Automatic Disbarment: A Convicted Felon's Just Desserts

By MICHAEL A. GENTILE*
AND SARAH DIANE MCSHEA**

Introduction

It is indeed ironic that at a time when public confidence in the honesty and integrity of lawyers is at its lowest, we should be called upon to defend one of the most reasonable and reliable procedures yet devised for ousting from the Bar those practitioners who are clearly dishonest, untrustworthy or unfit. We speak, of course, of the felony disbarment rule.

Generally cited with admiration and approval, statutes[1] mandating the automatic or summary disbarment of convicted felons have, from time to time, drawn criticism and aroused controversy. Not surprisingly, one of the foremost opponents of felony disbarment is the legal profession's conservative bastion and powerful protector: the American Bar

* Chief Counsel, Departmental Disciplinary Committee, Appellate Division of the Supreme Court of New York, First Department. B.A. Brooklyn College; J.D. Brooklyn Law School. Formerly Assistant District Attorney and Chief of Investigations, Kings County District Attorney's Office, 1971-80.

** Deputy Chief Counsel, Departmental Disciplinary Committee, Appellate Division of the Supreme Court of New York, First Department. B.A. Yale University; J.D. Boston University School of Law.

1. The jurisdictions mandating disbarment upon conviction of a felony or "moral turpitude" offense include the District of Columbia, Mississippi and New York. D.C. CODE ANN. § 11-2503 (1981) (moral turpitude); MISS. CODE ANN. § 73-3-41 (1972); N.Y. JUD. LAW § 90(4) (McKinney 1983).

California permits summary disbarment of attorneys convicted of felonies, but only if 1) an element of the felony is "to deceive, defraud, steal or make or suborn a false statement" and 2) the offense is committed in the practice of law or against a client. CAL. BUS. & PROF. CODE § 6102(c) (West Supp. 1986). Since this provision was added in 1985, no decisions have been handed down indicating whether a separate hearing will be necessary to determine the elements of the felony and its connection with the practice of law.

In Maryland, the Court of Appeals issues an order to show cause why an attorney should not be disbarred once he is convicted of a felony. Taking into account the attorney's response and the circumstances of the case, the court may then suspend the attorney pending the outcome of a disciplinary hearing. MD. ANN. CODE, MD. RULES BV16 (1985).

Association. Like Professor Abramovsky,[2] the ABA proposes that lawyers convicted of felonies be afforded mitigation hearings and an opportunity to avoid disbarment.[3]

We think this position is misguided and premised upon the false notion that disciplinary proceedings serve some purpose other than protection of the public and the reputation of the bar. While concerns about the careers and rehabilitation of troubled practitioners are laudable indeed, they have little place in a discussion about the licenses of convicted felons to practice law. Not only is there no constitutional bar to the felony disbarment rule, but neither fairness nor justice require that the legal profession descend further in public esteem to preserve lawyers' licenses.

I. New York's Felony Disbarment Rule

What are, and what should be, the consequences of a felony conviction to a lawyer's license to practice law? For well over one hundred years, New York has provided one answer to this question: immediate and automatic disbarment.[4] It is the unwavering view of the New York courts and legislature that a lawyer convicted of a felony cannot be permitted to remain at the bar.[5] At the moment of his conviction, a New York lawyer ceases to be an attorney.[6] No intervening act is required by any disciplinary authority or any court.[7] Justice was never swifter and, we would urge, never fairer.

II. Why Felony Disbarment Is Constitutional

The United States Constitution does not require that attorneys convicted of felonies be afforded evidentiary hearings before being disbarred or suspended. One hundred years ago, Justice Bradley eloquently expressed the moral and professional sensibilities of his day: "If regularly convicted of a felony, an attorney will be struck off the roll as [a matter]

2. *See* Abramovsky, *A Case Against Automatic Disbarment*, 13 HASTINGS CONST. L.Q. 415, 417 (1986).

3. *See, e.g.*, ABA STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1979); ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986).

4. N.Y. JUD. LAW § 90(4) (McKinney 1983); *In re E.*, 65 How. Pr. 171, 172 (1879); *In re Niles*, 48 How. Pr. 246, 251-52 (1875).

5. N.Y. JUD. LAW § 90(4) (McKinney 1983).

6. *Id.*

7. *In re* Ginsberg, 1 N.Y.2d 144, 146-47, 134 N.E.2d 193, 194, 151 N.Y.S.2d 361, 362-63 (1956) (striking lawyer's name from roll of attorneys "is no more than a formal recording of the existing fact of disbarment. It is a solemn pronouncement but not a new adjudication."); *In re* Sweeney, 95 A.D.2d 579, 580, 467 N.Y.S.2d 585, 586 (1983) (the law is "self-executing").

of course, whatever the felony may be, because he is rendered infamous."[8] We submit that, Professor Abramovsky's views notwithstanding,[9] the law is no different today. An attorney regularly convicted of a felony may be disbarred summarily, without offense to either the federal Constitution or modern notions of justice.

The justification for automatic and mandatory felony disbarment is clear. As the New York Court of Appeals wrote in *In re Mitchell*,[10] affirming the disbarment of the former Attorney General of the United States upon his conviction of perjury and obstruction of justice, "[t]o permit a convicted felon to continue to appear in our courts . . . would not 'advance the ends of justice', but instead would invite scorn and disrespect for our rule of law."[11] The court affirmed the constitutionality of both the felony disbarment rule and its application before the appeal was exhausted.[12] Without citing *In re Ming*,[13] *Mitchell* rejected *Ming*'s premise that a criminal conviction could not serve as the predicate for professional discipline until it was final, that is, until all appeals were completed.[14] The court upheld the fairness of the felony disbarment rule, finding that the "concern for the protection of the public interest far outweighs any interest the convicted attorney has in continuing to earn a livelihood in his chosen profession."[15] In balancing an attorney's interest in his law license—an interest that the New York Court of Appeals has recently described as a "property" interest[16]—against the public interest in maintaining the honor and integrity of the legal profession, the lawyer's right to his license inevitably will be less important, particularly when the lawyer is a convicted felon. Even the *Ming* court, troubled by the summary suspension of an attorney convicted of a misdemeanor offense, side-stepped the clearly distinguishable issue of the convicted felon's right to practice law, apparently recognizing the fundamentally

8. *Ex parte* Wall, 107 U.S. 265, 273 (1882).

9. *See* Abramovsky, *supra*, note 2.

10. 40 N.Y.2d 153, 351 N.E.2d 743, 386 N.Y.S.2d 95 (1976).

11. *Id.* at 156, 351 N.E.2d at 745, 386 N.Y.S.2d at 97.

12. *Id.* at 157, 351 N.E.2d at 746, 386 N.Y.S.2d at 97.

13. *In re* Ming, 469 F.2d 1352 (7th Cir. 1972). *See* Abramovsky, *supra* note 2, at 422.

14. *Mitchell*, 40 N.Y.2d at 157, 351 N.E.2d at 746, 386 N.Y.S.2d at 97 (strong "presumption of regularity" attaches to judgment of conviction).

15. *Id.* at 156, 351 N.E.2d at 745, 386 N.Y.S.2d at 97; *see also In re* Hughes, 90 N.J. 32, 36, 446 A.2d 1208, 1210 (1982).

16. *In re* Capoccia, 59 N.Y.2d 549, 553, 453 N.E.2d 497, 499, 466 N.Y.S.2d 268, 269 (1983); *accord In re* Seiffert, 65 N.Y.2d 278, 480 N.E.2d 734, 491 N.Y.S.2d 145 (1985); *cf.* Supreme Court of N.H. v. Piper, 105 S. Ct. 1272, 1276-78 (1985) (for purposes of Privileges and Immunities Clause, right to practice law is a "fundamental" right).

different implications of misdemeanor and felony offenses.[17]

In criticizing the felony disbarment rule, Professor Abramovsky first focuses on issues of due process.[18] This attack relies heavily upon the dicta in *Ming* and upon a plethora of eminently quotable sentiments articulated in various "due process" cases. However, except for an isolated Eighth Circuit case,[19] the constitutional objections to automatic or mandatory disbarment have foundered utterly.

In *United States v. Jennings,*[20] the Fifth Circuit, citing *In re Mitchell* with approval, severely criticized *Ming* for failing adequately to consider the importance of both the "public interest in avoiding the appearance of impropriety in the legal profession,"[21] and the interests of the convicted attorney's clients.[22] The court rejected *Ming*'s assumption that an attorney's interest in his license is as great as an alien's interest in avoiding deportation.[23] *Jennings* concluded that, under the particular facts of the case, due process did not require a separate hearing to suspend the convicted attorney's license.[24]

The Third Circuit, in *United States v. Friedland,*[25] affirmed without opinion a lower court ruling upholding the constitutionality of summary discipline upon a felony conviction. Like many other observers, the New Jersey district court rejected *Ming* in favor of *Mitchell,* finding it "intolerable that a convicted felon should be permitted to engage in the practice of law."[26]

Despite arguments to the contrary, the lawyer convicted of felonious conduct has had due process of law. He received ample notice of the charges in an indictment or criminal information. He had a full opportunity to contest the charges before a jury or trial judge—unless he chose to plead guilty. The consequences of his felony conviction were well known to him before trial or plea. He faced not only loss of his law license, but

17. *In re* Ming, 469 F.2d at 1355 n.2 ("We do not here consider whether such summary disbarment or suspension for conviction of a felony violates due process.").

18. Abramovsky, *supra* note 2, at 419-26.

19. *In re* Jones, 506 F.2d 527 (8th Cir. 1974).

20. 724 F.2d 436 (5th Cir.), *cert. denied,* 104 S. Ct. 2682 (1984).

21. *Id.* at 449.

22. *Id.* at 450.

23. *Id.* at 449-50.

24. *Id.* at 451. In so holding the court found persuasive several factors unique to the case: the defendant was convicted of a crime of moral turpitude (fraud); the judge who ordered suspension of the defendant's license also presided over the defendant's trial; and the defendant did not raise the due process argument at sentencing even though he was given a chance to do so.

25. 502 F. Supp. 611 (D.N.J. 1980), *aff'd mem.* 672 F.2d 905 (3d Cir. 1981); *see also In re* Stoner, 507 F. Supp. 490 (N.D. Ga. 1981).

26. *Friedland,* 502 F. Supp. at 617.

also the risk of incarceration for a substantial period of time, the loss of all civil rights and the forfeiture of public office.[27]

The loss of a law license upon conviction of a felony is not an additional "penalty" imposed upon the lawyer for his criminal conduct.[28] Rather, disbarment under such circumstances may more aptly be described as a "loss of status." There is therefore little point in conducting hearings at which the convicted felon can put forth mitigating evidence, explain the circumstances of his criminal conduct and demonstrate his hitherto good character and unblemished record. The New York legislature—and the legislatures of other jurisdictions mandating disbarment under similar circumstances[29]—view a felony conviction as conclusive evidence of unfitness to practice law. There is no constitutional infirmity in this per se disqualification of convicted felons.

Professor Abramovsky's second constitutional attack, predicated upon the Equal Protection Clause, fares no better. He argues that the automatic felony disbarment rule improperly discriminates against lawyers since other professionals do not similarly have their licenses revoked upon conviction.[30] This argument fails on two levels. First, disbarment clearly withstands the rational basis test. Further, even if disbarment were subject to strict scrutiny, it would survive.

Under the traditional test, equal protection analysis requires only that the statutory classification have a "rational basis" and that it not rest on "grounds wholly irrelevant to the achievement of the State's objective."[31] In other words, the classification must be rationally related to some legitimate governmental purpose.[32] The automatic disbarment of attorneys convicted of felony offenses clearly survives constitutional scrutiny under this test. In New York, a felony conviction has long been conclusive evidence that the defendant is not only unfit to practice law but unfit to hold any public office. In *Toro v. Malcolm,*[33] for example, New York's Court of Appeals affirmed the automatic termination of a state corrections officer upon his conviction of a felony. Although the officer's conviction was eventually reversed and he was reinstated, the

27. *See, e.g.,* N.Y. CIV. RIGHTS LAW § 79 (McKinney 1976); De Veau v. Braisted, 363 U.S. 144, 158-59 (1960); *cf.* Hawker v. New York, 170 U.S. 189 (1898).

28. *Ex parte* Wall, 107 U.S. 265, 273 (1882). *Contra In re* Ruffalo, 390 U.S. 544, 550 (1968) ("Disbarment . . . is a punishment imposed on the lawyer.").

29. *See supra* note 1.

30. *See* Abramovsky, *supra* note 2, at 426-28.

31. People v. Whidden, 51 N.Y.2d 457, 460, 415 N.E.2d 927, 928, 434 N.Y.S.2d 937, 938 (1980) (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)).

32. *See, e.g.,* People v. Shepard, 50 N.Y.2d 640, 409 N.E.2d 840, 431 N.Y.S.2d 363 (1980).

33. 44 N.Y.2d 146, 375 N.E.2d 739, 404 N.Y.S.2d 558 (1978).

court upheld the statutory termination provision and denied back pay. In weighing the interests of the felonious officer against the public interest, the court stated: "the balance must be struck in favor of the public's right to rest assured that its officers are individuals of moral integrity in whom they may, without second thought, place their confidence and trust."[34] We strike the same balance in weighing the public interest in the integrity of the legal profession against the felon's interest in his law license.

Automatic disbarment should not be subject to strict scrutiny. Equal protection analysis requires enhanced judicial review for legislation affecting suspect classifications[35] or fundamental interests.[36] Clearly, attorneys are not members of a suspect class. Further, the practice of law is not a fundamental right, but a privilege.[37] Thus strict scrutiny is inappropriate.

Even though strict scrutiny is inappropriate, automatic disbarment would nonetheless withstand such scrutiny. The stricter test requires that the challenged law be "necessary to promote a *compelling* government interest."[38] Felony disbarment promotes a compelling interest. The attorney is "an instrument . . . to advance the ends of justice."[39] Surely justice is a compelling state interest. Just as surely is that interest thwarted when the very agents of justice demonstrate their contempt for the law by committing felonies. In addition, the attorney owes a high duty of loyalty and fidelity to his client.[40] The client's right to an attorney may rise to constitutional dimension.[41] Surely the compelling state interest in affording citizens the right to counsel would be frustrated if felons were placed in such high positions of trust.

New York's disciplinary scheme has previously withstood an equal

34. *Id.* at 152, 375 N.E.2d at 742, 404 N.Y.S.2d at 562; *see also* Gunning v. Codd, 49 N.Y.2d 495, 403 N.E.2d 1208, 427 N.Y.S.2d 209 (1980).

35. Such as race, alienage or nationality. *Whidden*, 51 N.Y.2d at 460, 415 N.E.2d at 928, 434 N.Y.S.2d at 938; *see also* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

36. *See Shapiro,* 394 U.S. at 638.

37. People *ex rel* Karlin v. Culkin, 248 N.Y. 465, 470, 162 N.E. 487, 489 (1928); *see also* Sams v. Olah, 225 Ga. 497, 504-05, 169 S.E.2d 790, 798 (1969), *cert. denied*, 397 U.S. 914 (1970); Iowa State Bar Ass'n v. Kraschel, 260 Iowa 187, 193, 148 N.W.2d 621, 625 (1967). *Contra In re* Levine, 97 Ariz. 88, 90-91, 397 P.2d 205, 206-07 (1964); *In re* Schaengold, 83 Nev. 65, 68-69, 422 P.2d 686, 688 (1967).

38. *Shapiro*, 394 U.S. at 634 (emphasis in original).

39. *Karlin*, 248 N.Y. at 471, 162 N.E. at 489.

40. Gay v. Heller, 252 F.2d 313 (5th Cir. 1958).

41. U.S. CONST. amend. VI.

protection attack. In *Mildner v. Gulotta*[42] a federal district court rejected the argument out of hand. In disciplining professionals, the court wrote, "the State may legitimately find reason to conclude that differing procedural safeguards are appropriate for different professions."[43]

Lawyers are officers of the court and guardians of the legal process. They should be held to the highest standards of personal and professional honesty and obedience to the law. Should hairdressers or hot dog vendors or even doctors be held to the same standard? If not, are we obliged to relax our expectations of lawyers? We think not.

In support of his proposal requiring mitigation hearings for all attorneys convicted of felonies, Professor Abramovsky cites two examples of convictions that might not lead to disbarment if the attorney had an opportunity to be heard: the recidivist drunk driver and the barroom brawler.[44] Arguably neither one has committed acts which have any bearing upon his professional ethics or his character and fitness to be an attorney. Should these attorneys, then, be automatically disbarred? We say they must: they are convicted felons. If their offenses were not so serious, they should not have been classified by the state legislature as felonies. The remedy is not to repeal the felony disbarment rule, but to re-examine our penal codes.

The barroom brawler, that is, the lawyer convicted of second-degree assault rather than third-degree assault, which is a misdemeanor, must live with the consequences of his action. The legislature has seen fit to label a felony what might otherwise have been an isolated and aberrational outburst. We are willing to live with an occasional harsh result—and so are the people and courts of New York—because the salutary effects of the felony disbarment rule are so great.

III. The Practical Effects of Disbarment

In addition to constitutional matters, there are practical considerations which may affect the way the reader will view the plight of the felonious lawyer. First, most of those involved in the criminal justice system believe—if on no other basis than their common experience—that most defendants are factually guilty of the crimes they are accused of

42. 405 F. Supp. 182 (E.D.N.Y. 1975), *cert. denied,* 425 U.S. 901 (1976) (state may legitimately deny appellate review to lawyers while providing appeals for other disciplined professionals).

43. *Id.* at 193. Unlike other professionals, a lawyer's criminal conviction "compromises his position in the community." *In re* Williams, 105 A.D.2d 974, 975, 481 N.Y.S.2d 530, 531 (1984).

44. *See* Abramovsky, *supra* note 2, at 418-19.

committing. This argument undercuts Professor Abramovsky's concern about the innocent lawyer who is "compelled" to plead guilty to a misdemeanor to avoid the risk of a felony conviction and automatic disbarment.[45] In all likelihood, the accused lawyer does not deserve this sympathy. Our second practical observation is that, for several reasons, an attorney is in a better position than a nonattorney. Unlike the layman, the accused lawyer has a bargaining chip in the criminal process, namely, his license to practice. Second, as an attorney he is in a better position to evaluate his legal predicament. Once proceedings have begun, the nonattorney must rely solely on the advice of his counsel. Further, the attorney should be more aware of the legal consequences of his conduct before any act is committed. The rule that ignorance of the law (and its consequences) is no excuse should apply with special force to attorneys.

The public has an important interest in the integrity of the legal profession[46] and a "compelling interest in regulating our system of justice to assure high standards of professional conduct."[47] Citizens and noncitizens alike are more dependent than ever upon the presumed integrity and honesty of lawyers—their own and their adversaries'. Judges depend upon the integrity of the counsel who appear before them,[48] and government agencies rely upon the personal and professional ethics of advocates pleading their clients' various causes. We resolve many of our conflicts—personal, economic, social and political—through the legal system and with the aid of lawyers. It is therefore essential that lawyers be trustworthy and, more importantly, that we perceive them to be so.

Conclusion

Convicted felons face disbarment first and foremost because, as Professor Drinker once wrote, their continuation at the bar "would be a 'scandal and contempt' to the court or an outrage to the profession."[49] Many criminal offenses also demonstrate that an attorney is dishonest and lacks integrity, and therefore that he poses a direct danger to his clients and the public. Yet the primary reason for disbarring convicted felons is that their continued presence at the bar arouses well-founded suspicions concerning the honesty and integrity of every other lawyer.

45. *Id.* at 114-15.

46. *See, e.g., In re* Levy, 37 N.Y.2d 279, 333 N.E.2d 350, 372 N.Y.S.2d 41 (1975).

47. *In re* Anonymous Attorneys, 41 N.Y.2d 506, 511, 362 N.E.2d 592, 597, 393 N.Y.S.2d 961, 965 (1977).

48. Middlesex Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 434 (1982).

49. DRINKER, LEGAL ETHICS 44 (1953).

The public's trust in the honesty and integrity of lawyers is absolutely critical to the legal profession's ability to assist in the resolution of conflicts and the dispensation of justice. Every lawyer convicted of a felony brings dishonor upon his colleagues. Automatic disbarment of convicted felons protects the public because it serves notice to the profession that "certain conduct will not be tolerated and is thereby an assurance to the public that, as far as known, certain taints do not exist, because, if discovered, they would be eradicated."[50]

In jurisdictions that do not disbar felons—and sadly they are a majority in this country—there is a rampant public cynicism about the integrity of the bar. This distrust undermines the effectiveness of all lawyers in their representation of clients and ultimately has dire consequences for the legal system as a whole.

While such cynicism may be found in New York, lawyers can with some pride and confidence maintain that lawyers convicted of felonies are reliably and routinely disbarred. With the assurance of discipline and professional sanctions for professional misconduct comes, slowly but surely, public trust in the profession. While there remains ample room for improvement in the disciplinary system, it would seem the height of self-destructiveness to retreat from a position that has only enhanced the legal profession's public image.

50. *In re* Nearing, 16 A.D.2d 516, 518, 229 N.Y.S.2d 567, 569 (1962).