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IMPOLITIC REINSTATEMENTS OF DISBARRED LAWYERS

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SOME people intermittently criticize the few lawyers who appear in court as counsel for persons charged with kidnapping, murder or highway robbery. In fairness to such attorneys it should be said that they do not "defend" criminals in any anti-social way. They but legitimately invoke legal rules which, if applied, compel the state to produce better evidence or to conduct the prosecution more fairly. In this end and in other respects they do no worse than their ethical brethren who, in their civil practice, defend dishonest clients. There are two classes of lawyers, however, that do deserve censure: First, the few dishonest ones; and, second, those who aid, abet, or whitewash the former in the ways hereinafter suggested. This second group has been doing too much in favor of disbarred attorneys who apply for reinstatement. That situation makes it timely to emphasize the fact, or at least to submit and to defend the proposition, that under no circumstances ought any lawyer to be restored to the profession after a disbarment for acts of theft, embezzlement, fraud or deceit. The victimized laymen would, without much persuasion, agree with this thesis, but most members of the bench and bar probably require to be reminded of, or shown, reasons based on considerations of public policy or of the interests of the profession before concluding that disbarments in general ought to be permanent and without hope of reinstatement. Heretofore a great many lawyers have acquiesced in, and some have diligently worked for, reinstatements of even such professional outcasts as were in the category of embezzlers. In one case of a disbarred blackmailer

"the petition for reinstatement was signed by seventy attorneys, said to include all but two of the members of the bars of" three counties.[1]

The contempt for the profession, which many people feel, is inspired or increased by the detected delinquencies of some members, in spite of the good character of others. The public and the private eye that can clearly see the discovered embezzler is myopic as to blameless lawyers. This is but one reason among many for urging the permanent expulsion from the bar of any member found dishonest either in his private or professional capacity.

There is nothing to prevent one who is disposed to lie, cheat or defraud from selecting the practice of the law as his ostensible occupation. The result is that such a moral delinquent is as likely to be discoverable, as he has been, in this profession as he is among bankers or stock salesmen.

To be successful in his deceitful attempts upon persons of ordinary prudence he must have, as he has, the ability to gain the confidence of his prospective or potential victims. The art of so doing, ordinarily exercised without a specific evil intent, also enables him to obtain the friendship of persons who never become either his actual or intended dupes. Accordingly, it sometimes happens that a thousand or more persons who have not defrauded are willing to testify to the "good reputation" of some smooth and influential villain. When they do so they possibly make inaudible or futile the complaint of some lone sufferer from the artifices of the respectable thief.

The perpetrator of frauds deals honestly with his influential associates, not only because they are too wary to be entrapped by any thieving scheme, but also in order that he might on some future occasion use them as the makers of his reputation. He cheats only some obscure persons. If he is a lawyer, that fact gives him additional power for deceit. His fraudulent designs are unsuspected because of the popular presumption that a member of the bar will not lie in his private capacity. He is thought to be conforming to some stringent system of "ethics" because his legal associates generally do. Acting ostensibly because of a social disposition, but in fact

[1]See Ex parte Marshall, ... Miss., ..., 147 So. 791, 803.

for selfish reasons, the refined and intelligent crook worms himself into, and thereafter fortifies himself with, the friendship of the most influential persons. Consequently, it is not surprising to find that governors of states have bestowed favors upon persons later found guilty of confidence games. The Supreme Court of Colorado once dealt with a case where a disbarred attorney brazenly flaunted in its judicial face a "pardon" issued by the chief executive of the territory.[2] A similar situation arose in Illinois, and in a New York case the pardon was one issued by the President of the United States.[3]

The situation, psychological or otherwise, now sought to be explained is illustrated by the reports of various disbarment and reinstatement proceedings. In one Oklahoma case "judges and lawyers" testified to the "high social and moral standing" of an applicant for reinstatement. The Supreme Court was greatly impressed by that fact and reinstated him, notwithstanding it had just observed that "respondent made restitution."[4] A lawyer of any "moral standing" does not do, nor has he done, things which call for "restitution." Such acts ought to be expected only of common lay thieves without "social standing." The reports contain many cases where a respondent in a disbarment proceeding or an applicant for reinstatement has had prominent members of the bar testify that he is "a lawyer of good reputation, of honesty and integrity." A South Dakota malefactor had also three ex-judges of the Supreme Court endorse his application.[5] In one case the Supreme Court of Colorado, after striking the name of a lawyer from the roll because of dishonest acts, immediately reinstated him for the apparent reason, among others, that a number of eminent lawyers and judges "testify to his good reputation."[6]

Naturally, the successful confidence man, whether layman or lawyer, has a "good reputation." It is the chief instrumentality in his criminal activities. It is an easily constructed device for fraud, and works well provided self-serving discre-

[2]Matter of Browne, 2 Colo. 553, 558.
[3]Peo. ex rel. v. George, 186 Ill. 122, 57 N. E. 804; In re Kaufmann, 211 N. Y. S. 256.
[4]In re Snodgrass, 26 P. (2d) 756.
[5]In re Egan, 218, N. W. 1.
[6]Peo. v. Essington, 32 Colo. 168, 171, 75 P. 394.

tion is used, or expedient delay taken, in the selection of victims. The court in the case last cited said of the delinquent attorney:

> "His conduct has been exemplary except in the instances charged in the information."

The conduct of any occasional criminal is "exemplary except in the instances" where the criminality is manifested.

Some bar associations resist reinstatements, but others, neglecting the functions they are presumed to perform, sometimes exert themselves to the utmost to procure the reinstatement of some previously expelled member. Tending to be illustrative in this connection is a case where the reinstatement of an attorney disbarred for embezzlement was unanimously recommended by the Bar Association of Kent County, Delaware.[7] The beneficiary of such a favor was a self-confessed embezzler of the funds of an estate. As might be expected, the malefactor was fervidly represented to the court as one reformed and as "a person of integrity and good character." If a bar association is disposed to eulogize and coddle its socially prominent criminals, instead of purging itself of them, the public is justified in holding the entire group in contempt, and would be stupid to do otherwise.

It may be of interest to note that the "prominent lawyers" who willingly devote both time and energy toward restoring embezzlers to the bar never contribute to a restitution fund for the benefit of the parties betrayed, injured or ruined by the applicant whose petition for reinstatement they endorse. They do not even pause to inquire as to the condition or wishes of the persons who suffered at the hands of the swindler. Possibly among such "busy" class-conscious lawyers were those who could not spare five minutes towards helping to find a position for a law school graduate who has no "eminent" uncle already in the profession.

The "good reputation" of the embezzler applying for reinstatement does not assuage the misery of those who bore the loss, especially when the stolen funds become needed for immediate medical attention or emergent hospital care. To them the bar's solicitude and a court's compassion for the respectable thief is an insult added to the injury already re-

[7] In re Hawkins, 87 Atl. 243.

ceived. Naturally they are thereafter disposed to assist in creating public sentiment against the entire legal "crew." They are excusable in surmising that the numerous lawyers who offered testimonials in favor of the miscreant did so because of consciousness of secret guilt of similar misconduct. The defrauded clients or betrayed associates are not in a poetic mood and derive no comfort from the fact that some judge, in reinstating the disbarred attorney, gazes upon the culprit with a benign countenance and recites:

> "The quality of mercy is not strained;
> It droppeth as the gentle rain from heaven
> Upon the place beneath; it is twice blest—
> It blesseth him that gives and him that takes . . ."

To the victims such expression from the bench is but a vain hoot of a judicial owl.

If any one group of citizens ought to be depended upon to support deserved disbarments and to resist the reinstatement of corrupt disbarred attorneys it is the committee on grievances of any bar association, yet cases may be found where even such a presumably strict vigilante group has recommended reinstatements. Sometimes, as if ashamed to take all the responsibility, it procures and submits also endorsements from bankers and businessmen. Again, it may evasively recommend a "reinstatement on probation."

It may be of interest to note that often when a court disbars a lawyer there is a loud blare of the judicial trumpets, proclaiming the necessity that a member of the bar shall "demean himself with scrupulous propriety." In at least a few cases, however, when a few months later the expelled malefactor stealthily creeps back to the same tribunal with a petition for reinstatement, appearing with a formidable array of counsel and furnishing the court with a cartload of testimonials from "eminent" lawyers and ambitious politicians, reinstatement is granted "without written opinion." What was once properly done with commendable private and official pride, and publicly explained, seems in some cases to be later undone, secretly and silently.

The courts that have the power to reinstate naturally feel the pressure of such bar association action as was manifested

in the Delaware case, and naturally consider testimonials from lawyers and laymen. If they yield to such persuasion they are not as much at fault as the attorneys who support the petition for reinstatement. But, to their great credit, many such tribunals do not always surrender their common sense or appreciation of justice. 48 A. L. R. 1236, 1240, cites many cases where a reinstatement was denied. A New York court refused to conform to the wishes of "many prominent lawyers" to reinstate a man who "did not deny the charges against him, culpable as they were."[8] A California court denied reinstatement to a convicted embezzler who had received "a full pardon by the governor" and submitted to the court "numerous testimonials from officials and other persons."[9]

So great has been the pressure brought to bear upon courts in behalf of disbarred embezzlers who had "friends" in the pulpits, in the Chamber of Commerce, and at the bar, that the judges have tried in some instances to counteract it by formulating rules regarding the sufficiency of the proof of the alleged "good character" at the time of the petition for reinstatement.[10] But generally the test applied was altogether too easy for the petitioner pretending repentance and reformation. In substance, it was, and is, if restored to the bar will he be upright?[11] The result has been that one outspoken jurist could say:[12]

"We have refused to disbar and have reinstated men who betrayed their clients. We have refused to disbar and have reinstated men who stole their clients' funds. We have refused to disbar and have reinstated men who bear the felon's brand. We have shown mercy to men whose acts were dishonorable and reprehensible. We have shown mercy to men whose acts made black the escutcheon of the bar."

Occasionally a court is hard pressed for reasons with which to justify an order of reinstatement. Thus in one case the Supreme Court of Montana found that "no reason exists why the applicant should not be reinstated," because ". . . the

[8]Matter of Clark, 112 N. Y. S. 777.
[9]In re Riccardi, 64 Cal. App. 791, 222 Pac. 625 (1923).
[10]6 C. J. 615, note 84.
[11]6 C. J. 615, note 81.
[12]Hilliard, J. in Peo. v. Lindsey, 93 Colo. 41, 58.

larceny upon conviction of which the petitioner was disbarred was committed while the petitioner was under the influence of intoxicating liquor," and "since the order of disbarment was made he has become sober."[13]

Reinstatements are sometimes granted, not on the court's independent consideration of the application, but because of recommendations of a bar association. Thus in a New Jersey case the applicant had been guilty of many thieving and disreputable acts.[14] He had been convicted in a criminal court of the crime of obtaining money under false pretenses, and at the time of his application had not made full restitution to his victim.[15] The court reinstated him chiefly because the Camden County Bar Association, "after a thorough investigation, unanimously asked for his reinstatement." The "thorough investigation" did not disclose that the applicant had not obtained money by false pretenses, and had not embezzled monies at various times. His failure to make restitution was said to be due to inability. The bar association ignored the question whether applicant could have foreseen such inability at the time of the larcenous acts. If a full restitution had been made, that fact would have been seized upon as an additional reason for reinstatement. The court itself found a way to evade the obvious converse of the situation. It quoted from a Delaware decision where, in a like case, it was said that a "thoroughly good man may be *unable* to make any restitution at all." It may be submitted that if one is under a legal or moral obligation to make a "restitution" of stolen funds, that very obligation precludes the possibility that he is "a thoroughly good man." As well say that a "thoroughly good man" is unable to bring back to life one whom he has murdered. One hundred and twenty-five witnesses testified for the applicant. One was a "former judge," another a "Congressman." The report is instructive to prospective wrongdoers. It teaches them not to steal from a "judge" or a "Congressman," but rather to victimize some obscure widow. Her feeble cries of distress will be drowned out by the vociferous testimonials of lawyers, judges, busi-

[13] In re Newton, 70 Pac. 982.
[14] In re Harris, 66 N. J. Law 473, 49 Atl. 728.
[15] In re Harris, 88 N. J. Law 18, 95 Atl. 761.

nessmen, and Congressmen. Why so much solicitude for a lawyer thief? No array of attorneys and politicians rush to the aid of a shopgirl who steals a ribbon. There is no reinstatement for her, even if her employer is one of the businessmen who comes to the aid of a thieving lawyer.

It may be of interest to note that among the things which influenced courts to exercise "discretion" in favor of a reinstatement is a situation indicated in the following words of a brief quoted by the Oklahoma court:

> "His father was a distinguished lawyer; his family for several hundred years back have been in the legal profession."

Ordinarily such a fact ought to militate against the applicant, and the court should terminate the local professional dynasty. We have no Mongolian system of caste. If this is a land of equal opportunity an applicant for reinstatement ought to be in a better position if his counsel is able to say:

> "His father was a lazy section hand; his family for several hundred years back have been without education or property."

Sometimes when a court restores to the profession a disbarred blackmailer or embezzler it professes to believe "that men are, and may be, rehabilitated when they have yielded to temptation, when they have repented."[16] What is thus assumed by them is but a half-truth. Persons guilty of some crimes may be "rehabilitated." Reinstatements may be justly granted in cases where disbarment resulted from intemperance, negligence, crimes of passion, or strong language in books or briefs. Emotional instability is curable or at least excusable in most cases, but the disposition to cheat generally is not. Dishonesty in an educated adult is a permanent yellow streak in his psychic constitution, but even if not, disbarment resulting from it ought to be permanent. Ordinarily, if the guilty lawyer fears to renew fraudulent practices by overt acts he is apt to do so vicariously by advising selfish clients how to commit frauds without detection or punishment.

[16] See Ex parte Marshall, 147 So. 791, 794.

The intelligent lawyer of mature years who has been found flagrantly dishonest on one occasion is forever prone to relapse into delinquency and remains potentially a worse miscreant, notwithstanding that the contrary may be assumed in what is tearfully said about him in a subsequent memorial meeting of a bar association. It is a curious fact, psychological or otherwise, that untruthful and dishonest persons who observe that numerous friends believe in, and are sincerely testifying to, their "honesty and integrity," yield to the suggestion and become unconscious of their own turpitude or moral instability. In 1902 a Montana lawyer was disbarred for fraud and deceit. One year thereafter he asked to be reinstated. The court then observed that his petition "does not state anything which shows that the applicant has a just conception of the serious nature of the several charges made and proven against him, or that he in anywise regrets having done any of the things which he did."[17] That characterization almost typifies the psychology of one kind of a respectable crook. After participating in, or creating, a fraudulent transaction he proceeds to conceive a series of ideas which convince him of self-justification and ultimately overcome all sense of guilt. Thus the embezzler can face the world with an air of innocence after a little loose thinking or imagination on his part that at the time of the theft he intended to make restitution before detection, or that at the time of the deceit he did not acutely realize that he was perpetrating an injurious falsehood. He may deem himself guiltless because he is financially unable to meet a legal or moral claim, evading thought of the fact that at the time the obligation was entered into he knew that such inability was imminent or already present, and concealed that material circumstance from the one with whom he dealt. It is possible, also, for a refined crook to induce a sense of self-righteousness by doing a little charitable work or performing some kind acts. Such incidental conduct serves not only as a jag which deadens the consciousness of wrongs committed but also as an exhibit in proof of a good character. The "reputation" thus bolstered up may be utilized to camouflage further fraudulent intents or to escape the consequences of detected misdoings. If caught in the com-

[17] In re Weed, 72 Pac. 653.

mission of a good sized theft or extortion so that the "reputation" fails to work as an immunity bath, there may be a plea of "a nervous breakdown" and a few friendly physicians and psychiatrists then do the whitewashing.

When "eminent lawyers" testify to the "good character" of some ex-thief they desire to have restored to their ranks, they may be sincere, but let it be remembered that they would have had the *same* testimony, had it been called for, *prior* to the time of the criminal or dishonest acts which resulted in the disbarment.

A common motivation for a court's refusal to disbar a dishonest lawyer or for ordering the reinstatement of one already disbarred, is the sympathetic desire that he be permitted to earn money in the way in which he has been trained, presumably in order that he might not become "poor." But poverty has been the condition of many honest lawyers while in active practice as well as in their declining years. Embezzlers are not made of such finer clay that ways of affluence must be provided for them. Most of the disbarred do not actually suffer when no petition for reinstatement is pending. They evade the soup line. Many of them are given good positions by some of the "eminent" lawyers who afterwards clamor for their reinstatement. In one reported case the court observed that an applicant for reinstatement "has been in the employment, as general assistant and confidential managing clerk" of a prominent law firm.

The disbarred lawyers do not seem to be satisfied with subordinate positions with practicing attorneys. They want to be "big shots" in the estimation of the general public. But they are not too good for mere "jobs." Many lawyers ablet than they are simply associated with some attorney or firm. Dishonest men are not worthy even to be messengers in a law office. However able, they are not needed in any capacity, in the light of the fact that the law schools are furnishing many able young men with high ideals and who are capable of filling any legal position or practicing law alone.

Ways are being sought to prevent the profession from being overcrowded. It is unfair arbitrarily to "flunk" any competent law school graduates who take a bar examination. However less expedient, it would be more just to weed out

the dishonest practitioners, if any there are, regardless of age or ability. There is no way of doing this effectively because the unscrupulous lawyers are clever enough to conceal their moral obliquity from upright associates. What can be done, however, is to encourage betrayed clients to make complaints, and to urge laymen who have been defrauded by any lawyer to disclose their respective experiences. It is timely, also, for those able to be heard, to denounce the practice of attempting to undo a deserved and belated disbarment by endorsing a petition for reinstatement. A good start in that direction was made by the Supreme Court of Wisconsin when it rebuked the sixty lawyers of Dane county for filing a petition, ostensibly as friends of the court, in behalf of an accused in a disbarment proceeding.[18] The Supreme Court of South Dakota, when deluged by testimonials, cited that case with approval and pointed out that lawyers who sign petitions in favor of reinstatement, merely because of sympathy for the applicant, are "unmindful of their obligations as attorneys and officers" of the court.[19]

[18]In re Stolen, 193 Wis. 602, 214 N. W. 379 (1927).
[19]In re Egan, 52 S. D. 394, 218 N. W. 1, 15 (1928).

ANOTHER WAY TO ELEVATE THE BAR

By BENTLEY M. MCMULLIN, *of the Denver Bar*

THE apotheosis of formal legal education still continues. Cunningly prepared tracts plead that every state grant admission to the bar only after three years in an approved law school, with a prior college course. Mapped in purest white are those loyal sovereignties meeting these requirements, in shaded tones those which have compromised with their ideals, in solid black the recalcitrants which have utterly failed. The claim is made that compliance will produce a bar better able to dispense law, freer from objectionable characters, of greater social value, and, though unexpressed, the thought may also be present that competition will be lessened. Without stopping to deny the claims of the newspapers and our own clients that we lack learning, ability and conscience,