ETHICALLY SPEAKING

This month, *Ethically Speaking* invited Wayne Gross, Chair of the Orange County Bar Association's Professionalism and Ethics Committee, and Michael D. Marcus, Chair of the Los Angeles County Bar Association's Professional Responsibility and Ethics Committee, to share their views regarding the pending proposal under consideration by the California State Bar regarding permanent disbarment. The proposal is available online at http://www.calbar.ca.gov/state/calbar/cal bar_generic.jsp?cid=10145&n=77809. The deadline for public comment on the proposal is July 12, 2006.

A Rod for Crooked Lawyers

by Wayne Gross

Courteous Reader, Had not my affections to my countrymen more engaged me, than any particular enmity I have against the Lawyers' corrupt interest, by any damage I have sustained by them; I should have forborne publishing the ensuing lines. But if the very heathens could say, Non solum nobis nati sumus; we are not only born for ourselves, but that next to the duty we owe to God, we are bound, every individualized man, to be a helpful member to his country; why should I, or any man keep silence, whilst this pestiferous generation of the Lawers, runs from city to country, seeking whom they may devour? It is thy duty as well as mine, to cry aloud for justice against them.

The foregoing sentiments were expressed in a pamphlet called "A Rod For The Lawyers," published in London in 1659 by William Cole, a self-described "Lover of his Country." According to Cole, lawyers are "the grand Robbers and Deceivers of the Nation; greedily devouring yearly many Millions of the People's Money." While his language is dated, Cole's basic sentiment that lawyers are crooked is widely shared by the public. We lawyers should be cognizant that the public is inclined to believe the worst about us. As in Cole's portrayal of Seventeenth Century lawyers, today's movies and television often present lawyers as aggressive egomaniacs who put their ambitions before the interests of clients and society. We know such portrayals of lawyers are far from accurate; all but a very few place their clients interests first and foremost. Too often, however, those few monopolize the profession's public face.

POINT/COUNTERPOINT: PERMANENT DISBARMENT

Consider Ron Silverton. Mr. Silverton was first disbarred in 1975 following convictions for conspiracy to obtain money by false pretenses and to present a fraudulent insurance claim and one count of soliciting another to commit or join in the commission of grand theft. He served nine months in prison. Reinstated on his fourth try in 1992, the State Bar Court found that within 22 months, he began engaging in new misconduct – charging his clients unconscionable fees. The sanction the State Bar Court recommended for his new offense? A 60-day suspension.

Silverton appealed to the Supreme Court, which has the final say on attorney discipline. The Court denied his petition but took the unusual step of hearing the case on its own motion to consider whether to increase his discipline. During the hearing, Justice Marvin Baxter said discipline authorities should consider the effect of lawyer misconduct on both the general public and the reputation of the legal profession. "It is beyond me how someone who's been disbarred would play it that close to the line . . . How long do you have to wait before you put an end to victimizing the public? Does it require a new moral turpitude offense?"

After disbarring Silverton, the Supreme Court asked the bar to update a previous proposal recommending permanent disbarment as a sanction for attorney misconduct. In response, the State Bar's Committee On Regulation, Admissions And Discipline ("RAD") has sent out for public comment a proposal that sets forth guidelines that the State Bar Court must consider in determining whether to recommend permanent disbarment. This article supports the State Bar's proposal. Its implementation will best protect the public from being victimized by those lawyers who have established themselves as a danger to the community, and thereby enhance the public image of the vast majority of lawyers who do it right.

Since the bar court was created in 1989, about 12 to 15 reinstatement petitions have been filed annually by lawyers who had either been disbarred or had resigned with charges pending. About half are granted. During the same period, on average roughly 200 lawyers have resigned or been disbarred every year. Chief Trial Counsel Scott Drexel, who heads the bar's discipline operation and favors permanent disbarment, said he believes that few attorneys would receive the ultimate sanction. "Our goal was to limit permanent disbarment to the most egregious cases."

Nonetheless, critics of the proposal assert that everyone, including lawyers, deserves a second chance, particularly when such misconduct doesn't directly relate to the practice of law. They cite our current State Bar President as an example of a lawyer who successfully rehabilitated himself after severely injuring the driver of another car in a drunk driving incident in 1986. Had the other driver

died, he said, "I would never have had the opportunity to come back here" if permanent disbarment had been required for a second-degree murder conviction. Such criticism was well taken, and caused RAD to modify the original proposal, which had enumerated about a dozen specific crimes, from murder to kidnapping, as grounds for disbarment. RAD felt that such a list cast too wide a net. After voting to eliminate a number of the offenses on the list, RAD retained a list of specific acts of misconduct that relate to the practice of law (*e.g.*, stealing client funds) or the administration of justice (*e.g.*, subornation of perjury), or that involve fraud, moral turpitude, or a pattern of serious misconduct. The new list, by focusing on either direct, serious harm to clients or the administration of justice, addresses the aforementioned concerns that too wide a net was being cast.

Finally, it should be noted that the personal rehabilitation of lawyers, while important, is not the sole goal of bar discipline. Equally important are public protection and promoting respect for the legal profession. Cal. R. Prof. Conduct 1-100(A). Permanently disbarring the most egregious offenders protects the public from being victimized repeatedly by recidivists. According to Scott Drexel, seven California lawyers have been disbarred twice. Moreover, the possibility of permanent disbarment should cause would-be offenders to think twice before engaging in misconduct. Thus, RAD's proposal, by allowing permanent disbarment for conduct that directly harms clients or the administration of justice, furthers the important goal of protecting the public, while at the same time affording attorneys who commit other felonies, such as drunk driving, with an opportunity to rehabilitate themselves.

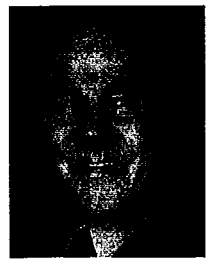
In sum, as reflected in Cole's scathing remarks quoted above, the public has long been inclined to believe the very worst about our profession. We can only imagine what he would say if he were alive today and observed a system in which lawyers are disciplined by other lawyers, and there were no prohibition against egregious repeat offenders from seeking reinstatement. I'm afraid that none of us would be spared the rod.

Assistant U. S. Attorney Wayne Gross is the Chair of the Orange County Bar Association's Professionalism and Ethics Committee.

An Unjustified, Radical Shift

by Michael D. Marcus

HAVING SERVED AS A JUDGE of the California State Bar Court, I can state without qualification that the proposed radical shift to permanent disbarment, from the Supreme Court's long-held policy of recognizing "the regeneration of erring attorneys" (*Resner v. State Bar* (1967) 67 Cal.2d 799, 811, citing *In re Gaffney* (1946) 28 Cal.2d 761, 764; *In re Andreani* (1939) 14 Cal.2d 736, 749), is neither supported by empirical evidence nor substantially justified. The extremely rare Ron Silvertons of the profession are not sufficient reason for changing a system that has functioned well.



The burden of proof for reinstatement is already "a heavy one" (*Hippard v. State Bar* (1989) 49 Cal.3d 1089, 1091-1092) where disbarred lawyers must "show by sustained exemplary conduct over an extended period of time that they have sustained the standard of fitness to practice law." (*In re Basinger* (1988) 45 Cal.3d 1348, 1362.) Ninety-seven percent of disbarred lawyers are unable to meet this substantial burden of proof and have been denied readmission. An overwhelming majority of the remaining three percent who have proved their rehabilitation by clear and convincing evidence have validated the trust placed in them.

Thus, both the existing heavy burden on attorneys to gain reinstatement and the fact that so few attorneys have been successful in meeting that challenge demonstrate that the exacting and well-recognized body of law governing reinstatement to the bar has been effective in protecting both the public and the bar.

If enacted, the proposed change would allow permanent disbarment for any one of seven extremely broad categories of crimes and misconduct, including "(ii) engaging in multiple instances of the intentional theft or conversion of client funds, resulting in substantial harm to one or more victims;" "(iii) engaging in the intentional corruption of the judicial process, including but not limited to, bribery, forgery, perjury or subornation of perjury" and "(vii) engaging in conduct involving fraud, moral turpitude or a

pattern of serious misconduct that is so egregious that that the member should be permanently disbarred."

The State Bar's Chief Trial Counsel justifies this all-encompassing list because of "consistency in application" without which might "result in uneven application ... with one State Bar Court judge recommending permanent disbarment for an offense that another State Bar Court judge determines warrants only a ten-year or even a five-year reinstatement waiting period." This argument for consistent application of the disbarment sanction fails on several grounds: (i) each reinstatement case must be resolved on its own facts (*In re Young* (1989) 49 Cal.3d 257, 268); (ii) the required application of too many predetermined criteria would deny judges the right to apply their own discretion; (iii) it would render unimportant and irrelevant the use of mitigating factors as a consideration in determining discipline (*Edwards v. State Bar* (1990) 52 Cal.3d 28, 37-38); and (iv) it ignores existing case law which already provides that the State Bar Court judges must take into account the recommended discipline in prior cases with similar facts. (*In the Matter of Taylor* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 563, 580.)

The above-proposed categories (ii), (iii) and (vii) have their own problems. The first, concerning the multiple and intentional conversion of client funds, includes small sums of money which, historically, have not resulted in disbarment. (*see Baker v. State Bar* (1989) 49 Cal.3d 808; *Lawhorn v. State Bar* (1987) 43 Cal.2d 1357.) If adopted, however, it would lead to permanent disbarment as long as the misappropriation caused the amorphous "substantial harm" to the client. The "intentional corruption of the judicial process" in proposed category (iii) is susceptible to constitutional attack for its ambiguity and so broad that it could include making misleading statements to a judge or judicial officer (Business and Professions Code § 6068(d) and Rule of Professional Conduct 5-200(B) [which, historically, have warranted only brief periods of suspension]), the suppression of evidence that an attorney has the legal obligation to reveal or produce (Rule of Professional Conduct 5-220) and the willful destruction or concealment of any documentary evidence (Penal Code § 135, a misdemeanor). None of the foregoing, by themselves, have ever been cause for disbarment but now, if the change is adopted, could produce that result. Finally, the breadth and ambiguity of proposed category (vii) would ensnare most members who have not fallen within the preceding six. And, as every lawyer who has ever defended a criminal case knows, the Chief Trial Counsel's assurance that such sanctions would not be imposed is unenforceable.

Another proposed change, which has received little attention, would extend by two years the time before which a disbarred person could apply for reinstatement. The few attorneys still allowed to apply for reinstatement under the proposal would now have to wait seven years rather than the existing five from the effective date of their disbarment. Presently, however, it is well recognized – because of the investigative period accorded the Office of Chief Trial Counsel that follows the reinstatement application and the time required for pre-trial, trial, preparation of the Hearing Department decision and the inevitable appeals to both the Review Department and the Supreme Court – that a successful applicant must already wait at least seven years before once again being able to practice law. Thus, this change is purely punitive in nature.

Finally, it is proposed that the few applicants who have not been permanently disbarred would have to pass the attorney bar exam to gain reinstatement. This change would impose a substantial financial burden on the applicant and thus, once more, is punitive since, again, consistency in application is the only justification for the amendment. The existing standard that the petitioner must (i) show present learning and ability in the general law and (ii) pass the Professional Responsibility Examination are a better barometer of an applicant's legal acumen because, historically, the former requirement has included testimonials by supervising lawyers and proof that the person has kept current in the law, as well as permitting evidence of the petitioner's legal writings. In contrast, a passing score on the bar exam merely indicates that a person is a good test-taker.

Because of the above failings, the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association strongly opposes permanent disbarment. I hope that you will, too.

Michael D. Marcus, a mediator and arbitrator in Los Angeles with ADR Services, Inc., is the Chair of the Professional Responsibility and Ethics Committee of the Los Angeles County Bar Association.

Proposed New Rule 951.2(e), California Rules of Court

Under Proposed California Rule of Court 951.2(e), when recommending disbarment, the State Bar Court must recommend whether a lawyer should be prohibited from seeking reinstatement and must consider the following:

(i) conviction of a crime involving malfeasance in public office which involved fraud or the embezzlement or intentional misuse of public funds;

(ii) engaging in multiple instances of the intentional theft or conversion of client funds, resulting in substantial harm to one or more victims;

(iii) engaging in the intentional corruption of the judicial process, including but not limited to bribery, forgery, perjury or subornation of perjury;

(iv) engaging in multiple instances of insurance fraud committed in the course of the practice of law, including but not limited to staged accidents, the submission of false or fraudulent claims for the payment of a loss or injury or repeated instances of runner-based solicitation;

(v) engaging in the unauthorized practice of law when the member knew of his or her disbarment, resignation or suspension from practice;

(vi) the member was previously disbarred or resigned with disciplinary charges pending; and

(vii) engaging in conduct involving fraud, moral turpitude or a pattern of serious misconduct that is so egregious that the member should be permanently disbarred.

Proposed New Rule 951.2(e), California Rules of Court.