COLLOQUY

A Case Against Automatic Disbarment

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"Disbarment being the very serious business that it is, ample opportunity must be afforded to show cause why an accused practitioner should be not disbarred."[1]

Introduction

The disciplinary process, in essence, has two primary goals.[2] First, the appropriate authorities, whether they be called the Grievance Committee or Disciplinary Committee, attempt to protect the public from unscrupulous or otherwise unsavory attorneys.[3] Concomitantly, these administrative bodies seek to penalize behavior that is deemed to be in contravention of the Code of Professional Responsibility.[4] The spectrum of the disciplinary remedies usually ranges from private reprimand to public censure; from suspension to the ultimate punishment of disbarment.[5] Illustrative of this process is New York's disciplinary system.[6]

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1. Theard v. United States, 354 U.S. 278, 282 (1957).

2. *See generally* Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423 (1982); *In re* Ruffalo, 390 U.S. 544 (1968); Theard v. United States, 354 U.S. 278 (1957); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867).

3. *Ruffalo,* 390 U.S. at 550.

4. *Id.* at 555.

5. STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS §§ 6.1 - 6.10 (1979).

6. *See* N.Y. JUD. LAW § 90 (McKinney 1983). In New York, lawyers are admitted to practice and disciplined by New York's four Appellate Divisions. *See* 22 N.Y.C.R.R. § 603 (1st Dept.); 22 N.Y.C.R.R. § 691 (2d Dept.); 22 N.Y.C.R.R. § 806 (3d Dept.); 22 N.Y.C.R.R. § 1022 (4th Dept.). For purposes of this Article, procedures used in the First Department, which covers Manhattan and the Bronx, will be cited.

In New York, a lawyer who comes close to violating a disciplinary rule customarily receives a letter of caution.[7] The letter is sent to attorneys whose actions, though technically violating no disciplinary rule, are nonetheless inconsistent with the duties of competency and veracity that are required of members of the bar.[8] If an attorney's conduct contravenes a particular disciplinary rule, the state disciplinary committee may recommend five possible levels of penalty.[9]

The least severe punishment is a letter of admonition, wherein the state disciplinary committee determines that the attorney has violated one of the state's disciplinary rules.[10] A second level of punishment applies to more serious cases. The committee, following a hearing, may issue a private reprimand to a lawyer who has violated the Code of Professional Responsibility.[11] Admonitions and reprimands place the attorney on notice that any future behavior will result in further, probably more severe, disciplinary action.[12] The next level of punitive action is public censure.[13] Public censure ordinarily results from cases of attorney neglect, in which unethical conduct is mitigated by the particular facts at bar.[14] Public censure consists of publication of the charges against the attorney and the supporting facts in the state's official reporters and in a local legal newspaper. The rationale for this procedure is both specific and general deterrence.[15] The fourth level of penalty may result if an attorney's conduct seriously contravenes a disciplinary rule. At this level, the attorney may be suspended for one, two or even five years.[16]

The epitome of the disciplinary process is disbarment, the highest level of disciplinary action. Disbarment strikes the attorney from the rolls of the state's practicing attorneys and, in effect, terminates his legal career.[17] Although technically a disbarred attorney may petition for reinstatement after seven years, the petition is rarely granted. Even if the petition is approved, the attorney starts his legal career de novo, with the

7. 22 N.Y.C.R.R. § 603.9(c) (1st Dept.).

8. *Id.*

9. N.Y. JUD. LAW § 90.2 (McKinney 1983); 22 N.Y.C.R.R. § 603.9(c).

10. 22 N.Y.C.R.R. § 603.9(a).

11. *Id.*

12. 22 N.Y.C.R.R. § 603.9(b).

13. *See* N.Y. JUD. LAW § 90 (McKinney 1983).

14. *See, e.g., In re* Weldon, 94 A.D.2d 327, 465 N.Y.S.2d 79 (1983); *In re* Knapp, 89 A.D.2d 419, 455 N.Y.S.2d 438 (1982); *In re* Koch, 77 A.D.2d 486, 433 N.Y.S.2d 819 (1980); *In re* Weiss, 54 A.D.2d 78, 387 N.Y.S.2d 575 (1976); *In re* Reifschneider, 60 A.D. 478, 69 N.Y.S. 1069 (1901).

15. *In re* Refschneider, 60 A.D. 478, 69 N.Y.S. 1069 (1901).

16. N.Y. JUD. LAW § 90.2 (McKinney 1983).

17. *Id.*

mark of Cain inscribed prominently on his letterhead.[18]

The disbarment process ordinarily is reserved for cases of extreme professional misconduct, such as the theft of escrow funds,[19] the utilization of false or fraudulent documents,[20] the commingling of funds[21] or conduct that has resulted in a criminal conviction.[22] A hearing guaranteeing the putative defendant due process of law is mandatory in all circumstances involving acts that appear to reflect professional misconduct, except in cases of felony conviction.[23] New York State law automatically and unilaterally requires an attorney's immediate disbarment the moment he is convicted of a felony,[24] even though the vast majority of states do not.[25]

This Article contends that automatic disbarment deprives an attorney of due process, violates his Fifth Amendment rights, impinges his right to equal protection of the law and, in essence, takes away his livelihood and reputation without affording him a meaningful forum or realistic opportunity to be heard. The drastic remedy of disbarment should result only after a thorough and meaningful hearing, at which the allegedly unethical attorney has a meaningful opportunity to present substantial mitigating factors that might negate or reasonably explain the felonious aspect of his conduct. In summary, the issue is not whether an attorney should be disbarred because of a felonious act, but whether such a drastic punishment should be administered automatically.

Although there are various degrees of felonies and types of behavior that might constitute felonious acts, all felonies result in automatic disbarment under the New York statute.[26] While certain felonies ultimately should result in disbarment, other felonies are unrelated to the practice of

18. Disbarment leaves no literal black marks, but it permanently harms an attorney's reputation.

19. *See, e.g., In re* Pinello, 100 A.D.2d 64, 473 N.Y.S.2d 7 (1984); *In re* Hodes, 97 A.D.2d 308, 469 N.Y.S.2d 371 (1983), *appeal denied,* 61 N.Y.2d 983, 463 N.E.2d 622, 475 N.Y.S.2d 281 (1984).

20. *In re* McComb, 93 A.D.2d 568, 462 N.Y.S.2d 683 (1983); *In re* Cahn, 87 A.D.2d 1014, 449 N.Y.S.2d 239 (1981).

21. *In re* Rinaldi, 95 A.D.2d 211, 465 N.Y.S.2d 552 (1983); *In re* Warfman, 91 A.D.2d 356, 458 N.Y.S.2d 915 (1983).

22. *In re* Margiotta, 60 N.Y.2d 147, 456 N.E.2d 798, 468 N.Y.S.2d 857 (1983); *In re* DeWindt, 93 A.D.2d 507, 462 N.Y.S.2d 223 (1983).

23. N.Y. JUD. LAW § 90 (McKinney 1983).

24. *In re* Barash, 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967); *In re* Ginsberg, 1 N.Y.2d 144, 134 N.E.2d 193, 151 N.Y.S.2d 361 (1956).

25. The ABA Center for Professional Responsibility reports that only the State of New York mandates the automatic disbarment of a lawyer upon conviction of a felony.

26. N.Y. JUD. LAW § 90.4 (McKinney 1983); *see also In re* Cahn, 52 N.Y.2d 479, 420 N.E.2d 945, 438 N.Y.S.2d 753 (1981); *In re* Chu, 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977).

law and are therefore inapposite to the distinct question of whether the convicted individual is suited to practice law. For example, a lawyer who is found guilty of perjury, suborning perjury, theft of clients' funds or the use of false or fraudulent documents, should ordinarily be disbarred after a full and fair hearing.[27] Disbarment appears reasonable for each of these felonies because they relate directly to the attorney's honesty and the integrity of his legal practice.

On the other hand, the New York statute requires automatic disbarment for felonies unrelated to the practice of law. In New York, a second conviction for driving while intoxicated within ten years of the first conviction constitutes a felony.[28] Should an attorney be disbarred for this conviction? An attorney's tendency to drink and drive has no direct connection with his honesty or ability to practice law. To disbar the attorney automatically is to ignore such mitigating factors as, for example, whether his drinking was predicated on the loss or suffering of a loved one. The disease of alcoholism cannot be remedied by expelling an individual from the legal profession.

Another example illustrative of the arbitrary and fundamentally unfair nature of automatic disbarment is felony assault conviction. In New York, assault in the second degree constitutes a felony,[29] but assault in the third degree is a misdemeanor.[30] The difference is that for a misdemeanor, one must intend to cause physical injury, while for a felony, one must intend to cause *serious* physical injury. With so hazy a distinction, it may be that the status of the offense as a felony or misdemeanor will be determined by the strength or weakness of the offender's plea bargaining. Automatic disbarment does not take into account the circumstances of the assault—was it an unprovoked fight in a bar or an aggravated neighborhood dispute? Should a forced plea bargain determine whether the allegedly unethical and unprofessional attorney will be afforded the protection of a hearing that preserves his basic due process rights?

In both instances sketched above, a hearing is necessary to afford due process of law to an accused attorney, to discover the relevant facts and circumstances and to determine whether the convicted individual is capable of professionally and ethically performing his legal duties in the future. The question is—are the vast majority of states that do not sanction automatic or mandatory disbarment incorrect in their solid respect

27. *See, e.g., In re* Stone, 80 A.D.2d 93, 437 N.Y.S.2d 682 (1981); *In re* Hirsch, 77 A.D.2d 267, 433 N.Y.S.2d 199 (1980); *In re* Mitchell, 48 A.D.2d 410, 370 N.Y.S.2d 99 (1975), *aff'd,* 40 N.Y.2d 153, 351 N.E.2d 743, 386 N.Y.S.2d 95 (1976).

28. N.Y. VEH. & TRAF. § 1192 (McKinney Supp. 1986).

29. N.Y. PENAL LAW § 120.05 (McKinney Supp. 1986).

30. N.Y. PENAL LAW § 120.00 (McKinney Supp. 1986).

for basic constitutional principles and in their means of protecting the citizenry? Or is New York, one of the few states that do prescribe automatic disbarment,[31] behind the times, acting in a Pavlovian, stare decisis manner?

I. Automatic Disbarment Deprives Attorneys of Fundamental Constitutional Guarantees

A. Due Process in Disbarment Proceedings

The United States Supreme Court has consistently held that legal disciplinary actions "are adversary proceedings of a quasi-criminal nature."[32] Accordingly, the Court has concluded that "[d]isbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer."[33] Due to the fact that disciplinary proceedings are deemed to be quasi-criminal in nature, it is "only fair and just that the Government not subject any person to such a drastic divestment [of his livelihood] without affording him substantial due process of law."[34]

The Court has consistently and firmly held that the "power of the States to control the practice of law cannot be exercised so as to abrogate federally protected rights."[35] For purposes of due process, an attorney threatened with the penalty or punishment of disbarment because of a felony conviction should be entitled to the same due process as a person being tried in a criminal court for a crime. In a perceptive analysis of dominant Supreme Court decisions in this area, the Second Circuit Court of Appeals stated:

> [A] court's disciplinary proceeding against a member of its bar is comparable to a criminal rather than to a civil proceeding. . . . [I]t cannot be disputed that for most attorneys the license to practice law represents their livelihood, loss of which may be a greater punishment than a monetary fine. Furthermore, disciplinary measures against an attorney, while posing a threat of incarceration only in cases of contempt, may threaten another serious punishment—loss of professional reputation. The stigma of such a loss can harm the lawyer in his community and in his client relations as well as adversely affect his ability to carry out his professional functions, par-

31. The few jurisdictions that mandate automatic disbarment in cases of felony conviction include the District of Columbia, Mississippi and New York. D.C. CODE ANN. § 11-2503 (1981) (moral turpitude offenses); MISS. CODE ANN. § 73-3-41 (1972); N.Y. JUD. LAW § 90.4 (McKinney 1983).

32. *E.g., In re* Ruffalo, 390 U.S. 544, 551 (1968).

33. *Id.* at 550 (citations omitted).

34. *In re* Stroh, 97 Wash. 2d 289, 303, 644 P.2d 1161, 1169 (1982) (quoting *In re* Ming, 469 F.2d 1352, 1355 (7th Cir. 1972)), *cert. denied*, 459 U.S. 1202 (1983).

35. Johnson v. Avery, 393 U.S. 483, 490 n.11 (1969).

> ticulary if his branch of the law is trial practice. Undoubtedly these factors played a part in leading the Supreme Court to characterize disbarment proceedings as being of a 'quasi-criminal nature'.[36]

Although federal and state courts are not united on the issue, for the most part they have opined that attorney disciplinary proceedings must comport with due process.[37] Virtually any state encroachment upon one's ability to pursue a profession or livelihood must satisfy the contours of due process.[38] In analogous circumstances, the United States Supreme Court concluded that the automatic defrocking of a priest[39] for aiding the Confederacy was impermissibly arbitrary.[40] The Court reasoned that one might have had different motives for aiding the Confederacy—for example, out of love and loyalty to one's father. Similar considerations moved the Court in *Ex parte Garland*[41] to insist that an attorney can be disbarred only "by the judgment of the court."[42] Thus, the flexibility of the states, state bar associations and the courts in formulating and executing disciplinary proceedings for attorneys is limited by the Due Process Clause, which traditionally has been a safeguard against arbitrary state action.[43]

For more than a century, the Supreme Court has expressly required disciplinary proceedings to provide "that . . . notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence."[44] The Court has stated without qualification that the state disbarment procedure must not suffer "from want of notice or opportunity to be heard" if it is to comport with constitutionally man-

36. Erdmann v. Stevens, 458 F.2d 1205, 1209-10 (2d Cir.) (citations omitted), *cert. denied,* 409 U.S. 889 (1972).

37. *In re* Ming, 469 F.2d 1352 (7th Cir. 1972); *In re* Fleck, 419 F.2d 1040 (6th Cir. 1969), *cert. denied,* 397 U.S. 1074 (1970); Chaney v. State Bar of Cal., 386 F.2d 962 (9th Cir. 1967), *cert. denied,* 390 U.S. 1011 (1968); Hackin v. Lockwood, 361 F.2d 499 (9th Cir.), *cert. denied,* 385 U.S. 960 (1966).

38. *See* Reich, *The New Property,* 73 YALE L.J. 733 (1964).

39. The automatic defrocking of a priest can easily be compared to the automatic disbarment of an attorney.

40. Cummings v. Missouri, 71 U.S. (4 Wall) 277 (1866).

41. 71 U.S. (4 Wall.) 333 (1866). In *Garland,* the statute involved was not a criminal statute but one on all fours with New York's automatic disbarment provision. It was a January 24, 1865, Congressional enactment, which in effect, disbarred attorneys ex post facto, who had aided the Confederacy. The Court held that the statute violated article I, section 9 of the United States Constitution.

42. *Id.* at 379.

43. *Ruffalo,* 390 U.S. at 551-52; Selling v. Radford, 243 U.S. 46, 51 (1917).

44. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 540 (1868).

dated due process of law.[45]

Further, the Court has ruled that a state could not prevent the admission of an applicant to the Bar (which is no different in principle from disbarring an attorney already admitted) except on the basis of evidence sufficient "to raise substantial doubts about his present good moral character."[46] The Court required a "record which rationally justifies a finding that [the prospective attorney] was morally unfit to practice law."[47] The Court explicitly held that "whether the practice of law is a 'right' or a 'privilege,' " due process standards must be strictly upheld: "Regardless of how the State's grant of permission to engage in this occupation is characterized, it is sufficient to say that a person cannot be prevented from practicing except for valid reasons. Certainly the practice of law is not a matter of the State's grace."[48] Mr. Justice Frankfurter, in his concurring opinion, expressed the Court's rationale precisely: "Refusal to allow a man to qualify himself for the profession on a wholly arbitrary standard or on a consideration that offends the dictates of reason offends the Due Process Clause."[49]

The United States Supreme Court has determined that disbarment proceedings are "of a quasi-criminal nature"[50] and that disbarment "is a punishment or penalty imposed on the lawyer."[51] It concomitantly concluded that an attorney facing the possibility of disbarment "is accordingly entitled to procedural due process, which includes fair notice of the charge"[52] as well as the opportunity to rebut the charges contained in a disbarment petition.[53]

Automatic disbarment is an "inflexibly harsh rule" that sacrifices fairness and reason, and one that brings about "abberational [sic] re-

45. *Selling*, 243 U.S. at 51. The Court in *Selling* stated it would not recognize a state disbarment as binding if:

> [F]rom an intrinsic consideration of the state record, one or all of the following conditions should appear: 1, That the state procedure from want of notice or opportunity to be heard was wanting in due process; 2, that there was such an infirmity of proof as to facts found to have established the want of fair private and professional character as to give rise to a clear conviction on our part that we could not consistently with our duty accept as final the conclusion on that subject; or 3, that some other grave reason existed which should convince us that to allow the natural consequences of the judgment to have their effect would conflict with the duty which rests upon us not to disbar except upon the conviction that, under the principles of right and justice, we were constrained so to do.

46. Schware v. Board of Bar Examiners, 353 U.S. 232, 246 (1957).
47. *Id.* at 246-47.
48. *Id.* at 239 n.5.
49. *Id.* at 249 (Frankfurter, J., concurring).
50. *Ruffalo*, 390 U.S. at 551.
51. *Id.* at 550.
52. *Id.*
53. *Id.*

sults."[54] The authorities discussed above make it plain that an attorney is entitled to a hearing before a court, to present evidence in mitigation and explanation, and to have the penalty, if any, determined by the court in light of the evidence—in short, due process. Automatic disbarment, however, eliminates the safeguards necessary to preserve individual rights. Illustrative of this proposition are two key federal cases dealing directly with the violation of due process resulting from automatic disbarment of attorneys convicted of crimes.[55]

In *In re Ming,*[56] the United States District Court summarily and without a hearing suspended Ming from practicing before it because he was convicted of failing to file federal income tax returns. Ming appealed and the Seventh Circuit reversed the order of the district court, holding that automatic suspension, without a hearing and without consideration of matters in mitigation and explanation, violated due process.[57] The court stated:

> As on an initial matter, we would not conceive that every Tom, Dick and Harry of a misdemeanor would serve as a basis for suspension. Secondarily, but conceivably of genuine significance, there is the matter of the duration of the suspension. Extenuating circumstances tending toward a minimization of the penalty very probably would require a hearing for proper development. Recently, in a case of parole revocation, the Supreme Court held that the parolee had the right to a hearing, with minimum due process requirements, including the opportunity to be heard in person and to present evidence and to confront and cross-examine adverse witnesses. While in a hearing on a suspension based on a finalized conviction of a misdemeanor, an attorney may not be allowed to reargue the merits of the conviction, he would seem to have similar interests to those of the parolee, or a person being sentenced for a crime, to some hearing under due process. In such a situation, 'a chance to respond' must be equated to 'the opportunity to be heard' which necessarily implies a hearing.[58]

Ming's crime was a misdemeanor. The court specifically refused to address disbarments based on felony convictions,[59] nevertheless a person convicted of a felony should be afforded the same rights.

In *In re Jones,*[60] the Chief Judge of the United States District Court

54. *In re* Thies, 45 N.Y.2d 865, 867, 382 N.E.2d 1351, 1352, 410 N.Y.S.2d 575, 577 (1978) (Wachtler, Fuchsberg, Cooke, JJ., dissenting).

55. *In re* Jones, 506 F.2d 527 (8th Cir. 1974); *In re* Ming, 469 F.2d 1352 (7th Cir. 1972).

56. 469 F.2d 1352 (7th Cir. 1972).

57. *Id.* at 1356.

58. *Id.* (citation omitted). The Court's rationale is at least equally applicable to disbarment, if not more so.

59. *Id.* at 1355 n.2. *Cf. In re* Echetes, 430 F.2d 347, 352 (7th Cir. 1970).

60. 506 F.2d 527, 528 (8th Cir. 1974).

for the Eastern District of Arkansas made an order striking Jones' name from the list of attorneys of that court upon Jones' conviction of filing false income tax returns, a felony. The Chief Judge acted summarily, without giving notice or a hearing, under a local rule similar to New York's automatic disbarment statute.[61] Jones appealed after a limited post-disbarment hearing, and the Eighth Circuit reversed on the ground that the lack of a meaningful hearing violated due process. The court stated:

> [W]e remand the case with instructions that Jones be permitted to present any evidence of mitigation, etc., that he desires. In the event the trial judge feels, after such a hearing, that the mitigating circumstances are so compelling that disbarment was not appropriate, he may then amend his judgment by ordering suspension or such other penalty as is deemed appropriate under the circumstances.[62]

In jurisdictions that employ automatic disbarment, an attorney's felony conviction constitutes the predicate for the petition for his disbarment. In essence, the conviction and the disbarment petition are handed down simultaneously.[63] The attorney is disbarred as of the moment of his conviction,[64] and "no further action, judicial or otherwise, is required . . . ."[65] Moreover, no consideration is given to the extent of the penalty to be imposed.[66] Disbarment is the automatic and immediate result.[67]

An attorney convicted of a felony has no real opportunity to be heard.[68] He has no opportunity to allege and prove mitigating circumstances concerning the offense, or its possible irrelevancy to the practice of law.[69] The respondent is denied the opportunity of presenting evidence bearing on his past record or on his present character and fitness to

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61. *Id.*

62. *Id.* at 529.

63. *In re* Barash, 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967); *In re* Ginsberg, 1 N.Y.2d 144, 134 N.E.2d 193, 151 N.Y.S.2d 361 (1956).

64. *Barash,* 20 N.Y.2d at 157, 228 N.E.2d at 898, 281 N.Y.S.2d at 1000.

65. *Id.*

66. *Id.*

67. N.Y. JUD. LAW § 90.4 (McKinney 1984).

68. An attorney convicted of a felony is entitled to a hearing in one situation only. This opportunity arises only if his conviction was obtained in a federal or sister-state court. Under such circumstances, the attorney could then allege that the wrongdoing does not comport with the felony criminal statute of the petitioning state. In essence, therefore, the petitioner has the mere duty of alleging that a felony conviction has occurred. *Id. See In re* Cahn, 52 N.Y.2d 479, 420 N.E.2d 945, 438 N.Y.S.3d 753 (1981); *In re* Chu, 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977). *But see In re* Donegan, 282 N.Y. 285, 26 N.E.2d 260 (1940).

69. *See In re* Cahn 52 N.Y.2d 479, 420 N.E.2d 945, 438 N.Y.S.2d 753 (1981); *In re* Chu, 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977); *In re* Barash, 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967); *see also* N.Y. JUD. LAW § 90.4 (McKinney 1983).

practice law. The respondent is denied the opportunity to present evidence bearing on the extent of the penalty to be imposed.[70] Forgotten are his accomplishments in the legal arena, his efforts to enhance and improve our criminal justice system, and his pro bono represention of impoverished clients. Irrelevant is his affiliation with various legal organizations whose objectives are the amelioration of the judicial process.[71]

Customarily, staff members of disciplinary committees contend that a disbarment hearing is both superfluous and unnecessary.[72] The basis of their contention has been that the respondent has already had his "day-in-court."[73] This argument is not merely imprecise, but it is fallacious and unrealistic.

The primary aim of a criminal trial is to determine whether or not a defendant has violated a penal statute. The prosecutor's goal is to prove the defendant's guilt, while the defendant zealously attempts to prove that he either did not commit the alleged criminal act or that the prosecution failed to prove his guilt beyond a reasonable doubt. The attorney's ability to practice law is not at issue. Evidence of the attorney's fitness of character, honesty or integrity may never arise.[74] Moreover, even if the attorney decides to put his character in issue, he is severely hampered by the rules of evidence, which dictate that witnesses may only testify as to character by offering reputation for honesty and veracity in the community.[75] The attorney is precluded from showing specific instances of pro bono work, his creative legal draftsmanship or past effectiveness in representing clients.[76] Thus, unless afforded a separate hearing, these factors and any others relevant to an individual's professional and ethical capability to practice law are excluded from the con-

70. *Barash,* 20 N.Y.2d at 157, 228 N.E.2d at 898, 281 N.Y.S.2d at 1000.

71. *Id.*

72. Gentile & McShea, *Automatic Disbarment: A Convicted Felon's Just Deserts,* 13 HASTINGS CONST. L.Q. 433 (1986); Gentile, *Unraveling the Complexity of Automatic Discipline,* N.Y.L.J., March 14, 1983, at 1, col. 3; Bonomi, *Professional Responsibility: An Alternative to Automatic Disbarment,* N.Y.L.J., April 14, 1978, at 1, col. 1.

73. Gentile, *supra* note 72, at 1; *see also* Gentile & McShea, *supra* note 72, at 436.

74. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1981). Lawyer conduct in the United States originally was governed by the Canons of Professional Ethics, which were adopted by the American Bar Association (ABA) in 1908. ABA Comm. on Professional Ethics and Grievances, Formal Ops. Foreword, at ix (1947). In 1969, a Model Code of Professional Responsibility was drafted and adopted by the ABA. ABA/BNA LAW. MANUAL ON PROF. CONDUCT (BNA) 1:301 (1984) [hereinafter cited as Lawyers' Manual]. In August 1983, the ABA House of Delegates adopted the MODEL RULES OF PROFESSIONAL CONDUCT (Rules), which replaced the entire Code. Lawyers' Manual, at 1:101 and 1:301. New York, in 1985, rejected the proposed Rules.

75. FED. R. EVID. 404-05.

76. *Id.*

sideration of the court having jurisdiction to disbar the attorney.[77] Consequently, an automatic disbarment statute, such as the one contained in Section 90.4 of the New York State Judiciary Law, proceeds on the bare basis of a record of conviction.[78]

Not only does procedure hamper the attorney in his ability to present evidence of character, but also tactical considerations may deny him the opportunity to explain his conduct. In many cases, a defendant, albeit an attorney, does not even take the stand on his own behalf. This strategy may be dictated by a number of factors. First and foremost is the belief that the prosecution has failed to prove its case. Second, the lawyer may just be a poor witness due to either demeanor, infirmity, alcoholism, or other debilitating factors.

While an attorney should not be permitted to reargue the merits of his criminal conviction in a disciplinary hearing, he must be permitted to come forth during a fair and impartial hearing with pertinent and relevant factors which he could not, or chose not, to bring forth during the criminal adjudication. As the Supreme Court of the United States pronounced more than one century ago:

> All that is requisite to [the state's disbarment proceeding's] validity is that, when not taken for matters occurring in open court [i.e., misconduct], in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence.[79]

The Court of Appeals, in *In re Ming,* convincingly argued that the phrase "notice and opportunity to be heard" forbids summary disbarment for conviction of a crime:

> Both licenses to practice law and welfare payments can be viewed as a type of "new property," the deprivation of which has drastic consequences to the individual. It is only fair and just that the Government not subject any person to such a drastic divestment without affording him substantial due process of law. As the Supreme Court noted in *Goldberg v. Kelly*, required procedural safeguards depend on the particular characteristics of the participants and the controversy, but " '[t]he fundamental requisite of due process of law is the opportunity to be heard.' "
>
> "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[80]

77. *Id. See Barash*, 20 N.Y.2d at 157, 228 N.E.2d at 898, 281 N.Y.S.2d at 1000.

78. *See supra* notes 63-67 and accompanying text.

79. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 540 (1868).

80. *In re* Ming, 469 F.2d 1352, 1355-56 (7th Cir. 1972) (citations omitted); *see also, In re* Crane, 23 Ill.2d 398, 400-01, 178 N.E.2d 349, 350 (1961).

The disbarment of an attorney is statutory and requires no judicial consideration.[81] Thus, an attorney subject to automatic disbarment never truly receives "notice" of his punishment before its imposition.[82] In fact, he is summarily disbarred as of the date of his conviction without having had the opportunity to present evidence on his own behalf.

B. Equal Protection

In his outstanding article on the constitutional infirmities and basic unfairness of the automatic disbarment remedy, John G. Bonomi,[83] one of the foremost experts on professional discipline in the State of New York, concluded that virtually all licensed professionals in New York who are convicted of felonies are guaranteed meaningful hearings that comport with due process of law. These hearings examine the substantive facts of the alleged misconduct and allow the convicted professionals the opportunity to fully present evidence of mitigating circumstances.[84] It is most ironic that attorneys are only afforded a meaningful and just forum when representing such licensed professionals as doctors, engineers, architects, and even hot dog vendors who are the targets of disciplinary action. Attorneys are permitted to champion the due process rights of their clients, yet, in an almost Kafka-esque scenario, the very champions of due process are denied the enjoyment of the rights and benefits they so strenuously safeguard for others. It is a violation of the equal protection doctrine to afford due process to the majority of professionals, but not to attorneys.

The Equal Protection Clause of the Fourteenth Amendment requires states not to discriminate between persons similarly situated unless there is a reasonable, nonarbitrary basis for treating them differently.[85] The state's classifications may be overturned if they are not rationally related to legitimate state interests.[86] The courts apply strict scrutiny to any state action involving a fundamental right[87] or a suspect class.[88] Whether deferentially or strictly reviewed, automatic disbarment violates the Equal Protection Clause.

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81. *See supra* notes 63-69.

82. *See Jones,* 506 F.2d at 528.

83. Bonomi, *Professional Responsibility: An Alternative to Automatic Disbarment,* N.Y.L.J., Apr. 14, 1978, at 1, col. 1.

84. *Id.* at 4, col. 3.

85. F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

86. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976).

87. That is, a right implied by the Constitution. *See, e.g.,* Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel).

88. Race is one example of a suspect classification. *See, e.g.,* Avery v. Georgia, 345 U.S. 559 (1953).

Arguably, automatic disbarment should be subject to close judicial review. When fundamental rights are at issue, discriminatory state actions are subject to strict scrutiny.[89] Although the courts have not yet gone so far as to hold that an individual's right to work automatically triggers strict scrutiny equal protection review, it is clear that the right to earn a livelihood is a fundamental personal freedom protected by the Fourteenth Amendment.[90] The importance of that right is underscored by the fact that some courts have held that the right of an attorney to practice law is a vested right.[91] Automatic disbarment deprives an attorney of that right to earn a living without affording him due process of law and some form of heightened review sould be appropriate under equal protection analysis.[92]

Even under the more relaxed rational relation test, automatic disbarment violates equal protection. There is no rational basis for denying attorneys the right enjoyed by other professionals to a full and fair disciplinary hearing in connection with felony convictions. Some have argued that attorneys as officers of the court are similar to public officials, and are therefore subject to automatic expulsion from the bar for unethical conduct.[93] The United States Supreme Court, however, has refused to accept the characterization of an attorney as an officer of the government

89. *Shapiro,* 394 U.S. at 638.

90. Takahashi v. Fish and Game Comm'n, 334 U.S. 410, 415-16 (1948).

91. *In re* Levine, 97 Ariz. 88, 90-91 (1964); *In re* Schaengold, 83 Nev. 65, 68-69 (1967). *Contra* Sams v. Olah, 225 Ga. 497, 504-05 (1969); Iowa State Bar Ass'n v. Kraschel, 260 Iowa 187, 193 (1967); People v. Culkin, 248 N.Y. 465, 470 (1924).

92. It may be argued that by denying attorneys due process, New York has made them an unprotected special class. In *In re* Griffiths, 413 U.S. 717 (1973), the United States Supreme Court deemed the wholesale classification of aliens as unfit to practice law in the State of Connecticut as violative of the Equal Protection Clause. The resident alien seeking admission to the bar was married to an American citizen and was a graduate of an American law school. The Court stated that violation of the Equal Protection Clause occurs unless the state shows "that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Id.* at 721-22 (citations omitted). The Court rejected Connecticut's overbroad contention that an alien has unclear national loyalties that may undermine his ability to serve the court system or his clients. *Id.* at 723-24. The Court also refused to accept the State's characterization of an attorney as an officer of the government subject to the special qualifications imposed on individuals, particularly aliens, in the governmental process. The Court required Connecticut to cease its broad exclusion of aliens from the practice of law, and held that the State must make reasonable determinations on an individual case basis in order to comport with the standards of the Equal Protection Clause. *Id.* at 722-23. Similarly, sweeping disbarment of every attorney convicted of a felony denies them even the semblance of due process and transforms them into a special class of unprotected individuals.

93. People v. Culkin, 248 N.Y. 465, 162 N.E. 487 (1928); 21 ALB. L. REV. 100, 102 (1957).

subject to special qualification.[94] The discrimination cannot be justified by arguing that an attorney as a fiduciary should be held to a higher standard. First, there may be no connection between the underlying conviction and an attorney's trustworthiness. Secondly, many other professionals are also fiduciaries. It is unreasonable to differentiate between these professionals and attorneys.

Unlike virtually any other licensed professional, attorneys are summarily disbarred as soon as they are convicted of a felony, without even a cursory hearing. There is no opportunity to determine the facts and circumstances surrounding the attorney's conviction, let alone the nexus, if any, between his conviction and the capability to practice his chosen profession. As Mr. Bonomi concluded, this situation "constitutes separate and unequal treatment [which is] violative of the [E]qual [P]rotection [C]lause of the United States and New York Constitutions."[95]

C. Due Process and Fifth Amendment Concerns in Criminal Proceedings

Application of automatic disbarment hinders an attorney not only in the disciplinary setting, but also in his defense of the predicate criminal action. An attorney who is charged with a felony, justifiably or not, is under severe pressure to take a plea to either a misdemeanor or petty offense. This is due to the fact that a zealous attempt to defend himself against the felony accusation may result in both conviction and automatic disbarment. This dilemma has a significant chilling effect on the attorney's defense. Recognizing that jurors are unpredictable and often unsympathetic to lawyers accused of crime, the attorney in quest of preservation of his career may well forego his day in court rather than risk conviction. Further, as explained above,[96] evidentiary rules preclude the attorney from submitting his professional qualifications, past pro bono work and other activities that would substantially negate the assertion that he is unfit to practice law. A plea to a misdemeanor or a petty offense at least will ensure him of a hearing at which he can introduce mitigating factors and meaningful character testimony as to his ability to practice law.[97] The irrefutable effect of automatic disbarment is that a lawyer may forfeit his profession if he chooses to fully exercise his constitutional privilege to defend himself in court, or he may be forced to sacrifice his privilege to retain his livelihood. Consequently, even the integrity of the criminal adjudication is substantially eviscerated by the automatic

94. *In re* Griffiths, 413 U.S. 717, 723 (1973).
95. Bonomi, *supra* note 83, at 4, col. 3 (citations omitted).
96. *See supra* notes 69, 75 and accompanying text.
97. N.Y. JUD. LAW § 90 (McKinney 1983).

disbarment approach. An attorney is placed in a Hobson's Choice—he can neither focus on the criminal trial nor can he adequately safeguard his reputation and integrity.

Ironically, the rights essentially denied to an attorney in a criminal adjudication in an automatic disbarment jurisdiction are guaranteed to him in a disciplinary proceeding. The United States Supreme Court, in *Spevack v. Klein,* [98] reviewed the disbarment of a New York attorney who refused to produce records or to testify at a judicial inquiry. In reaffirming the principle that the Fourteenth Amendment includes the Fifth Amendment privilege against self-incrimination,[99] the Court held that the privilege extends to lawyers in disbarment proceedings.[100] The Court explicitly found any penalty for invoking the Fifth Amendment, including disbarment, impermissible.[101]

In reality, the attorney faced with a felony adjudication in an automatic disbarment jurisdiction does not enjoy such protection. If he decides to go to trial to fight the felony charge, he almost certainly has to testify. If he chooses not to testify, the odds of conviction, and therefore automatic disbarment, are substantially raised. Further, an attorney truly innocent of any offense may be forced to accept a reduced charge in order to guarantee a disciplinary hearing rather than risk conviction and the loss of an opportunity to explain. Consequently, a reasonable alternative to automatic disbarment must be adopted.

II. Fairness and Fundamental Constitutional Safeguards Mandate Alternatives to Automatic Disbarment

The American Bar Association Model Rules,[102] addressing attorney discipline, provide safeguards that are absent from automatic punishment systems. A model system would provide for a hearing whereby mitigating circumstances may be introduced whenever an attorney is subjected to discipline following his conviction of a crime. This hearing would be designed to afford an individual clear notice of the charge that he is unfit to practice law, along with a warning of his possible punishment. Most critically, it would provide the attorney with a genuine opportunity to introduce evidence in explanation and mitigation.

Three decades ago, California amended its Business and Profes-

98. 385 U.S. 511 (1967).

99. *Id.* at 514.

100. *Id.* at 514-15.

101. *Id.*

102. *See* A.B.A. Standing Comm. on Prof. Discipline Suggested Guidelines for Rules of Disciplinary Enforcement (1974).

sional Code to eliminate summary disbarment.[103] Among the key changes was the insertion of language in the statute which requires discipline to be determined "according to the gravity of the crime and the circumstances of the case."[104] In an early and influential opinion, the California Supreme Court observed that such reform is not intended to emasculate professional standards, but to ensure discipline based on the particular facts of each case:

> No intent of the Legislature to lessen professional standards can be derived either from the wording or legislative history of the 1955 amendments. Sponsored by the State Bar, the amendments give greater flexibility and in substance (a) affirm this court's established policy of referring cases where the question of moral turpitude was doubtful upon the record of conviction to the State Bar for hearing, report and recommendation; (b) provide a means of obtaining a better record than provided under the former law by the bare 'record of conviction' (which consists of indictment, information or complaint, plea of guilty and other minute orders); (c) permit disciplinary investigation where the crime itself does not involve moral turpitude; (d) remove the legislative mandate that disbarment is mandatory upon the final conviction of any crime involving moral turpitude; and (e) permit this court to take into account unusual situations even in the case of more serious crimes.[105]

This model should be adopted by the states that currently authorize automatic or mandatory disbarment. Among the relevant factors such a hearing should focus upon are: (1) the nature of the offense; (2) the prior reputation of the convicted attorney for honesty and veracity; (3) the nexus between the crime and competency to practice law effectively; (4) the attorney's prior professional record; (5) his pro bono service to the community; and (6) his potential for rehabilitation.

If these factors are adopted, the appropriate courts could decide whether an attorney should be disbarred "on the foundation of a hearing in mitigation and explanation, rather than on the bare record of conviction, [and] may impose a penalty for the crime and circumstances of the

103. 1939 Cal. Stat., ch. 34, p. 357.

California laws pertaining to disbarment have undergone some change recently. California permits "summary" disbarment of attorneys convicted of certain kinds of felonies. Summary disbarment felonies are those that have as an element some sort of intent to deceive or steal, and that are committed in the practice of law. CAL. BUS. & PROF. CODE § 6102(c) (West Supp. 1986). Though such disbarment is labeled "summary," it remains to be seen whether the California courts will require a hearing to determine whether the felony was committed in connection with the practice of law.

104. CAL. BUS. & PROF. CODE § 6102(b) (West 1955).

105. *In re* Smith, 67 Cal. 2d 460, 462, 432 P.2d 231, 232, 62 Cal. Rptr. 615, 616 (1967) (citations omitted).

case."[106]

Conclusion

Automatic disbarment based on a felony conviction is a drastic remedy. For all intents and purposes, disbarment terminates the legal career of an attorney. In addition, once disbarred the individual attorney is stigmatized for the remainder of his life in whatever job or profession he ultimately accepts. He loses the opportunity to practice law—an opportunity that is only gained via years of preparation and hard work.

It is by no means contended that dishonest or disreputable attorneys should be kept on the rolls. An attorney who has violated his fiduciary trust vis-a-vis his clients or has acted in a manner that clearly subverts our legal system should be removed. The traditional dual concern of safeguarding the public and deterring other lawyers from committing unlawful and unethical acts should be maintained. However, the cost of policing the legal profession and protecting the public should not be the evisceration of the very constitutional rights that the legal profession zealously seeks to preserve. A hearing wherein an attorney is afforded an opportunity to mitigate the charges against him and to put forth his past record will not necessarily permit him the unrestricted right to practice law. Rather, instead of disbarment, the appropriate penalty may well be suspension if and when a prognosis of rehabilitation appears likely.

To deny an individual the opportunity to salvage his career by showing that the conduct in question was a mere aberration in an otherwise fruitful and law abiding life violates not only the dictates of the Constitution, but the very principles of fundamental fairness on which our society's ethics rest. Moreover, even the grossest offender is entitled at least to a hearing to determine the degree of his wrongdoing. In a sense, denial of due process to attorneys found to have violated the law is as unseemly as the conduct, whatever it might be, of which these attorneys are convicted. Denial of constitutional rights and privileges, both in the criminal and ethical arena, must be accompanied by the requisite due process standard which affords a hearing prior to dismissal from the legal profession. Anything less leaves all attorneys stained with the mark of a system that condones punishment without due and fair process.

106. Bonomi, *supra* note 83, at 4, col. 6.