

## Judiciary Law § 90(4): Conviction of Any Federal Felony Compels Automatic Disbarment

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tion of statutory construction, the logical flaws in the opinion are unlikely to have serious adverse consequences. By referring to "accident" and the accrual of the "main claim" interchangeably,<sup>217</sup> however, the Court has left unclear which event should be considered in determining whether the 1976 amendment is applicable. This distinction would be significant, for example, in wrongful death cases where the accident occurs prior to August 1, 1976, but the death occurs thereafter. The problem arises because the time of the accident has no significance in the cause of action for wrongful death, which accrues when an administrator is appointed to represent the interests of the decedent's distributees.<sup>218</sup> In cases where the death occurs after August 1, 1976, it is submitted, the Court would have little alternative but to hold that the amendment to section 167(3) requires an insurer to defend and indemnify an impleaded spouse. Even under the *Mandels* rationale, it would seem difficult for the Court to find that the date of the underlying accident rather than the accrual date of the main claim controls, since the amendment, by its terms, applies to "causes of action" arising on or after its effective date. Thus, were the Court to hold that the accident date controls, it would have to do so on the unlikely ground that a wrongful death claim "arises" when underlying tortious conduct occurred.

*Frank K. Walsh*

#### JUDICIARY LAW

Judiciary Law § 90(4): *Conviction of any federal felony compels automatic disbarment*

Section 90(4) of the Judiciary Law mandates automatic disbarment of an attorney who has been convicted of a felony.<sup>219</sup> Traditionally, the courts limited this statute to instances in which the

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<sup>217</sup> See *id.* at 458, 382 N.E.2d at 764, 410 N.Y.S.2d at 64.

<sup>218</sup> See EPTL § 5-4.1 (1967); D. SIEGEL, NEW YORK PRACTICE § 44 (1978).

<sup>219</sup> N.Y. JUD. LAW § 90(4) (McKinney 1968) provides in pertinent part: "Any . . . attorney . . . convicted of a felony, shall, upon such conviction, cease to be an attorney . . . or to be competent to practice law as such." Under § 90(4), an attorney convicted of a felony is ipso facto disbarred without further judicial proceedings. *In re Mitchell*, 40 N.Y.2d 153, 156, 351 N.E.2d 743, 745, 386 N.Y.S.2d 95, 96 (1976); *In re Barash*, 20 N.Y.2d 154, 157, 228 N.E.2d 896, 898, 281 N.Y.S.2d 997, 1000 (1967); *In re Ginsburg*, 1 N.Y.2d 144, 147, 134 N.E.2d 193, 194, 151 N.Y.S.2d 361, 362 (1956). Section 90(4) further provides that upon presentation of a certified or exemplified copy of the judgment of conviction, the appellate division will order the attorney's name struck from the rolls. N.Y. JUD. LAW § 90(4) (McKinney 1968).

crime was a New York felony, or a federal felony for which there was an equivalent felony under New York Law.<sup>220</sup> The Court of Appeals departed from this interpretation in *In re Chu*,<sup>221</sup> holding that automatic disbarment would result from a federal felony conviction despite the absence of a "precisely matching [New York] felony statute."<sup>222</sup> Recently, in *In re Thies*,<sup>223</sup> the Court of Appeals, reaffirming

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<sup>220</sup> *In re Donegan*, 282 N.Y. 285, 292, 26 N.E.2d 260, 262 (1940). Donegan was convicted of conspiracy to use the mails to defraud, a felony under federal law but a misdemeanor under New York State Law. Pursuant to Ch. 946, [1895] N.Y. Laws, (current version at N.Y. JUD. LAW § 90(4) (1968)), the Appellate Division, First Department, struck Donegan's name from the roll of attorneys. 282 N.Y. at 287-88, 26 N.E.2d at 261. On appeal, the sole issue before the Court of Appeals was "whether the term 'felony,' as employed in [§ 88(3)] of the Judiciary Law . . . includes an offense defined as a felony by Federal statute, which, if cognizable under the laws of New York, would at most be a misdemeanor . . ." *Id.* at 288-89, 26 N.E.2d at 261. The Court held that the term "felony," as employed in the statute, included only federal felonies which were also felonies under the laws of New York. *Id.* at 290-91, 26 N.E.2d at 262. In reaching its conclusion, the Court reasoned that if the statute encompassed all federal felonies, an attorney might be automatically disbarred for a conviction of a federal felony which, if punishable only as a misdemeanor under New York law, would entitle him to a hearing and result in less severe discipline. *Id.* at 291, 26 N.E.2d at 262; see N.Y. JUD. LAW § 90(2), (6) (McKinney 1968 & Supp. 1978-1979). The Court further noted that automatic disbarment is, in effect, a punishment, and therefore the statute, being penal in nature, must be strictly construed. *Id.* at 292, 26 N.E.2d at 263.

*Donegan*, however, was a departure from the practice previously followed in the appellate division which had mandated disbarment upon conviction of any federal or New York felony. See, e.g., *In re Hess*, 250 App. Div. 581, 295 N.Y.S. 82 (1st Dep't 1937) (per curiam); *In re Hodgskin*, 193 App. Div. 217, 183 N.Y.S. 401 (1st Dep't 1920) (per curiam).

From 1940 until 1977, when the Court of Appeals decided *In re Chu*, 42 N.Y.2d 490, 493-94, 369 N.E.2d 1, 3, 398 N.Y.S.2d 1001, 1003 (1977), the determination in *Donegan* remained the rule in New York. For cases decided under the *Donegan* rule, see *In re Levy*, 37 N.Y.2d 279, 333 N.E.2d 350, 372 N.Y.S.2d 41 (1975) (per curiam); *In re Cristenfeld*, 58 App. Div. 2d 505, 397 N.Y.S.2d 101 (2d Dep't 1977) (per curiam); *In re Kilcullen*, 55 App. Div. 2d 437, 391 N.Y.S.2d 108 (1st Dep't 1977) (per curiam).

<sup>221</sup> 42 N.Y.2d 490, 369 N.E.2d 1, 398 N.Y.S.2d 1001 (1977).

<sup>222</sup> *Id.* at 494, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003. In *Chu*, an attorney was convicted of knowingly filing false documents with the Immigration and Naturalization Service, a felony under federal law. *Id.* at 491, 369 N.E.2d at 1, 398 N.Y.S.2d at 1001-02. Cognizant of a New York statute making it a felony to offer a false instrument for filing, the New York Bar Association initiated a proceeding in the appellate division to strike the defendant's name from the rolls. *Id.* at 491-92, 369 N.E.2d at 2, 398 N.Y.S.2d at 1002. The appellate division refused to grant the order to strike on the ground that the federal crime was not recognized as a felony in New York. *Id.* at 492, 369 N.E.2d at 2, 398 N.Y.S.2d at 1002. In particular, the intermediate appellate court noted that New York's statute requires an intent to defraud the state or any political subdivision thereof, but that in this case, the fraud was practiced on a federal agency. *Id.* The Court of Appeals reversed, holding that a conviction for conduct punishable as a felony under federal law is a sufficient basis for automatic disbarment under § 90(4) of the Judiciary Law. *Id.* at 493, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003. The Court also noted that the federal and New York statutes were sufficiently analogous to justify the sanctions of § 90(4). *Id.* at 494, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003.

Judge Wachtler, in a concurring opinion in which Judges Fuchsberg and Cooke joined, expressed concern over the scope of the majority's opinion. While agreeing with the majority that the substantive federal and state provisions in the case were so similar as to bring the

*Chu*, held that a federal felony conviction results in automatic disbarment without regard to whether the conduct is punishable as a felony in New York.<sup>224</sup>

In *Thies*, the appellant was convicted in federal district court of assault on a federal officer.<sup>225</sup> Pursuant to section 90(4) of the Judiciary Law, the Joint Bar Association Grievance Committee for the Second and Eleventh Judicial Districts sought an order striking Thies' name from the rolls of attorneys. The Appellate Division, Second Department, granted the order<sup>226</sup> and Thies appealed, contending that a hearing on the circumstances of the offense should have been held prior to his disbarment.<sup>227</sup>

In a per curiam opinion, a closely divided Court of Appeals<sup>228</sup> affirmed the appellate division's order.<sup>229</sup> Citing *Chu*, the Court reaffirmed its position that section 90(4) mandates automatic disbarment when an attorney is convicted of any crime "judged by the Congress to be of such seriousness and so offensive to the community as to merit punishment as a felony."<sup>230</sup> Thus, the Court concluded that consideration should not be given to mitigating circumstances or to the severity of the crime.<sup>231</sup> Additionally, the Court rejected Thies' claim that the application of section 90(4) to federal felonies which are not felonies under the laws of New York violates the eighth and fourteenth amendments.<sup>232</sup>

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federal statute within the scope of § 90(4), Judge Wachtler "assume[d] that the majority did not intend to imply that all felony convictions in Federal courts would necessarily dictate the same result." *Id.* at 495, 369 N.E. 2d at 4, 398 N.Y.S.2d at 1004. (Wachtler, J., concurring).

<sup>223</sup> 45 N.Y.2d 865, 382 N.E.2d 1351, 410 N.Y.S.2d 575 (1978) (per curiam), *remittitur amended*, 45 N.Y.2d 924, 383 N.E.2d 877, 411 N.Y.S.2d 231 (1978), *aff'g* 61 App. Div. 2d 1037, 403 N.Y.S.2d 53 (2d Dep't), *appeal filed*, No. 78-1405, 47 U.S.L.W. 3637 (March 27, 1979).

<sup>224</sup> 45 N.Y.2d at 866-67, 382 N.E.2d at 1351, 410 N.Y.S.2d at 576.

<sup>225</sup> See *Court of Appeals Stands Fast On Disbarment of All Felons*, N.Y.L.J., Oct. 20, 1978 at 1, col. 2. The federal district court judge admitted the altercation "was at least partly engendered by governmental ineptitude." *Id.* at 4, col. 3. Moreover, he questioned the New York authorities for permitting this incident to be grounds for disbarment. *Id.*

<sup>226</sup> 61 App. Div. 2d at 1037, 403 N.Y.S.2d at 53-54.

<sup>227</sup> *Court of Appeals Stands Fast On Disbarment of All Felons*, N.Y.L.J., Oct. 20, 1978, at 1, cols. 2, 3. Thies' claim was apparently predicated on § 90(6) of the Judiciary Law which grants an attorney who is guilty of a crime that does not result in automatic disbarment under § 90(4) the right to be heard in his own defense before his is subjected to discipline. See N.Y. JUD. LAW § 90(6) (McKinney Supp. 1978-1979).

<sup>228</sup> Chief Judge Breitel and Judges Jasen, Gabrielli and Jones concurred in the per curiam opinion, while Judges Wachtler, Fuchsberg and Cooke dissented in a memorandum opinion.

<sup>229</sup> 45 N.Y.2d at 866, 382 N.E.2d at 1352, 410 N.Y.S.2d at 576.

<sup>230</sup> *Id.* at 866-67, 382 N.E.2d at 1351, 410 N.Y.S.2d at 576 (quoting *In re Chu*, 42 N.Y.2d at 494, 369 N.E.2d at 3, 398 N.Y.S.2d at 1003 (1977)); see note 221 and accompanying text *supra*.

<sup>231</sup> 45 N.Y.2d at 866, 382 N.E.2d at 1351, 410 N.Y.S.2d at 576.

<sup>232</sup> 45 N.Y.2d 924, 925, 383 N.E.2d 877, 411 N.Y.S.2d 231.

In contrast, the dissent objected to the establishment of a "per se" rule which mandates summary disbarment for conviction of a felony in another jurisdiction, without regard to whether the offense is punishable as a felony in New York.<sup>233</sup> Maintaining that discipline may be attained "without sacrificing fairness and reason,"<sup>234</sup> the dissent objected to the majority's rule which precludes an evaluation of the seriousness of the offense. The dissent concluded that only a statutory change could avoid the unduly harsh consequences of the majority's decision.<sup>235</sup>

Section 90(4) is designed to protect the public from those who are unfit to practice law<sup>236</sup> and to maintain public confidence in the

<sup>233</sup> *Id.* at 867, 382 N.E.2d at 1352, 410 N.Y.S.2d at 577 (Wachtler, Fuchsberg, & Cooke, JJ., dissenting).

<sup>234</sup> *Id.* The dissenting opinion is substantially similar to Judge Wachtler's concurring opinion in *In re Chu* in which Judges Fuchsberg and Cooke joined. See 42 N.Y.2d at 495, 369 N.E.2d at 4, 398 N.Y.S.2d at 1004 (Wachtler, J., concurring); note 221 *supra*. In *Chu*, Judge Wachtler expressed concern with an overly broad interpretation of the majority's decision because certain federal felony convictions may not be sufficiently severe to warrant automatic disbarment. 42 N.Y.2d at 495, 369 N.E.2d at 4, 398 N.Y.S.2d at 1004 (Wachtler, J., concurring).

<sup>235</sup> *Id.* It appears that the statutory change advanced by the dissent was intended only to avoid the "inflexibly harsh" rule of the instant case and was not meant to abolish automatic disbarment when a federal felony is cognizable as a felony under New York law. See *id.*

Subsequent to *Thies*, the severity of New York's disbarment provisions was partially mitigated by an amendment to § 90(5) of the Judiciary Law. N.Y. JUD. LAW § 90(5) (McKinney Interim Annotation Service Feb. 1979). The amendment grants the appellate division discretionary power to readmit a disbarred attorney if he has not been convicted of a crime during the seven year period following disbarment. *Id.* Prior to the amendment, disbarment was irrevocable unless the attorney obtained either a presidential or gubernatorial pardon or a reversal of the conviction for which he was disbarred. See *In re Sugarman*, 64 App. Div. 2d 166, 409 N.Y.S.2d 224 (1st Dep't 1978) (per curiam); *In re Glucksman*, 57 App. Div. 2d 205, 394 N.Y.S.2d 191 (1st Dep't 1977) (per curiam); ch. 946, [1895] N.Y. Laws 1. Although the amendment increased the grounds on which a disbarred attorney may seek readmission, it did not alter the rule that mere compliance with the criteria set forth in the statute does not automatically entitle him to reinstatement. N.Y. JUD. LAW § 90(5) (1975), as amended by Ch. 782, § 1, [1978] N.Y. Laws 54. See also the memorandum attached to N.Y.S. 6065, 201st Sess. (1978), enacted as § 90(5) as amended, in which Senator Caemerer, who sponsored the bill stated: "Readmission to the practice of law is discretionary at present and would remain so." To obtain reinstatement, an attorney must petition for a hearing during which he must prove his fitness to practice law by a preponderance of the evidence. See *In re Barash*, 20 N.Y.2d 154, 228 N.E.2d 896, 281 N.Y.S.2d 997 (1967); *In re Kaufmann*, 245 N.Y. 423, 157 N.E. 730 (1927); cf. *Toro v. Malcolm*, 44 N.Y.2d 146, 375 N.E.2d 739, 404 N.Y.S.2d 558 (1978) (subsequent reversal of conviction does not automatically restore correction officer to his position or entitle him to back pay.)

<sup>236</sup> See *In re Mitchell*, 40 N.Y.2d 153, 156, 351 N.E.2d 743, 745, 386 N.Y.S.2d 95, 97 (1976); *In re Levy*, 37 N.Y.2d 279, 282, 333 N.E.2d 350, 352, 372 N.Y.S.2d 41, 44 (1975) (per curiam); *In re Kahn*, 38 App. Div. 2d 115, 124, 328 N.Y.S.2d 87, 96 (1st Dep't) (per curiam), *aff'd*, 31 N.Y.2d 752, 290 N.E.2d 435, 338 N.Y.S.2d 434 (1972) (mem.); cf. *Ex parte Wall*, 107 U.S. 265, 273 (1882) (disciplinary proceedings not intended to punish attorney but to protect public from persons unfit to practice law).

integrity of attorneys and the legal system.<sup>237</sup> As such, the statute is concerned not only with the conduct underlying a felony, but also with the public's perception of a legal system which would permit a convicted felon to remain an attorney. Although the *Thies* Court's rationale adequately considers the need to maintain the integrity of the profession in the eyes of the public, its decision to allow disbarment without regard to the affect of an attorney's conduct on his fitness to practice law<sup>238</sup> may cause unjust results.<sup>239</sup>

The same unfairness that results in the *Thies* situation also may obtain when an attorney is convicted of committing a New York felony.<sup>240</sup> It is clear that by predicating disbarment upon conviction of any felony, the legislature has failed to distinguish between conduct which per se renders an attorney unfit to practice<sup>241</sup>

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<sup>237</sup> 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); *In re Kahn*, 38 App. Div. 2d 115, 124, 328 N.Y.S.2d 87, 96 (1st Dep't) (per curiam), *aff'd*, 31 N.Y.2d 752, 290 N.E.2d 435, 338 N.Y.S.2d 434 (1972) (mem.); *In re Glassman*, 19 App. Div. 2d 146, 146, 241 N.Y.S.2d 468, 469 (1st Dep't 1963).

<sup>238</sup> Under the Court's ruling, an attorney would be automatically disbarred for crimes which do not directly reflect an unfitness to practice law. See, e.g., 15 U.S.C. § 1243 (1976) (carrying a switchblade on an Indian reservation); 18 U.S.C. § 1461 (1976) (uttering indecent language on the radio); 26 U.S.C. § 7201 (1976) (defacing a coin made at United States mint).

<sup>239</sup> See 45 N.Y.2d at 867, 382 N.E.2d at 1352, 410 N.Y.S.2d at 577 (Wachtler, Fuchsberg and Cooke, JJ., dissenting); Bonomi, *Automatic Disbarment—Amendment or Repeal*, N.Y.L.J., Jan. 12, 1979, at 1, col. 1, at 2, col. 1. Recently, the Senate Judiciary Committee approved a bill to amend § 90(4) which would overturn the *Chu* rule. The bill, N.Y.S. 3028, 201st Sess. (1978), would allow automatic disbarment only if the felony of which an attorney is convicted in another jurisdiction is also a felony in New York. Additionally, the proposed amendment would permit attorneys disbarred for convictions of felonies in federal and other state courts which do not constitute felonies in New York to apply for reinstatement. See *State Senate Judiciary Panel Backs Revision of "Chu" Rule*, N.Y.L.J., March 21, 1979, at 1, col. 2, at 30, col. 2.

<sup>240</sup> Section 90(4) mandates that an attorney who has been convicted of criminally negligent homicide, N.Y. PENAL LAW § 125.10 (McKinney 1975), or possession of more than 8 ounces of marijuana, *id.* § 221.20 (McKinney Supp. 1978-79), is summarily disbarred without an opportunity to offer evidence in mitigation. Whether such conduct is indicative of an unfitness to practice law per se is doubtful.

<sup>241</sup> A list of the types of conduct which per se manifests unfitness to practice may be found in the ABA Model Rules of Disciplinary Enforcement. See ABA Standing Committee on Professional Discipline, *Suggested Guidelines for Rules of Disciplinary Enforcement* 13 (1977). The guidelines include interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation or an attempt, solicitation or conspiracy to commit any of these as crimes which render an attorney unfit to practice. Since the purposes of § 90(4) require that the public be protected from attorneys with serious character defects, crimes of moral turpitude such as murder and arson also appear to be appropriate bases for automatic disbarment. With regard to sanctions, the ABA recommends that an attorney convicted of any crime be afforded a hearing into the seriousness of the conduct and mitigating circumstances. Automatic suspension pending a hearing, however, is required when an attorney is convicted of a "serious crime". See *id.*

and conduct which is not directly related to his competence as an attorney.<sup>242</sup>

It is suggested that the legislature should amend section 90(4) so that consideration is given to the dual purposes of the statute. This may be accomplished by a rule which provides for automatic disbarment only when an attorney is guilty of conduct which justifies a conclusive presumption of unfitness to practice law. For all other convictions, automatic suspension pending a disciplinary hearing should be imposed to insure adequate protection of the public and fairness to the attorney. The determination whether the attorney's conduct merits disbarment, suspension or reprimand can be made at the hearing by examining the seriousness of the crime and any mitigating circumstances.<sup>243</sup>

Adoption of this proposal would not diminish public confidence in the legal system, since automatic disbarment would still be imposed for crimes which evince a serious character defect or lack of integrity. Although it may be argued that the dual purposes of section 90(4) may be accomplished most effectively through summary disbarment for all felonies, it is submitted that, by adding a measure of flexibility, the legislature would provide a procedure which promotes "firm discipline . . . without sacrificing fairness and reason."<sup>244</sup>

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<sup>242</sup> See note 240 *supra*.

<sup>243</sup> The ABA has recommended a proposal providing for automatic suspension of an attorney convicted of a "serious crime" until a disciplinary hearing is held. Following the hearing, a court may enter an order either suspending or disbaring the attorney depending on the gravity of the crime and any mitigating circumstances. ABA Standing Committee on Professional Discipline, *Suggested Guidelines for Rules of Disciplinary Enforcement* 14 (1977). The principal distinction between the ABA proposal and the proposal suggested herein is that the ABA recommendation does not provide for summary disbarment even where the conduct engaged in by an attorney directly affects his fitness to practice law. See *id.*

<sup>244</sup> See 45 N.Y.2d at 867, 382 N.E.2d at 1352, 410 N.Y.S.2d at 577 (Wachtler, Fuchsberg, & Cooke, JJ., dissenting). It should be noted that only seven other states provide for automatic disbarment. See ALA. CODE tit. 34, § 3-86 (1977) (any felony except manslaughter and any crime involving moral turpitude); ARIZ. REV. STAT. § 32-273 (1976); ARIZ. SUP. CT. R. 29(c)-(d) (1973 & Supp. 1978) (any felony); FLA. STAT. ANN. § 454.18 (West 1965) (any "infamous crime"); GA. CODE ANN. § 9-501 (1973) (any crime involving "moral turpitude"); MISS. CODE ANN. § 73-3-41 (1972) (any felony except manslaughter); TEX. CIV. CODE ANN. tit. 320a-1, § 6 (Vernon 1973) (any felony involving "moral turpitude" or any misdemeanor involving theft, embezzlement or fraudulent appropriation of money or other property where probation has not been given or has been revoked); UTAH CODE ANN. § 78-51-37 (1977) (any felony or misdemeanor involving "moral turpitude").