The New York Felony Disbarment Rule: A Proposal for Reform

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REFORM

INTRODUCTION

An attorney occupies a privileged position in our society. As an officer of
the court,1 his integrity is presumed; he is held out to the public as one
particularly worthy of trust and confidence.2 The attorney’s privileged posi-
tion was not artificially conceived. It proceeds from the very nature of the
practice of law. “The general public has need for a professional man in whom
it can repose a particular type of confidence whenever it is faced with some
distressing problems, often of a very personal nature.”3 On the other hand,
the practice of the law implicates professional obligations beyond those
immediately owed by the attorney to his client. It “implies an equally
demanding relation of trust and confidence to the court and to the general
public, as well as high duties toward the law and the impartial administra-
tion of justice.”4

“A Lawyer that is a Knav... profanes the Sanctuary of the Distressed and
Betrays the Liberties of the People.”5 To deter knavery, to protect the public
and to ensure adherence to law and high standards of conduct,6 society and
the profession have designed a system for disciplining errant attorneys.
Although the primary purpose of attorney discipline is protection of the
public,7 strict enforcement also bolsters public confidence in law, lawyers,
and the legal system.8

1. E.g., In re Zuckerman, 20 N.Y.2d 430, 439, 231 N.E.2d 718, 721, 285 N.Y.S.2d 1, 6
(1967), cert. denied, 390 U.S. 925 (1968). For a discussion of the ambiguity created by
designating an attorney an officer of the court, and the confusion this has engendered, see Cammer v. United
States, 350 U.S. 399, 405 (1956). The historical derivation of the designation of the attorney as an
officer of the court is discussed in 6 W.S. Holdsworth, A History of the English Law 431-40
(1927).
2. E.g., In re Chu, 42 N.Y.2d 490, 495, 369 N.E.2d 1, 4, 398 N.Y.S.2d 1001, 1004 (1977)
(Wachtler, J., concurring); In re Levy, 37 N.Y.2d 279, 282, 333 N.E.2d 350, 352, 372 N.Y.S.2d
41, 44 (1975); 21 Alb. L. Rev. 100, 102 (1957); see Theard v. United States, 354 U.S. 278, 281
(1957).
4. Id. at xiv.
5. Id. at xi.
6. “Membership in the bar is a privilege burdened with conditions. A fair private and
professional character is one of them. Compliance with that condition is essential at the moment
of admission; but it is equally essential afterwards ... .” In re Rouss, 221 N.Y. 81, 84, 116 N.E.
782, 783 (1917). “The [attorney] was received into that ancient fellowship [the bar] for something
more than private gain. He became an officer of the court, and, like the court itself, an
instrument or agency to advance the ends of justice.” Karlin v. Culkin, 248 N.Y. 465, 470-71,
162 N.E. 487, 489 (1928); see Schwarc v. Board of Bar Examiners, 353 U.S. 232, 247 (1957)
(Frankfurter, J., concurring); In re Mitchell, 40 N.Y.2d 153, 156, 351 N.E.2d 743, 745, 386
961, 963 (1977); In re Mitchell, 40 N.Y.2d 153, 156, 351 N.E.2d 743, 745, 386 N.Y.S.2d 95,
96-97 (1976); see In re Buffalo, 390 U.S. 554, 550 (1968).
8. Public confidence is said to be necessary for the effective administration of the legal system.
See In re Mitchell, 40 N.Y.2d 153, 156-57, 351 N.E.2d 743, 745-46, 386 N.Y.S.2d 95, 97 (1976);
The most drastic form of discipline is disbarment. In New York, if an attorney is convicted of a felony, he is automatically disbarred. The application of this rule has produced some bizarre results. For instance, in a recent case, a New York attorney was automatically disbarred for engaging in what was described as a "kindergarten shouting and pushing match" with a federal officer. Cases such as this have made reexamination of the felony disbarment rule a necessity.

This Note will begin with an overview of New York disciplinary procedures. Next, the many problems of the felony disbarment rule will be discussed along with some possible solutions to these problems. Finally, a new automatic disbarment rule will be offered.


9. The term "felony" has been construed to include all federal felonies. In re Chu, 42 N.Y.2d 490, 493, 369 N.E.2d 1, 3, 398 N.Y.S.2d 1001, 1003 (1977), discussed at note 90-102 infra and accompanying text; see In re Thies, 45 N.Y.2d 865, 382 N.E.2d 1351, 410 N.Y.S.2d 575 (1978) (per curiam). Certain sister state felonies are also included. See note 88 infra and accompanying text.

10. Section 90(4) of the Judiciary Law provides: "Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

"Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys." N.Y. Jud. Law § 90(4) (McKinney 1968).


14. See notes 121-29 infra and accompanying text.
I. GENERAL OVERVIEW OF ATTORNEY DISCIPLINE IN NEW YORK

The appellate division of each of the four judicial departments in the state is vested with control over the discipline of attorneys.\(^1\) They have the authority to censure, suspend, or disbar an attorney.\(^1\) In addition, each department delegates some disciplinary authority to local grievance committees.\(^1\) These committees may be given the authority to issue an admonition or reprimand.\(^1\)

An attorney is not subject to any form of discipline until he has been found to have engaged in misconduct. By statute, an attorney who is found guilty of "professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice" may be disciplined.\(^1\) Misconduct, however, has never been clearly defined. Each department attempts to define professional misconduct in its court rules, but the definitions are no more specific than the term itself.\(^1\)

Nevertheless, three classes of misconduct have been distinguished. These are felonies, serious crimes,\(^1\) and all other misconduct. Felonies result in

\(^{15}\) Section 90(2) of the Judiciary Law provides: "The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice . . . ." N.Y. Jud. Law § 90(2) (McKinney 1968).

\(^{16}\) Censure is formal discipline imposed by the court; suspension is the temporary disqualification from practice and disbarment is removal from the office of attorney. See id. Each department makes its own rules of procedure. See 22 N.Y.C.R.R. §§ 603.1-.22 (1st Dep't), 691.1-.22 (2d Dep't), 806.1-.12 (3d Dep't), 1022.1-.31 (4th Dep't) (1968-1969).

\(^{17}\) There are 17 such committees in the state. Hochberger, Lawyer Discipline: ABA Draft Diffs from New York Structure, N.Y.L.J., Aug. 28, 1978, at 1, col. 3. The First Department was the first to have laypersons on its committee. Id. The Second Department has announced that it will also include laypersons. N.Y.L.J., Jan. 18, 1979, at 1, col. 2. The committees may have their own procedural rules. See, e.g., Rules and Procedures of the Committee on Grievances of the Association of the Bar of the City of New York (1977).

\(^{18}\) E.g., 22 N.Y.C.R.R. § 603.9(a) (1st Dep't 1968). "An admonition is discipline imposed without a hearing. A reprimand is discipline imposed after a hearing." Id. The committee may also issue a letter of caution, but this is not a disciplinary action. A letter of caution is issued when an attorney's behavior requires comment, even though it does not constitute misconduct. Id. § 603.9(c). The distinction between disciplinary action and nondisciplinary action such as issuing a letter of caution is not clear. The distinction appears to be based on the recording of discipline as such. When a disciplinary body is deciding what discipline to impose, the attorney's prior record of discipline may be considered. See, e.g., id. § 603.9(b), (c).

\(^{19}\) N.Y. Jud. Law § 90(2) (McKinney 1968), quoted at note 15 supra.

\(^{20}\) The Third Department rules, for example, provide: "Any attorney who fails to conduct himself in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law, and any attorney who violates any disciplinary rule of the code of professional responsibility . . . or any other rule or announced standard of the court governing the conduct of attorneys, shall be deemed to be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law." 22 N.Y.C.R.R. § 806.2 (3d Dep't 1969); accord, id. §§ 603.2 (1st Dep't), 691.2 (2d Dep't), 1022.12 (4th Dep't) (1968-1969).

\(^{21}\) E.g., id. § 603.12 (1st Dep't 1968).
automatic disbarment. Serious crimes must be referred to the appellate division, which may impose censure, suspension, or disbarment after a hearing. All other cases of misconduct result in a proceeding before the disciplinary committee. The committee is given discretion to decide whether to refer the matter to the appellate division, impose an admonition or reprimand, or dismiss the proceeding. In determining the discipline to be imposed in cases of serious crimes or other misconduct, the court or committee weighs the gravity of the misconduct against the attorney's prior disciplinary record and any mitigating circumstances.

Disbarment results in the disqualification of the attorney to practice law in New York. If he continues to practice, he will be guilty of the misdemeanor of unlawful practice of law. New York disbarment, however, does not necessarily preclude an attorney from practicing in federal or sister state courts. Membership in the bar of a state court is a prerequisite to membership in the bar of a federal court. Nevertheless, once an attorney is admitted to the federal court only it can remove him. Although the state order of disbarment is not binding on the federal court, the state's determination of unfitness to practice law will raise a corollary presumption in the federal court. Unless the presumption is rebutted, the federal court will disbar the attorney.

23. E.g., 22 N.Y.C.R.R. § 603.12 (1st Dep't 1968).
24. Id. § 603.4(d); see id. § 691.4(e) (2d Dep't). The criteria used by the committee in deciding whether to refer the matter to the court in cases in which they have discretion is not stated.
26. N.Y. Jud. Law §§ 478, 484, 485, 486 (McKinney 1968 & Supp. 1978-1979). An action to enjoin the unlawful practice of law may be brought by the Attorney General, or, should he fail to bring it, by a bar association. Id. §§ 476-a to 476-b. The Attorney General is given broad powers to investigate complaints of unlawful practice. Id. § 476-c. Although these procedures are available, they have not been vigorously exercised. See note 40 infra and accompanying text.
30. Id. at 50.
31. See id.
32. In Selling v. Radford, 243 U.S. 46 (1917), the Court listed three grounds on which the state determination could be challenged: "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." Id. at 51. In Theard v. United States, 354 U.S. 278 (1957), the Court applied the Selling principles to federal district court proceedings to disbar attorneys previously disbarred by a state.

Currently, upon notice of an attorney's disbarment from practice in any state, he is automatically suspended from practice before the Supreme Court. He will also be disbarred from practice
II. PROBLEMS WITH THE NEW YORK FELONY DISBARMENT RULE

A. The Enforcement Gap

Under New York law, conviction of a felony ipso facto renders an attorney unfit to practice law. Consequently, upon the rendering of the judgment of conviction, the attorney is disbarred. The clerk of the particular court which rendered the judgment is required to forward notice of the conviction to the appellate division department in which the attorney was admitted. Upon receipt, the attorney's name will be stricken from the roll of attorneys. This, however, is merely a formality. Even if the attorney's name is not stricken, he has still been disbarred.

Nevertheless, there may be a significant time period between his conviction and the striking of the attorney's name. As a result, the disbarred attorney, weighing the risk of detection and possible criminal sanction against the deprivation of his professional life, may decide to continue practicing until his name has been stricken. Although the Attorney General's office is empowered to prosecute attorneys who continue to practice during this hiatus, enforcement has been lax. This has resulted in an "enforcement gap" in New York's disbarment procedure.

This problem is aggravated when the attorney is convicted in a federal or sister state court because there is no effective procedure to ensure that prompt notice of the conviction is forwarded to the appellate division. Indeed, if the appellate division does receive notice, it is often the result of fortuitous

33. Sup. Ct. R. 8. Disbarment by a state has the same effect in the Second Circuit. Fed. R. App. Prac. 46. In the Second Circuit, however, the attorney is served with a copy of an order of the court informing him of suspension or disbarment. Within 20 days of receipt of the order the attorney may show cause why the order should be modified or revoked. 2d Cir. R. 46f(1), (2). In the United States District Court for the Southern District of New York, disbarment by a state subjects the attorney to discipline to the same extent unless within 30 days he shows cause why the disbarment should be modified. S.D.N.Y. R. 5(d).

34. N.Y. Jud. Law § 486-a (McKinney Supp. 1978-1979). This provision applies only to forwarding notice of felony convictions. Each department, with the exception of the Third, has court rules requiring its clerks to forward notice of convictions of attorneys for any crimes. 22 N.Y.C.R.R. §§ 603.12(d) (1st Dep't), 691.7(e) (2d Dep't), 1022.12(d) (4th Dep't) (1968-1969); see note 119 infra.


36. See note 26 supra and accompanying text.

37. See note 26 supra.


41. "Officials responsible for overseeing the disciplinary mechanism acknowledge that attorneys convicted of either a state or Federal felony, while technically disbarred at the moment of conviction, can continue to practice for a minimum of two months, often longer." Fox, Felony Disbarments—An Enforcement 'Gap', N.Y.L.J., May 15, 1978, at 1, col. 2, at 1, col. 2.

In these cases, the time lapse between conviction and the striking of his name, during which the attorney may “safely” practice, may be quite long.

The problem of the unlawful practice of law by disbarred attorneys during the hiatus could be minimized. Upon receipt of the notice of conviction, the appellate division or local grievance committees should investigate whether the attorney has continued to practice after his conviction. If he has, the appellate division should inform the Attorney General’s office and suggest that the errant attorney be prosecuted. The increased risk of detection should help deter an attorney from the unlawful practice of law during the hiatus.

B. Readmission

In New York, until recently, felony disbarment resulted in a permanent disqualification to practice law, except under certain limited circumstances. Readmission was possible only if the attorney was pardoned or if his conviction was reversed. In either case, he could appeal to the appellate division which could grant readmission in its discretion. The felony disbarment rule, however, resulted in permanent loss of livelihood in all other cases. Consequently, vigorous debate ensued regarding the propriety of extending the right of readmission to all felony-disbarred attorneys. The opponents of readmission argued that it was prejudicial to the public interest to permit those who had been guilty of a breach of trust to be returned to a position of trust. Moreover, they argued, it was unfair to ask the public to assume the risk of the felon-attorney’s rehabilitation. 

The weight of authority, however, favored readmission. The rationale for

43. Id.
46. Readmission upon pardon or reversal is not a matter of right. In re Kaufmann, 245 N.Y. 423, 157 N.E. 730 (1927). Kaufmann concerned an attorney convicted of a federal felony, who was later pardoned by the President of the United States. The attorney wanted to argue his innocence of the crime as grounds for readmission. The appellate division, assuming the conviction was conclusive as to guilt, would consider only evidence of mitigating circumstances. The court of appeals reversed, holding that the pardon reopened the issue of guilt, but that the burden of proving innocence was on the attorney. Id. at 428-29, 157 N.E. at 732. In re Ginsberg, 1 N.Y.2d 144, 147, 134 N.E.2d 193, 194, 151 N.Y.S.2d 361, 363 (1956), applied this holding to cases in which the attorney's conviction is reversed. Ginsberg was subsequently limited in In re Barash, 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967), which held that, in cases of reversal, the attorney would be entitled to readmission unless proceedings were brought against his application with proof of charges sufficient to disbar him. Id. at 158, 228 N.E.2d at 898-99, 281 N.Y.S.2d at 1001.
49. In considering the issue, the New York legislature received comments from 25 individuals
allowing readmission was reviewed by the Massachusetts Supreme Court in its consideration of Alger Hiss’ application for readmission to the bar of that state. The court stated that because our system of justice is founded upon the principle of forgiveness and a belief in the possibility of rehabilitation, a disbarred attorney should be given the opportunity to prove that he had reformed. Indeed, the court concluded, he may then “become a credit to the bar and an asset to those he serves.”

Under a recent amendment to its readmission statute, New York has allied itself with the sentiments expressed in the Hiss opinion. The New York statute now permits the felony disbarred attorney to seek readmission seven years after his disbarment if he has not been convicted of a crime in the interim. Although this amendment is salutary, the new law is not without fault. The seven year disbarment period begins on the date of conviction. The period should commence on the date the attorney’s name is stricken from the roll. Under such a procedure, the attorney, wishing to “start the clock,” would have an incentive to report his conviction. Such a procedure would help to close the enforcement gap in the New York rule.

In addition, the readmission statute does not specify the consequence of conviction of a crime during the disbarment period. Conviction could forever bar the attorney from readmission or merely start the seven year disbarment period anew. To narrow the enforcement gap further, the statute should be construed to bar permanently attorneys who are convicted of unlawful practice during the disbarment period. This construction would further deter any attorney from continuing his practice after conviction.

C. Constitutional Problems

1. Procedural Due Process

The requirements of procedural due process under the fourteenth amendment protect liberty and property interests. Courts have held that an...
attorney has a property right in his practice of law. Under traditional notions of due process, however, the mere existence of a property right is not dispositive as to the procedures which must be adhered to before an individual may be deprived of his right. Typically, the person's interest in his right must be weighed against the government's interest in summary adjudication. In the context of automatic disbarment, attorneys have asserted that summary adjudication violates their fundamental right to a hearing under the due process clause.

The status of an attorney, however, is a "privilege burdened with conditions." The attorney's property right in the continuation of his practice is limited by the obligations and conditions he assumes upon admission to the bar. Upon admission, the attorney is granted the privileges and status of the profession. This grant, however, is subject to divestiture upon the breach of a condition subsequent: compliance with the standards for continued membership in the bar. The attorney has no "legitimate claim of entitlement" to his property right if he breaches a condition of continued membership.

Two courts, considering the constitutionality of automatic disbarment rules in jurisdictions other than New York, have held that the operation of those rules violated due process by denying the attorney a hearing. In each case,


61. In re Jones, 506 F.2d 527, 528 (8th Cir. 1974); see In re Ming, 469 F.2d 1352, 1355 (7th Cir. 1972).


63. "Property interests" are defined by existing rules or understandings that stem from an independent source such as state law—rules of understandings that secure certain benefits and that support claims of entitlement to those benefits. Board of Regents v. Roth, 408 U.S. 564, 577 (1972).

64. Id. Typically, the person alleging the existence of the property right must prove a legitimate claim of entitlement to it. See Perry v. Sinderman, 408 U.S. 593, 602 (1972).

65. In another context, the Supreme Court has upheld the use of "conditions subsequent." Rogers v. Bellei, 401 U.S. 815, 830 (1970). In this case, a foreign born child, with only one parent who was a citizen, was granted United States citizenship. The grant, however, was subject to divestiture upon the breach of a condition subsequent: a five year United States residency requirement. The child failed to fulfill this requirement and he was divested of his citizenship. Id. at 816-20; see In re Anonymous Attorneys, 41 N.Y.2d 506, 508, 362 N.E.2d 592, 595, 393 N.Y.S.2d 961, 963 (1977); cf. Board of Regents v. Roth, 408 U.S. 564, 567 (1972) (upheld condition precedent to continued employment).

66. See In re Jones, 506 F.2d 527, 529 (8th Cir. 1974); In re Ming, 469 F.2d 1352, 1355 (7th Cir. 1972).
however, the courts found unresolved issues of identity, finality and mitigation.67

Due process, however, does not require a hearing when there is no issue to be heard.68 Under the New York statute, there are no such unresolved issues. Identity is not an issue because the attorney is given notice of the proceeding to strike his name.69 If he is not the person who was convicted, he was not disbarred and can so inform the court.

Finality is also not an issue. Although the disbarment is effective regardless of any pending appeal,70 there is no constitutional infirmity in this procedure.71 Due process does not require the allowance of an appeal; therefore, the judgment of conviction at the trial level is entitled to respect as a final judgment “unless and until reversed upon appeal.”72

Nor is mitigation an issue. The state has a right to prescribe the minimum conditions that must be maintained in order to retain the privilege of membership in the bar.73 If such a minimum condition by definition excludes mitigation, there is no issue on which to have a hearing.

Under the automatic disbarment rule there is only one issue: whether the condition of membership has been breached. This issue is conclusively determined at the attorney's criminal trial.74 At the trial the attorney is afforded not only a hearing but the full spectrum of due process rights.75

67. In re Jones, 506 F.2d 527, 529 (8th Cir. 1974); In re Ming, 469 F.2d 1352, 1355 (7th Cir. 1972).
70. See note 45 supra and accompanying text.
72. Id. at 157, 351 N.E.2d at 746, 386 N.Y.S.2d at 97. Contra, In re Ming, 469 F.2d 1352 (7th Cir. 1972).
2. Equal Protection

The felony disbarment rule also raises equal protection questions. Although New York automatically disbars an attorney who is convicted of a felony, it does not automatically preclude a felon from entering the bar.\(^7\) One commentator has suggested that this disparate treatment constitutes a denial of equal protection.\(^7\) There is no constitutional infirmity, however, in unequal treatment of different classes if the distinction between the classes bears a rational relationship to a legitimate state interest.\(^7\)

The preadmission felon and the attorney are not similarly situated. The preadmission felon has neither assumed the responsibilities nor accepted the privileges of an attorney. The attorney, upon admission to the bar, promises to abide by the conditions of membership. The state has a legitimate interest in enforcing this promise by a system of discipline.\(^7\) The preadmission felon has made no such promise. Because attorney felons and preadmission felons are not persons similarly situated, their disparate treatment is rationally related to the state's interest in disciplining attorney felons.\(^8\)

D. What Felonies Are Included in the Rule?

New York's felony disbarment rule does not specify which convictions in other jurisdictions will trigger its operation.\(^8\) This omission has created considerable controversy. A relatively easy question is raised when the felony in the other jurisdiction is also a felony in New York. In such cases, courts have uniformly held that the felony disbarment rule applies.\(^9\) More difficult problems are presented, however, when the felony in the other jurisdiction is less than a felony or is not an offense at all in New York.\(^9\) Also problematic is the converse situation in which the offense is less than a felony in the

\(^7\) N.Y.L.J., May 23, 1978, at 1, col. 4, at 2, col. 3.
\(^8\) See note 73 supra and accompanying text. Nevertheless, the disparity remains during the seven year disbarment period.
jurisdiction where the attorney is convicted but constitutes a felony in New York.84

The applicability of automatic disbarment to felony convictions in other jurisdictions, for crimes not similarly classified in New York, was first considered by the New York Court of Appeals in In re Donegan.85 Donegan, an attorney, had been convicted of a federal felony. The comparable offense under New York law would have been, at most, a misdemeanor.86 The majority in Donegan held that only those federal felonies with New York equivalents came within the ambit of the rule and, thus, automatic disbarment did not apply.87 Similarly, in reliance on Donegan, automatic disbarment was held to be inapplicable to cases of felony convictions in sister states when New York had not enacted an equivalent felony.88 Automatic disbarment has also been used in the converse situation in which the offense does not constitute a felony in the jurisdiction of conviction but does constitute a felony in New York.89

In 1977, the court of appeals reconsidered Donegan in In re Chu.90 Chu, an attorney, was convicted of a federal felony; the analogous New York felony contained additional elements not present in the federal felony.91 The appellate division, following Donegan, held that the felony disbarment rule did not apply and ordered a disciplinary hearing.92 The court of appeals reversed, holding that Chu's conviction fell within the scope of the rule. The court reasoned that Congress' determination that such conduct required punishment as a felony was sufficient to invoke automatic disbarment.93 The court, somewhat obfuscating the grounds for its holding, also stated that the particular federal and New York felonies were sufficiently analogous so as to warrant use of the felony disbarment rule.94 The concurring opinion, objecting to the extension of the rule to include all federal felonies regardless of New York felony equivalents, would have expressly limited the decision to this latter reasoning.95

One problem raised by Chu is whether its inclusion of all federal felonies constitutes an impermissible delegation of power to the Federal government to

84. See In re Stein, 199 A.D. 673, 191 N.Y.S. 419 (1921).
86. Donegan was convicted under a federal conspiracy law. In New York, any conspiracy conviction was only a misdemeanor. Id. at 287, 26 N.E.2d at 260-61.
87. Id. at 290-91, 26 N.E.2d at 263.
89. In re Stein, 199 A.D. 673, 191 N.Y.S. 419 (1921).
91. Chu was convicted of filing false statements with a federal agency. The New York analogue pertained to filing false statements with a subdivision of the state and required intent to defraud the state. The statutes were distinguished on the basis that the federal law did not require proof of intent to defraud and that the federal agency was not a subdivision of this state. Id. at 492, 369 N.E.2d at 2, 398 N.Y.S.2d at 1002.
92. Id.
93. Id. at 493, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003. The practical effect of this language would be to overrule Donegan, but the court did not specifically do so.
94. Id. at 494, 369 N.E.2d at 3, 398 N.Y.S.2d 1003. This language would uphold Donegan, but relax the standard of equivalency.
95. Id. at 495, 369 N.E.2d at 4, 398 N.Y.S.2d at 1004 (Wachtler, J., concurring).
set the standards for New York disbarment. Under the system of dual sovereignty, however, federal law is entitled to the same respect as state law. Upon admission to the bar of New York, the attorney swears to uphold the state law and the Constitution and laws of the United States. Thus, automatic disbarment for conviction of a federal felony is not an impermissible delegation of power, but a recognition of the attorney's duty to obey and uphold both state and federal law.

Because of the ambiguity of the Chu opinion, however, it was unclear whether all federal felonies required automatic disbarment or if the Donegan equivalency standard was now satisfied by mere substantial similarity between the federal and New York felonies. Speculation was ended in In re Thies. There, the court, citing Chu, held that conviction of a federal felony required automatic disbarment, regardless of the existence of a New York equivalent. The dissenters, the same judges who had concurred in Chu, characterized the action of the majority as inviting "aberrational results." Moreover, recognizing that the establishment of such a per se rule was needlessly harsh and inflexible, the dissenters called upon the legislature to remedy the situation.

E. Reevaluation of the Felony Disbarment Rule

1. The Harshness of the Rule

Although the attorney has a duty to obey all laws, automatic disbarment may be an unduly harsh form of discipline to impose for conviction of a crime which does not impugn the attorney's fitness to practice law. The fundamental problem with the felony disbarment rule is the use of the term "felony" as the standard for invoking automatic disbarment. As recognized by the dissenters in Thies, this problem is exacerbated by the extension of the class of felonies in Chu. For instance, in one case prior to Chu, an attorney was convicted of conspiracy to melt silver coins, a federal felony, and was

96. Levitt, Letter to the Editor, N.Y.L.J., Nov. 3, 1978, at 2, col. 6. This question applies only to federal felonies as Chu did not apply to sister state felonies; the Donegan rule remains applicable to sister state felonies. 42 N.Y.2d at 494 n.6, 369 N.E.2d at 3 n.6, 398 N.Y.S.2d at 1003 n.6 (1977).
100. 45 N.Y.2d at 866, 382 N.E.2d at 1351, 410 N.Y.S.2d at 576. Although this is a departure from Donegan, the idea that all federal felonies are included in the felony disbarment rule is not new. Before Donegan, it was the general practice of the appellate divisions to invoke automatic disbarment for offenses denominated felonies by any jurisdiction. See In re Ackerson, 289 N.Y. 844, 845, 47 N.E.2d 442, 442-43 (1943) (per curiam); In re Koven, 282 N.Y. 646, 646-47, 26 N.E.2d 800, 800 (1940) (per curiam).
101. 45 N.Y.2d at 867, 382 N.E.2d at 1352, 410 N.Y.S.2d at 577 (Wachtler, J., dissenting).
102. Id.
103. Cf. Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39 (1957) (although a state may require high standards of qualification for admission to its bar, the exclusion of an applicant for reasons unrelated to his fitness or capacity to practice law is a violation of due process).
censured. Under *Chu*, he would have been automatically disbarred. In *Thies*, Mr. Thies had been arrested on a federal charge. The arraigning magistrate dismissed the complaint as insufficient. Thies, believing his arrest to be unlawful, attempted to leave the courthouse. A scuffle ensued when federal agents attempted to detain him. In the scuffle, an agent suffered a bruised thumb. Thies was charged with assault on a federal officer, a felony, and was convicted. At his sentencing, the judge not only scolded the federal agents for their role in the scuffle, but also questioned the wisdom of applying the New York disbarment rule to Thies. Nevertheless, Thies was automatically disbarred.

The term "felony" does not describe any particular offense. The offenses which are classified as felonies vary from jurisdiction to jurisdiction and within each jurisdiction the classifications vary with the times. For instance, under old English law, such a heinous offense as "fishing in a private pond by night" was denominated a felony.

The continued use of the nonspecific term "felony" will invite the "aberrational results" feared by the dissenters in *Thies*. Selective application of automatic disbarment would ensure the maintenance of strict attorney discipline without the need to sacrifice fairness. An attorney who is convicted of a felony that does not necessarily impugn trustworthiness should be afforded an opportunity to be heard on mitigating circumstances; disbarment could still result if warranted.

105. See notes 93, 100 supra and accompanying text.
107. Id. at 2, col. 2.
108. Id. at 2, cols. 2-3.
110. Both federal and New York law define felony in terms of the amount of punishment that can be imposed for conviction of the offense. 18 U.S.C. § 1(1) (1976); N.Y. Penal Law § 10.00(5) (McKinney 1975).
111. See *In re Donegan*, 282 N.Y. 285, 290, 26 N.E.2d 260, 262 (1940) (discussion of the term "felony").
112. Id. at 289, 26 N.E.2d at 262. Many felonies in the United States are antiquated and many have no bearing on an attorney's trustworthiness or ability to represent a client. *In re Chu*, 42 N.Y.2d 490, 495, 369 N.E.2d 1, 3, 398 N.Y.S.2d 1001, 1004 (1977) (Wachtler, J., concurring); Bonomi I, supra note 12, at 2, col. 4; Bonomi II, supra note 13, at 2, cols. 4-5 (discussing the felonies of melting silver coins and possession of a switchblade knife on an Indian reservation).

Although automatic disbarment is usually imposed for convictions that do bear on an attorney's fitness to practice law, this is not always the case. See, e.g., *In re Glasser*, 53 A.D.2d 38, 385 N.Y.S.2d 86 (1976) (per curiam) (cocaine conviction); *In re Costigan*, 39 A.D.2d 961, 333 N.Y.S.2d 984 (1972) (per curiam) (conviction for driving while intoxicated and while license suspended or revoked). It is arguable whether such crimes render a person per se untrustworthy or incapable of representing a client; therefore, they should not require automatic disbarment without a hearing on mitigating circumstances. See notes 11-12 supra and accompanying text. The Supreme Court has stated that it has a duty "not to disbar except upon the conviction that, under the principles of right and justice, we [are] constrained so to do." *Selling v. Radford*, 243 U.S. 46, 51 (1917).
114. Id.
115. Although it would not invoke automatic disbarment, conviction of these crimes would
2. Suggested Solutions

The primary purpose of attorney discipline is the protection of the public. Thus, automatic disbarment should be imposed only for conviction of specified crimes which impugn trustworthiness. Convictions of such crimes should engender automatic disbarment regardless of whether the crime is denominated a felony or a misdemeanor; it is the constituent elements of the crime, not the label placed on it, that are indicative of untrustworthiness. Crimes involving such elements as fraud, deceit, and misappropriation are examples of crimes that indicate untrustworthiness. Additionally, crimes such as murder, rape, and arson demonstrate a serious deficiency in moral character rendering an attorney unworthy of any kind of trust.

In addition to a system of selective application of automatic disbarment, the attorney should be automatically suspended upon conviction of any crime not enumerated under the automatic disbarment rule. The suspension would continue until the attorney filed notice of his conviction with the appellate division department in which he was admitted. The appellate division would then hold hearings to determine whether any discipline should be imposed. This procedure should aid in the administration of discipline by encouraging attorneys to report their convictions promptly.

CONCLUSION

Although adoption of the suggested automatic disbarment rule would retain the efficiency of automatic procedures while disposing of the problems inherent in the felony standard, much more is needed. The protection of the public requires a profession imbued with pride and a sense of responsibility to uphold the public trust. This can be achieved only through a complete reevaluation of the role of the attorney in society. Moreover, a disciplinary enforcement system should be designed that will demand the attorney's compliance not only with the letter of the law but also with its spirit.
§ 90a. Disbarment for Conviction of Certain Crimes

1. Any attorney who shall be convicted of any crime in subdivision 2 of this section, in any state or federal court, shall, upon such conviction, be disbarred.

2. The provisions of this section shall apply to convictions of the following crimes:
   a) Murder (as per Penal Law §§ 125.25(1), (3), .27).
   b) Rape (as per Penal Law §§ 130.35(1), .50(1), .65(1), .70(1)(a)).
   c) Arson (as per Penal Law §§ 150.10, .15, .20).
   d) Any other crime necessarily having one or more of the following elements, which also requires the actor to act knowingly with respect to such element:
      i) false swearing
      ii) misrepresentation
      iii) fraud
      iv) deceit
      v) extortion
      vi) misappropriation
      vii) theft
   e) Any crime of attempt or conspiracy to commit one of the aforementioned crimes.

3. Whenever any attorney shall be convicted of such crime, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and, thereupon, the name of the person so convicted shall, by order of the court, be stricken from

121. These proposals would repeal only N.Y. Jud. Law § 90(4), (5) (McKinney 1968 & Supp. 1978-1979). The proposed laws are put in separate sections because they are distinct from each other and from the general procedures now prescribed under § 90. The automatic disbarment bill would include a repealer of § 90(4), (5).

122. The definition of "attorney" as including both attorneys and counsellors-at-law should be specified in the preamble to the Judiciary Law, rather than repeating the cumbersome phrase "attorney and counsellor-at-law" whenever referring to an attorney.

123. See notes 81-98 supra and accompanying text. Impermissible delegation would not be an issue because New York law would be setting the standard. See notes 96-97 supra and accompanying text.

124. The list of crimes in this subdivision is merely illustrative of the types of crimes which impugn trustworthiness, either by showing a specific breach of trust or a general lack of moral character. See note 117 supra and accompanying text. Reasonable people may differ as to whether this list is underinclusive. Therefore, the legislature should consider whether additional crimes should fall within this subdivision. The Second Circuit disbarment rule provides: [A] "serious crime, shall include any felony, federal or state, and any lesser crime a necessary element of which, as determined by statutory or common law definition of such crime in the jurisdiction where the conviction has occurred, is (a) interference with the administration of justice; (b) false swearing; (c) misrepresentation; (d) fraud; (e) willful failure to file income tax returns; (f) deceit; (g) bribery; (h) extortion; (i) misappropriation; (j) theft; or (k) an attempt, or conspiracy, or solicitation of another to commit a serious crime." 2d Cir. R. 46(g)(2). See also 22 N.Y.C.R.R. §§ 603.12(b) (1st Dep't), 691.7(b) (2d Dep't), 1022.21(b) (4th Dep't) (1968-1969).
the roll of attorneys. The attorney shall be given notice of this proceeding and an opportunity to give any evidence that he is not the person convicted.\textsuperscript{125}

4. The appellate division shall have power to vacate or modify such order or disbarment upon:
   a) Reversal of the attorney's conviction, or
   b) Pardon of the attorney by the president of the United States, or governor of this or another state, or
   c) If during a period of seven years after the name of the attorney has been stricken from the roll of attorneys, he has not been convicted of a crime.\textsuperscript{126}

5. This section shall apply to attorneys convicted on or after [its effective date].\textsuperscript{127}

6. Attorneys disbarred under § 90(4) of the Judiciary Law in effect until [the effective date of this law], who would not have been so disbarred under this section, may, within three years of [effective date], apply to the appellate division for an order to vacate or modify such previous order to disbarment. This subdivision shall be repealed on [three years from effective date].\textsuperscript{128}

§ 90b. Suspension Upon Conviction of Any Crime

1. Any attorney who shall be convicted of any crime, not listed in § 90a, in any state or federal court, shall, upon such conviction, be suspended from the practice of law until he shall file written, signed, notice of such conviction with the appellate division of the judicial department in which he was admitted to practice.

2. Such notice shall include, at least, the name and current residence and business address of the convicted attorney, the date of conviction, the name of the court in which he was convicted, and the crime for which he was convicted.

3. Suspension under this section shall not be deemed discipline.\textsuperscript{129}

4. This section shall apply only to persons convicted on or after [its effective date].

\textsuperscript{125} Because this section is removed from the general hearing provisions of § 90, it provides for notice of the proceeding to strike the attorney's name in case there may be a question of mistaken identity. See note 66 \textit{supra} and accompanying text.

\textsuperscript{126} This provision incorporates the new readmission law as modified by the suggestions in notes 54-55 \textit{supra} and accompanying text.

\textsuperscript{127} Although the retroactive application of disciplinary rules has been held to be permissible, \textit{In re Leifer}, 63 A.D.2d 174, 407 N.Y.S.2d 1 (1978) (per curiam); \textit{In re Hopfl}, 62 A.D.2d 161, 404 N.Y.S.2d 601 (1978) (per curiam), for reasons of fairness, this statute will be applied prospectively only.

\textsuperscript{128} The three year statute of limitations is designed to prevent both administrative burden and stale litigation.

\textsuperscript{129} See notes 18, 118-19 \textit{supra} and accompanying text.