Lines, Inc.*, 580 F.2d 1179, 1187–90 (3d Cir. 1978).

285. *Id.*

286. *Id.* at 1187–90.

287. *Id.* at 1189 n.20.

conviction had been made.<sup>288</sup>

However, in *United States v. Garland*, the United States Court of Appeals for the Sixth Circuit went further by concluding that it may take judicial notice of the facts underlying a foreign criminal conviction.<sup>289</sup> In that case, a defendant, previously convicted of fraud for obtaining a loan under the alleged false pretense of a cocoa bean deal, was granted a new trial because of newly discovered evidence.<sup>290</sup> This evidence was a subsequent judgment by a Ghanaian court finding the defendant's Ghanaian business partners guilty of defrauding the defendant.<sup>291</sup> The Sixth Circuit found the judgment admissible to show the defendant made a deal with the Ghanaian business partners and that the business partners were then convicted of fraud.<sup>292</sup> Therefore, the defendant could use such evidence to support his claim that he was defrauded, negating the requirement of intent to defraud in his U.S. trial.<sup>293</sup>

Additionally, in another case concerning misappropriation of trade secrets, the Sixth Circuit allowed a party to admit a host of documents from previous civil and criminal actions in South Korea concerning the same misappropriation of trade secrets as the ones at issue.<sup>294</sup> The court permitted the foreign criminal conviction itself, a civil complaint, investigative reports produced by Korean authorities, and transcripts, including witness statements and interrogations, to be admitted into evidence.<sup>295</sup> All the documents were admissible as either non-hearsay or hearsay subject exceptions for public records, statements against the declarant's interest, or parties' admissions.<sup>296</sup>

If convictions and documents relating to convictions are admissible under traditional rules of evidence, it is quite likely they would be admissible under the less stringent requirements of the D.C. disciplinary proceedings.<sup>297</sup> Outside of D.C., the conviction and any documents relating to the trial, investigations, and discovery are likely admissible as non-hearsay or falling under hearsay exceptions, and can be used as evidence against a defendant. However, the Court of Appeals is still concerned about the fairness of foreign proceedings and may require Bar Counsel to show that such evidence is reliable and comports with minimum levels of due process before admitting it.<sup>298</sup> If the Court of Appeals finds the evidence of

288. *Id.* at 1190.

289. 991 F.2d 328, 330 (6th Cir. 1993) (answering in the affirmative the question of whether a subsequent criminal judgment in a foreign jurisdiction is subject to judicial notice and admissible into evidence).

290. *Id.* at 330, 336.

291. *Id.* at 331–32.

292. *Id.* at 335.

293. *Id.* at 336.

294. *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 411–12 (6th Cir. 2006).

295. *Id.*

296. *Id.* at 412–13.

297. *See, e.g., In re Shillaire*, 549 A.2d 336 (D.C. 1988) (acknowledging an affidavit is hearsay, but allowing it to be admitted).

298. *See Donnelly v. FAA*, 411 F.3d 267, 271–72 (D.C. Cir. 2005) (discussing the due process afforded to the plaintiff based on relevant evidence); *Lloyd v. Am. Ex. Lines, Inc.*, 580



the facts surrounding the conviction is fair, the defendant then has the burden to either challenge the admissibility under the rules of evidence or rebut the facts of the judgment with his or her own evidence.<sup>299</sup>

However, while Bar Counsel may have evidentiary options aside from issue preclusion, Bar Counsel still faces the challenge of gathering such evidence. Bar Counsel's case rests on the rules and regulations of the convicting nation concerning the recordation and availability of trial documents, professional courtesy, and proficient translators to procure and use the evidence in a Section 8 disciplinary proceeding. Depending on the sophistication of the convicting nation, there may be serious logistical hurdles to clear to obtain such evidence, adding time and expenses for an already taxed Bar Counsel.

In South Korean criminal proceedings, stenographic, audio, or video recording of the proceedings is only available if the prosecution, the defendant, or defense counsel files a motion prior to trial.<sup>300</sup> It is limited to uses concerning the same case<sup>301</sup> and is destroyed upon completion of the trial.<sup>302</sup> However, after trial, the sitting judge either renders a written decision stating the reasons for the decision or enters the judgment on a "protocol."<sup>303</sup> Once the trial is complete, "[a]ny person may file an application for inspection or copying of a litigation record . . . with the competent public prosecutor's office for the purpose of remedies for his rights, academic researches, or public interest."<sup>304</sup> Thus, while stenographic records are not available, the availability of the protocol can provide a wealth of information for Bar Counsel, including the procedural history of the case, "a statement of facts constituting the offense charged," "evidence examined, and the method of examination," "the gist of oral proceedings," assertions of procedural integrity, and statements of witnesses.<sup>305</sup> Further, the written decision or the decision entered onto the protocol outlines the specific factual findings of the court.<sup>306</sup>

## VII. A LOOK TO THE FUTURE

If the number of lawyers facing disciplinary proceedings based on foreign convictions increases, given the evidentiary hurdles faced with proving the fairness of the proceedings or with obtaining court documents, then bar counsels will look

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F.2d 1179, 1189–90 & n.20 (3d Cir. 1978) (discussing that the probative value of the foreign evidence is not substantially outweighed by unfair prejudice in admitting).

299. *See, e.g.,* United States v. Garland, 991 F.2d 328, 335 (6th Cir. 1993) ("The opposing party, of course, will have the opportunity to rebut these facts and opinions with evidence of its own.").

300. Regulations on Criminal Procedure, art. 30-2.

301. *Id.* art. 38-2(2).

302. *Id.* art. 39.

303. Criminal Procedure Act, art. 38–39.

304. *Id.* art. 59-2.

305. *See id.* art. 51 (providing the contents of the Protocol of Public Trial).

306. *See id.* art 39 (requiring a decision to state the reason on which it is based).

to organize internationally to combat these difficulties and increase the speed and ease of the process of obtaining such information necessary for prosecution.

The need to enhance communication channels—or even create such channels—between international disciplinary organs is not a novel concept. In 2009, the U.S.-based Conference of Chief Justices (CCJ), the Council of Bars and Law Societies of Europe (CBLs), and the Law Council of Australia (LCA) adopted parallel resolutions.<sup>307</sup> Each resolved to inform the other's disciplinary body of the existence of, and grounds for, discipline of foreign attorneys practicing in their jurisdiction.<sup>308</sup> The ABA Standing Committee on Professional Discipline has drafted a resolution calling for state disciplinary bodies to adopt similar international agreements with foreign disciplinary bodies.<sup>309</sup> However, the CCJ, CBLs, LCA, and ABA stopped short of calling for a shared list or general registration of all attorneys admitted in each jurisdiction; rather they compiled a list of names and addresses of each jurisdiction's disciplinary body.<sup>310</sup>

Even if similar resolutions were adopted internationally or individual states followed through with the ABA's proposed resolution, the problem encountered by *In re Wilde* remains. The type of misconduct the CCJ, CBLs, LCA, and ABA envisioned was misconduct related to a foreign attorney's practice of law, rather than the general commission of crimes.<sup>311</sup> A crime committed in a country in which the attorney was not registered to practice would not necessarily be disclosed to the home jurisdiction.<sup>312</sup> Furthermore, even if the attorney is registered to practice law in the jurisdiction in which the misconduct took place, whether the crime is reported to the home jurisdiction is entirely dependent on the host jurisdiction's own independently created definition of misconduct. If the host jurisdiction does not consider the commission of a specific crime to be misconduct, then no disciplinary proceedings would occur, and the home jurisdiction would never be notified. Whether the crime would constitute misconduct in the home jurisdiction

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307. *In Support of Cooperation Among United States and European Disciplinary Bodies*, Conf. of Chief Justices (Jan. 28, 2009), available at <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01282009-In-Support-of-Cooperation-Among-United-States-and-European-Disciplinary-Bodies.ashx>; *In Support of Cooperation Among United States and Australian Bar Admission and Lawyer Disciplinary Bodies*, Conf. of Chief Justices (Aug. 2009), available at <http://ccj.ncsc.org/~media/microsites/files/ccj/resolutions/08012009-cooperation-among-united-states-and-australian-bar-admission-and-lawyer-disciplinary-bodies.ashx>.

308. See *In Support of Cooperation Among United States and European Disciplinary Bodies*, *supra* note 307; *In Support of Cooperation Among United States and Australian Bar Admission and Lawyer Disciplinary Bodies*, *supra* note 307.

309. Memorandum from Myles V. Lynk, Chair, ABA Standing Comm. on Prof'l Discipline, & Stephen P. Younger, Chair, ABA Task Force on Int'l Trade in Legal Services, to ABA Entities et. al. (Mar. 20, 2013) available at [http://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/council\\_reports\\_and\\_resolutions/june2013council\\_meeting/2013\\_open\\_session\\_14\\_international\\_regulation\\_information\\_exchange\\_protocol.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/june2013council_meeting/2013_open_session_14_international_regulation_information_exchange_protocol.authcheckdam.pdf).

310. *Id.*

311. *In re Wilde*, 68 A.3d 749 (D.C. Cir. 2013).

312. One wonders how Bar Counsel was even informed about Wilde's South Korean conviction.

is of no import.

Despite the limits of these resolutions, improved communication channels among disciplinary bodies could provide measurable benefits. Direct access to the convicting nation's bar counsels, who possess inside knowledge of the convicting nation's legal system, will provide the home jurisdiction with many advantages. For example, the home jurisdiction bar counsels could both hear about convictions beyond its borders, and also benefit from improved access to evidence about those convictions.

To solve the specific misconduct problems encountered by *In re Wilde*, however, bar counsels would need some sort of international database of licensed, practicing attorneys from each country. This database would need to be constantly updated with disciplinary infractions and criminal records from each jurisdiction. Such a proposition is unlikely to gather support among lawyers. Moreover, the technology and infrastructure required may not exist. At this point in time, such oversight may be considered overkill as the "problem" of American attorneys committing crimes abroad is empirically based on only two cases.<sup>313</sup> Only time will tell if the incidence of American attorneys receiving criminal convictions abroad will increase due to trends in the global legal market.

### VIII. CONCLUSION

As technology and globalization change perceptions of physical boundaries, attorney discipline proceedings may begin to encounter more attorneys on the wrong side of foreign criminal justice systems. Attorney disciplinary proceedings are designed to efficiently and justly regulate the industry to better serve the public. To accomplish this, criminal convictions from domestic jurisdictions are treated as conclusive evidence of the attorney's behavior because Americans trust in our own due process of law. However, the lack of uniformity in due process among foreign criminal justice systems may not justify the same confidence.

The court in *In re Wilde* reflected this notion in ruling that it would not automatically utilize issue preclusion regarding the admissibility of an attorney's conviction in South Korea. Rather, in order to preclude the issue, Bar Counsel would have to show, on a case-by-case basis, that precluding argument on the admissibility of the conviction would be fair under the circumstances. This requires both a detailed analysis of the foreign country's criminal justice system and a sufficient gathering of facts concerning the fairness of the actual proceedings and the attorney's conduct that resulted in the conviction.

For the cash-strapped D.C. Bar Counsel, this is not an easy order to fill, especially since preclusion is only the first hurdle in the process. Bar Counsel then must show the conduct violated the state code of conduct and the basis for the recommended punishment. However, Bar Counsel could use the conviction and investigation as evidence without moving to preclude the issue—provided they can obtain such evidence—because attorney disciplinary proceedings, especially in

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313. *In re Wilde*, 68 A.3d 749 (D.C. 2013); *In re Scallen*, 269 N.W.2d 834 (Minn. 1978).

D.C., often have lower standards for the admissibility of evidence. Rather than affirmatively showing the fairness of the proceeding when moving to preclude the issue, if such evidence is admitted, the burden would shift to the attorney to rebut the evidence with his or her own evidence of the unfairness of the proceeding.

*In re Wilde* may be indicative of future challenges in attorney discipline, but it shows that the procedures in place can effectively cope with changes in the legal landscape.