

Treating All Attorneys Fairly: Changing the Rules for Disbarment, Regardless of Conduct

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I. INTRODUCTION

Kenneth Lawson, an attorney from Ohio, was permanently disbarred in 2009 following his felony conviction for conspiring to obtain controlled substances.¹ His addiction to painkillers and other drugs led to a number of poor decisions, some of which affected his clients, and ultimately led to his downfall.² While Lawson eventually landed on his feet with a nontenured position at the University of Hawaii's William S. Richardson School of Law, he cannot appear in court to teach his students about the trial process because he is not licensed to practice law in Hawaii.³ Although Lawson said that he planned to apply for the Hawaii bar in a 2013 interview, he is not listed in the Hawaii State Bar Association's directory, indicating that his permanent disbarment from the Ohio bar impacted his ability to gain a license in Hawaii.⁴

Prior to his conviction and disbarment, Lawson had a distinguished legal career, representing litigants in criminal and civil rights cases.⁵ Lawson now spends his time teaching courses and works with students as the Co-Director of the Hawai'i Innocence Project.⁶ He has given speeches to multiple legal organizations and frequently uses his skills to motivate sports teams. By all accounts, Lawson has been fully rehabilitated. He is a respected and influential member of Hawaii's legal community, yet he remains branded by the stigma of having been disbarred. Lawson's transgressions were serious, and warranted much of the harsh punishment he received, but it is confounding that a respected legal scholar remains prevented from actually practicing law.

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1. G.M. Filisko, *Disbarred lawyers who seek reinstatement have a rough road to redemption*, ABA JOURNAL (Aug. 2013), http://www.abajournal.com/magazine/article/disbarred_lawyers_who_seek_reinreinststate_have_a_rough_road_to_redemption [<https://perma.cc/F9WT-6Z5G>].

2. *Id.*

3. *Id.*

4. Hawaii State Bar Association Membership Directory, https://hsba.org/HSBA/SEARCH_DIRECTORY/HSBA/Directory/Directory_Search.aspx.

5. Kenneth Lawson Faculty Page, University of Hawaii at Manoa William S. Richardson School of Law, <https://www.law.hawaii.edu/personnel/lawson/Kenneth> [<https://perma.cc/K7ZC-C6QJ>].

6. *Id.*

While uncommon, permanent and indefinite disbarment is permitted in at least fourteen states in the United States.⁷ In these states, judges have the ability to permanently disbar attorneys for misconduct.⁸ While in some states attorneys are allowed to appeal after proving rehabilitation, usually after a specified timeframe, in other states, including New Jersey, attorneys are simply disbarred forever, never able to recover their previous status as attorneys.⁹ This note deals primarily with permanent, unappealable disbarment. The qualifications for permanent disbarment in states where it is permitted often result in *per se* rules requiring that certain conduct result in permanent and indefinite bans. These rules generally come from judges, rather than the legislature.¹⁰

Judicial decisions for permanent disbarment do not give attorneys the benefit of rehabilitation because appeals are not allowed.¹¹ Thus, attorneys who have been permanently disbarred lose their careers and are never allowed to practice law again. While the standards for misconduct that warrant permanent disbarment, where it is allowed, are certainly high, the states essentially assert that rehabilitation is so improbable that a disbarred attorney never deserves the chance to prove it. In contrast, the standards for passing the bar the first time are much less stringent than the standards for being readmitted to the bar after disbarment.

In many states and jurisdictions, attorneys are allowed to appeal their disbarments after a specified period of time.¹² If they can prove rehabilitation, these attorneys are permitted to return to practice. The former system does not allow disbarred attorneys to prove rehabilitation following their appeals process, while the latter does, although in most cases the presumption is against rehabilitation, giving the attorney a high bar to clear before being reinstated.¹³

II. THESIS

In this note, I will first explore the three primary forms of disbarment that are permitted in the US. The first is permanent disbarment based on *per se* rules. States with *per se* rules outline specific conduct that guarantee permanent disbarment, such as misappropriation of client funds or the commission of a felony.¹⁴ Second are states that permit judicial discretion in the admission of non-appealable disbarment, in addition to those that have both judicial discretion and *per se*

7. Brian Finkelstein, *Should Permanent Disbarment Be Permanent?*, 20 GEO. J. LEGAL ETHICS 587, 589 (2007).

8. Robert James R. Zazzali, *The Whys and Hows of Permanent Disbarment: New Jersey's Wilson Rule*, 21 GEO. J. LEGAL ETHICS 311 (2008).

9. *Id.* at 312.

10. *See, e.g., id.* at 316.

11. *Id.*

12. *Id.* at 311.

13. Melissa E. Nirenberg, *Reconsidering the Wilson Doctrine: Should New Jersey Continue to Automatically and Permanently Disbar Attorneys Who Have Misappropriated Funds?*, 51 RUTGERS L. REV. 713, 715 (1999).

14. *See, e.g., id.*

rules.¹⁵ Lastly, the majority of states allow appeals after a certain period of time, usually a matter of years.¹⁶ In these states, petitioners must show rehabilitation to gain readmission to the bar. I then move through arguments both for and against permanent disbarment, ultimately concluding that permitting appeals should be allowed in all states. Proponents of permanent disbarment argue primarily that the system is more efficient, protects the integrity of the profession, and that *per se* rules create clear lines that attorneys know if they cross they risk disbarment.¹⁷ While I concede that the system is likely more efficient in places where permanent disbarment is allowed, given the small number of attorneys who are reinstated each year in other states, the interests of fairness and due process outweigh the advantageousness of a more efficient system. Likewise, *per se* rules are unfair to those attorneys who are able to later prove rehabilitation. I further argue that the public perception of attorneys is sufficiently negative that permanent disbarment would likely have a minimal, if any, effect on public perception.

In the interest of due process, it is preferable to allow attorneys to appeal their disbarments once their ethical lapses have occurred significantly enough in the past that it is reasonable for them to have been rehabilitated. Having been licensed attorneys prior to permanent disbarment, the attorneys subject to this punishment have a strong interest in returning to the profession they previously dedicated their life towards. While the privilege to practice law is not a constitutional right, consideration must be paid to the significant interests that disbarred attorneys have in returning to the profession. Having been granted the right to practice law by going through the lengthy and expensive process of passing the bar, it is unfair to permanently disbar attorneys without allowing them to appeal their disbarment, subject to reasonable time limitations. It is a fundamental premise of our judicial system that rehabilitation is possible, and few offenses warrant a categorical prohibition on returning to legal practice.

In most states, disbarments are appealable after a statutorily granted amount of time.¹⁸ Even where those disbarments are nominally “permanent,” attorneys are often able to apply to be reinstated after a designated period.¹⁹ For the purposes of this note, those disbarments are separate from permanent unappealable disbarment. The case of Sam S. Matthews, cited in Anne Ben-Ami’s 2014 Georgetown Journal of Legal Ethics article, is instructive in this regard: after misappropriating client funds, Matthews was “permanently restrained and enjoined from practicing

15. See, e.g., Procedures of the Ark. Sup. Ct. Regulating Prof. Conduct of Att’ys at L. § 13.

16. See, e.g., *In re Matthews*, 996 A.2d 822, 822 (D.C. 2010).

17. See Zazzali, *supra* note 8.

18. See, e.g., Anne Ben-Ami, *Disbarment and Reinstatement in the District of Columbia and New Jersey: Misappropriation and the Merits of Permanent Disbarment*, 27 GEO. J. LEGAL ETHICS 359, 361 (explaining the process of disbarment and reinstatement in DC).

19. *Id.* at 363.

law” by the Supreme Court of New Jersey.²⁰ In contrast, after reviewing the same set of facts, the District of Columbia Court of Appeals disbarred Mr. Matthews but permitted him to apply for reinstatement after five years, as prescribed by D.C. Bar. R. XI § 14.²¹ While “permanent disbarment” as a phrase has been used to describe both appealable and non-appealable decisions, the application of truly permanent disbarment is best exemplified by New Jersey’s approach.

In DC, and most states, all disbarments are eventually appealable. While disbarred in both New Jersey and DC, Matthews was allowed to apply for reinstatement in DC five years after his initial disbarment.²² More serious offenses may lead to longer periods of initial disbarment in states lacking permanent disbarment, but, in states like New Jersey, there are *per se* rules delineating when a judge must permanently disbar an attorney. These rules ultimately harm the legal profession, as do they not permit judges to exercise discretion in unique circumstances.

Perhaps the most written about rule subject to the *per se* approach is misappropriation of client funds, termed the Wilson Rule in New Jersey.²³ According to former New Jersey Supreme Court Justice Zazzali, the rule is as follows: “Attorneys who knowingly steal or borrow client monies without their client’s consent will be disbarred.”²⁴ Zazzali praises New Jersey for having one of the highest ethical standards for attorneys in the country, attributing it in part to the strict standards for disbarment in the state.²⁵

There are two primary ways to criticize the Wilson Rule: criticism of the rigidity of the rule, as it is strictly applied in misappropriation cases without concern for exogenous circumstances, and opposition to indefinite permanent disbarment altogether. Justice Stein, also of the New Jersey Supreme Court, took the former approach in his dissent in *In re Bell*, advocating for flexibility in application of the rule, “taking into account the influence of extraordinary events.”²⁶ Extraordinary events could include unexpected deaths in the family, unexpected financial insolvency or a rapid deterioration of one’s health. In such circumstances, an attorney’s lapses, while serious, could warrant reinstatement to the bar at a later date, having shown that their past conduct was due not only to moral failings, but also to the circumstances that they were placed under.

20. *In re Matthews*, 969 A.2d 1132, 1132 (N.J. 2009). *See also* Ben-Ami, *supra* note 18, at 359 (arguing that New Jersey’s policy of permanent indefinite disbarment is preferable to policies regarding disbarment).

21. *In re Matthews*, 996 A.2d 822, 822 (D.C. 2010).

22. *Id.*

23. Zazzali, *supra* note 8, at 311–12.

24. *Id.*

25. *Id.*

26. *Matter of Bell*, 596 A.2d 752, 757 (N.J. 1991).

III. ARGUMENTS FOR AND AGAINST PERMANENT DISBARMENT

1. EFFICIENCY

Ben-Ami argued that New Jersey's system of permanent disbarment is preferable to a system that allows disbarred attorneys to reapply after a certain number of years if they show rehabilitation.²⁷ She argued, in part, that permanent disbarment is preferable because it is more efficient. Though efficiency is certainly important in a bloated judicial system and a factor in the assessment of fair process, efficiency is not the sole goal of the judicial system, nor even its primary goal. The goal of our system is justice and fairness to all litigants, which unfortunately frequently results in outcomes and processes that may be inefficient, but nevertheless guarantee fairness to all parties.

2. DUE PROCESS

While attorneys practice a specialized profession and do not necessarily require the Constitutional guarantees afforded to criminal litigants, they still deserve a fair process, as well as the ability to prove their rehabilitation.²⁸ Unlike criminal defendants, attorneys who are disbarred are not being denied a fundamental right guaranteed by the Constitution. As even the individuals who satisfy all of the subjective on-paper qualifications to serve as federal judges are entitled to apply for their jobs, they are not guaranteed the right to those jobs.²⁹ Likewise, due process applies differently for entitlements than it does for Constitutional rights.³⁰

All defendants in criminal trials, as well as most defendants and plaintiffs in civil trials, are given the opportunity to hear their cases before a "jury of one's peers."³¹ Unlike criminal and civil litigants, who can often opt to have a jury trial or bench trial, the decisions for disbarment are often granted by the judges of the State's highest court.³² While this makes sense given the specialized nature of the profession, the make-up of each court changes over the years. A court in 2019

27. Ben-Ami, *supra* note 18, at 359 (arguing that New Jersey's policy of permanent indefinite disbarment is preferable to other policy regimes governing disbarment).

28. Preet Bharara, *Chasing the Truth About Kavanaugh (with Jane Mayer)*, Stay Tuned with Preet (Oct. 4, 2018), https://content.production.cdn.art19.com/episodes/542f7b-9640-431f-8711-02cc751479dc/4466c39d65222219c9ae6f864fce883d8b78931f2e0df1fb9c240bc6733fb315aa55482669b24ec08b09853d8fbcf9ba9eb1b31a7203833e270c0572eac585b3/18_1004_JaneMayer_EP_V1.mp3 [https://perma-archives.org/warc/2V9Y-S4FJ/https://content.production.cdn.art19.com/episodes/542f7b-9640-431f-8711-02cc751479dc/4466c39d65222219c9ae6f864fce883d8b78931f2e0df1fb9c240bc6733fb315aa55482669b24ec08b09853d8fbcf9ba9eb1b31a7203833e270c0572eac585b3/18_1004_JaneMayer_EP_V1.mp3].

29. *Id.*

30. *Id.*

31. *See, e.g.*, In the Matter of Bell, 596 A.2d 752 (N.J. 1991).

32. The Disciplinary Board of the Supreme Court OF [THIS STATE], Mod. Rules L. Displ. Enforce. Rule 2.

might be willing to disbar an attorney, but five years later that same body could reach a different conclusion.

Nevertheless, United States' legal system is founded on the premise of due process: if an individual is given a right, in most instances he or she must be given due process before that right is taken away. Permanent disbarment is antithetical to that premise. Attorneys who attend three years of law school and pass the bar are given the right to practice law in a specific state, and often multiple. While decisions in one state are not binding in other states, they are often deferred to, although this varies to some degree between states that allowed truly permanent disbarment and those that allow for rehabilitation.³³ Significantly less literature is available on federal disbarments, as most journal articles seem to focus on state processes.³⁴

Attorneys are given the privilege of practicing law once admitted, and must uphold the standards that guide the profession. Once afforded this opportunity and ability, attorneys should at least be given the opportunity to prove rehabilitation when faced with the prospect of being disallowed from practicing law. Like all specialized professionals who must obtain higher education in order to practice, allegations of misconduct against attorneys should be taken seriously, and violators should be punished appropriately. Attorneys should also be properly investigated before disbarment, and individuals should be given the opportunity to rehabilitate themselves after proving themselves worthy of passing the bar after being disbarred.

3. PUBLIC PERCEPTION OF THE PROFESSION

Ben-Ami argues that permanent disbarment is important to maintaining the public's perception of attorneys as being ethical,³⁵ but that perception is eroded in numerous other ways. According to Gallup, only nineteen percent of Americans believe that lawyers in general have above-average levels of ethical standards and honesty.³⁶ It seems unlikely that this view is driven at all by the various policies regarding disbarment in each state. Further, it is not clear that a large portion of the public is generally familiar with the rules regulating attorney conduct, nor does it seem likely that the average person is aware of what acts lead to permanent disbarment. Even attorneys may be unaware of the minutiae of this field, at least those who have no risk of being sanctioned or disbarred.

Unflattering portrayals in shows and films like *Better Call Saul*, *The Wire*, *Breaking Bad* and *The Verdict*, reflect why the public likely does not have an especially rosy view of attorneys, as they are often portrayed as corrupt,

33. See, e.g., *In re Matthews*, 969 A.2d 1132, 1132 (2009).

34. *Disbarment in the Federal Courts*, 85 YALE L.J. 975, 976 (1976).

35. Ben-Ami, *supra* note 18, at 363.

36. *Honesty/Ethics in Professions*, GALLUP, <https://news.gallup.com/poll/1654/honesty-ethics-professions.aspx> [<https://perma.cc/N2DB-827P>].

conspiratorial and crooked. In addition to fictional portrayals, prominent lawyers in the political arena have recently gained a significant amount of negative attention for their behavior. For example, Paul Manafort, a former chairman of President Trump's 2016 election campaign, agreed to plea deal after the FBI uncovered his shady business ties to foreign entities.³⁷ Even the President's personal attorney, Michael Cohen, has not been immune from criminal sanctions, also pleading guilty for lying to Congress about his communications with Russian individuals who were interested in creating a Trump Tower Moscow.³⁸ Given the low public opinion of attorneys and their frequent portrayal as dishonest in the media, it is unconvincing that harsher punishments for misconduct do much, if anything, to improve the reputation of the profession.

4. *PER SE* RULES

Judges have taken various approaches to permanent disbarment, with disagreement within state supreme courts and across them. Some judges favor *per se* bans on certain conduct, like misappropriating client funds, which may seem on their face to warrant the harshest of sanctions.³⁹ On the other hand, other judges feel that while certain offenses do warrant disbarment, those offenses may not warrant permanent disbarment under all circumstances. Justice Stein of the New Jersey Supreme Court took a more functional approach in his partial dissent in *In re Bell*, arguing that a man who had been permanently disbarred deserved to have his case more closely examined, as he faced extreme difficulties in life when he was accused of misappropriation of client funds.⁴⁰ In light of these events, Justice Stein thought the attorney's transgressions were more reasonable.⁴¹ Instead, Justice Stein would have relaxed the rule, rather than apply it rigidly as the court chose to do.⁴²

In criminal trials most character evidence is excluded from being admissible in evidence because of the fear that it will bias the jury, causing them to convict an individual for past offenses rather than the one they are on trial for. While prior felonies are admissible for impeachment purposes, they are not admissible to show that an individual has the character to commit a certain crime. To assume that permanent disbarment is warranted is to effectively assume that one's character is such that after committing one offense, that they are of the character that they are likely to commit future offenses. While the logic is reversed, the

37. Sharon LaFraniere and Kenneth P. Vogel, *Paul Manafort Agrees to Cooperate With Special Counsel, Pleads Guilty to Reduced Charges*, THE N.Y. TIMES, (Sept. 14, 2018), <https://www.nytimes.com/2018/09/14/us/politics/manafort-plea-deal.html> [<https://perma.cc/6TW3-QHY7>].

38. Mark Mazzetti, Benjamin Weiser, Ben Protess and Maggie Haberman, *Cohen Pleads Guilty and Details Trump's Involvement in Moscow Tower Project*, THE N.Y. TIMES, (Nov. 29, 2018), <https://www.nytimes.com/2018/11/29/nyregion/michael-cohen-trump-russia-mueller.html> [<https://perma.cc/5H3Y-ZR84>].

39. See, e.g., Zazzali, *supra* note 8, at 311–12.

40. *In the Matter of Bell*, 596 A.2d 752, 756 (N.J. 1991).

41. *Id.*

42. *Id.*

judgment of character remains in both scenarios. To prohibit individuals from proving rehabilitation essentially assumes that their character is such that they are unable of being rehabilitated.

While judges, not juries, decide who gets permanently disbarred, they should not be *per se* disallowed from considering the totality of the circumstances of the offense. To do so forces judges to assume that an attorney who commits an offense that warrants disbarment has the propensity to commit that offense in the future. In this view there is nothing that they can do to warrant reinstatement; for an individual like Mr. Bell, permanent disbarment means the complete destruction of his career. Further, the role that judges play in disbarment hearings is akin to the role that they play in bench trials. While the expertise and institutional competence of judges to preside over bench trials is not contested, the finality of their decisions in this field lacks the due process afforded to other litigants.

Becoming an attorney is an arduous, challenging, and expensive process. In most cases, it takes at least three years of schooling which, for full-time law students, can mean hundreds of thousands of dollars in debt.⁴³ Even after three years of schooling, passing the bar is no guarantee. Only approximately 59% of law school graduates passed the bar in February 2018, according to the latest statistics.⁴⁴ The passage rate varies significantly from school to school, and the lowest first-time bar passage rate for an accredited law school was just 26.53% in 2017.⁴⁵

US News claims that the unemployment rate for lawyers is currently 0.9%,⁴⁶ but other evidence indicates that the unemployment rate is closer to 11.7%.⁴⁷ Further, in 2014, just 66.3% of attorneys were employed in jobs that required bar passage.⁴⁸ While this is up from the prior year's 64.4%, the percentage declined every year since 2007.⁴⁹ This evidence indicates that the supply for attorneys in the US far exceeds the demand. The market for attorneys in the United States is

43. Ilana Kowarski, *See the Price, Payoff Law School Before Enrolling*, US NEWS & WORLD REPORT (March 21, 2018), <https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/2018-03-21/understand-the-cost-payoff-of-law-school-before-getting-a-jd>.

44. NCBE, *2017 Statistics* (Spring 2018), at 14, <http://www.ncbex.org/pdfviewer/?file=%2Fdocsdocument%2F218> [<https://perma.cc/9Q6Q-4E45>].

45. Kathryn Rubino, *The Law School With The Worst Bar Exam Passage Rate*, ABOVE THE LAW (Aug. 6, 2018), <https://abovethelaw.com/2018/08/the-law-school-with-the-worst-bar-exam-passage-rate/> [<https://perma.cc/DXN3-Y9QJ>]. See also Cheryl Miller, *Pass Rate for California's February Bar Exam Sinks to All-Time Low*, THE RECORDER (May 18, 2018), <https://www.law.com/therecorder/2018/05/18/pass-rate-for-californias-february-bar-exam-sinks-to-all-time-low/> [<https://perma.cc/395T-YMC9>] (citing the February bar passage rate at 27.3%).

46. US News and World Report, *Lawyer Overview*, <https://money.usnews.com/careers/best-jobs/lawyer> [<https://perma.cc/LKV6-6DGV>].

47. NALP Bulletin, *Employment Rate of New Law Grads Up for the First Time Since 2007, Helped by Smaller Class Size*, (August, 2015), <https://www.nalp.org/0815research#table1> [<https://perma.cc/ZE9V-NRJB>].

48. *Id.*

49. *Id.*

massive, as attorneys represent approximately 10 percent of the entire country's GDP.⁵⁰ While some offenses should clearly disqualify attorneys from returning to practice in the immediate aftermath of an offense, it is unfair to permanently restrict attorneys from returning to practice after ethical lapses given the time and expense undergone to become an attorney.

While this does suggest that perhaps the United States simply has too many lawyers, reflected also in the bloated court system, in the context of disbarment it means that disbarred attorneys have a lot of competition if they want to attempt to reenter the market after sanctions. In a market that is arguably over-saturated, disbarring attorneys on grounds that may be somewhat arbitrary makes an already competitive profession unnecessarily more so.⁵¹ The grounds for disbarment vary from state to state, and disbarment from one state often leads to complications in other states.⁵²

Disbarment is most notable when it occurs as a result of attorney misconduct with clients.⁵³ In cases where an attorney commits a serious criminal offense, one independent of an offense committed in service of their client, permanent disbarment is a largely unnecessary penalty.⁵⁴ Criminal records are enough to carry penalties much more serious than any bar sanctions could compare with. Further, in many professions that require significantly less educational experiences than attorneys, criminal records are still disqualifying.⁵⁵ While the wisdom of this attitude may also be misguided, it is at least reasonable to expect that the legal profession has much more scrupulous standards than other professions, given the strong emphasis on ethics required of attorneys.

5. ETHICAL STANDARDS

Some proponents of permanent disbarment believe that it creates higher standards for ethics in locations where it is implemented.⁵⁶ While it might seem logical that harsher punishments should result in a reduced number of offenses, disbarment for nearly any amount of time is a sufficiently serious deterrent, as it

50. Conrad Black, *The Obamacare Disaster*, NATIONAL REVIEW, (October 17, 2013), <https://www.nationalreview.com/2013/10/obamacare-disaster-conrad-black/> [<https://perma.cc/2YD2-AVRG>].

51. Noam Scheiber, *An Expensive Law Degree, and No Place to Use It*, NEW YORK TIMES (June 17, 2016), <https://www.nytimes.com/2016/06/19/business/dealbook/an-expensive-law-degree-and-no-place-to-use-it.html> [<https://perma.cc/ST2P-F6QR>].

52. Kenneth Lawson, mentioned in this Note's Introduction, is one such individual. Lawson was disbarred in Ohio and did not return to practice after moving to Hawaii.

53. Ben-Ami, *supra* note 18, at 359 (arguing that New Jersey's policy of permanent indefinite disbarment is preferable to other forms).

54. Adam D. Fuller, Elizabeth Shively Boatwright and Bryan E. Meek, *No Attorney-Client Privilege for You: The Crime-Fraud Exception*, AM. BAR ASS'N (April 8, 2014), <https://www.americanbar.org/groups/litigation/committees/trial-practice/articles/2014/spring2014-0414-crime-fraud-exception-attorney-client-privilege/> [<https://perma.cc/FLQ2-M2LH>].

55. Sam Becker, *7 Jobs You Can Never Get With a Criminal Record*, CHEAT SHEET (October 19, 2017), <https://www.cheatsheet.com/money-career/jobs-criminal-record.html/> [<https://perma.cc/CP9J-SNMY>].

56. Zazzali, *supra* note 8, at 312.

seriously disrupts attorneys' abilities to practice law. Attorneys in many states are barred for an initial period of five years, after which they have the opportunity to apply for reinstatement.⁵⁷ Further, the American Law Reports states that disbarment is not "punitive in character but protective both of the profession and of the public and also having its aim the reformation of the offender."⁵⁸ As a professional organization, the ABA has a strong interest in making sure the barriers to entry are sufficiently high to ensure that all members of the profession are in good standing. Likewise, the public should respect the profession in order to maintain its status and to have individuals feel confident in the legal system and lawyers more generally. Given that deterrence is not a stated objective, it should not be taken into account when assessing the policy.

Further, as a means for deterring improper acts for attorneys, the logic of permanent disbarment is flawed. For example, studies have demonstrated that lengthier prison sentences have little deterrent effect on crime. The certainty of being caught is actually much more of a deterrent than any punishment itself.⁵⁹ If this is true of criminals generally, it is likely to hold true for attorneys who commit crimes as well. I do not advocate that sanctioned lawyers be publicly shamed to deter them from committing unethical acts, but the approach taken by proponents of the permanent disbarment is missing an inferential logical step.

Nevertheless, proponents of permanent disbarment, such as the one judge of the Supreme Court of New Jersey have asserted, "Once the rule is clear, lawyers will be much less likely to take their client's funds, no matter what the reason."⁶⁰ The court stated that swift and severe punishment was necessary to deter future conduct.

Part of the reason that New Jersey adopted permanent disbarment as a punishment for certain offenses was the lack of uniformity across cases where attorneys sought to be readmitted to the bar.⁶¹ While it is of course unfortunate that the law is not always even-handed in its pronouncements, it makes little sense to promote uniformity when that might simply mean that more rehabilitated offenders are disbarred for prior conduct. If the system for proving rehabilitation is robust enough, operating under the presumption that rehabilitation is less likely, there is little risk that individuals who have not rehabilitated will be unjustly and incorrectly reinstated to the bar.

57. See, e.g., D.C. Bar. R. XI § 14.

58. M. C. Dransfield, Annotation, *Reinstatement of attorney after disbarment, suspension, or resignation*, 70 A.L.R.2d 268 (1960).

59. National Institute of Justice, *Five Things About Deterrence*, <https://nij.gov/five-things/pages/deterrence.aspx> [<https://perma.cc/7R4R-2NTS>].

60. *In re Konopka*, 126 N.J. 225, 237 (N.J. 1991) (reinstatement granted, 128 N.J. 103, 104 (N.J. 1992)).

61. Ben-Ami, *supra* note 18, at 363.

Other proponents argue that because the ability to practice law is a privilege, not a right, there should be “a presumption against readmission.”⁶² For example, the primary considerations taken by the Arkansas Supreme Court have been “the integrity of the bar and the courts and the public’s interest in readmitting the disbarred attorney.”⁶³ Rehabilitation was treated by the court as merely a secondary condition to be taken with “due consideration.”⁶⁴ While it is technically possible to be readmitted to the bar in Arkansas, the barriers are so high that for most individuals gaining readmittance is simply impossible.

The standard in Arkansas for readmission is a notably higher standard than it is for attorneys who pass the bar for the first time and it only applies to attorneys who were not convicted of a “serious crime” and those whose disbarment hinged on a character for dishonesty.⁶⁵ The latter two groups of individuals may be permanently disbarred with no opportunity to return to practice. In many cases the only possible defense is that the action that was grounds for disbarment was taken negligently, not intentionally with malice.⁶⁶ While the application of disbarment laws and rules may be unjust, the presumption for possible reinstatement should remain.

IV. CONCLUSION

Given the challenging nature of the legal profession and the work that attorneys put in to pass the bar, it is unfair to permanently disbar attorneys. Despite potential inefficiencies in a system that never allows unappealable permanent disbarment, the interests of fairness and rehabilitation outweigh the costs associated with allowing appealable decisions. In many states permanent disbarment is the result of judge-made law in individual cases, not the decisions of the legislature. The result of this is that permanent disbarment leads to *per se* prohibitions on hearing appeals in individual cases. While certain offenses likely do warrant permanent disbarment, such as the most extreme felonies, many individuals are likely to be able to show rehabilitation. Separate criminal penalties, such as jail-time, should be significant enough to ruin the worst offenders’ chances of returning to practice law.

62. Mark T. Daven, *Forever Banned: An Analysis of Permanent Disbarment in Arkansas After In Re Madden*, 66 ARK. L. REV. 1029, 1034, <https://cpb-us-e1.wpmucdn.com/wordpressua.uark.edu/dist/0/285/files/2014/03/66-ArkLRev-1029-Daven.pdf> [<https://perma.cc/3LBQ-TGG9>].

63. *Id.*

64. *Id.*

65. *Id.* at 1029.

66. *Id.*