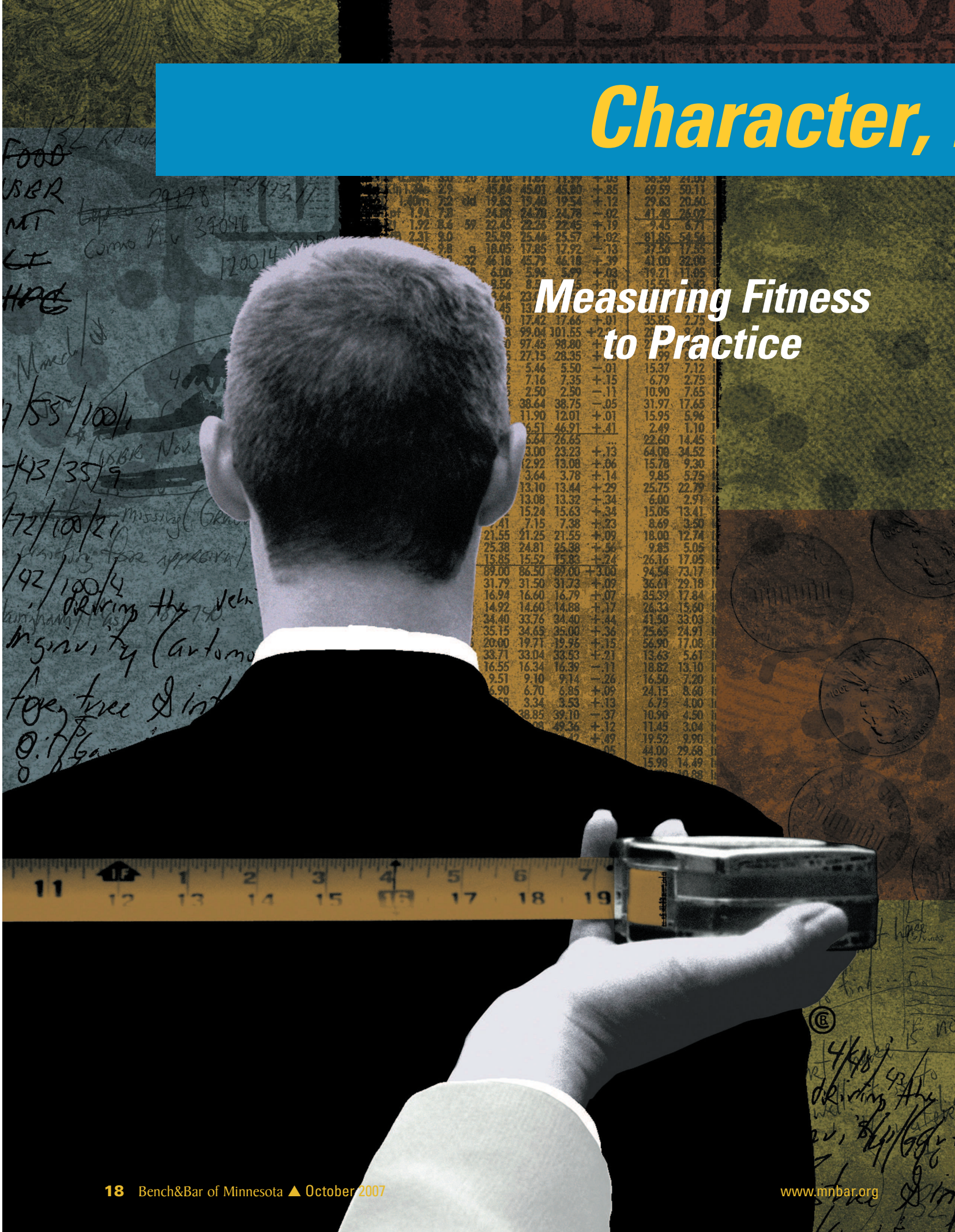
Character,

Measuring Fitness to Practice



Fitness & Redemption

Over the past 20 years the Minnesota Supreme Court has evolved a remarkable jurisprudence in reinstatement and bar admission cases that is nearly scriptural in its subject and its vocabulary. Although miscreants, generally, are redeemable, few have shown the desire, resolve, and actual transformation needed to obtain certification of redemption.

BY WILLIAM F. WERNZ

Mr. Wernz, don't you believe that all human beings can be redeemed?" Justice Glenn Kelley responded pointedly to the argument that the Court should not just deny the reinstatement petition of T. Eugene Thompson, but should also permanently disbar him.[1]

Over 20 years have passed, but the colloquy and issues remain clear. "Your honor, the [d]irector concedes that people, generally, are capable of transformation. Mr. Thompson is, however, a special case. He was disbarred [20] years ago, after conviction for hiring the murder of his wife. He plotted the murder for years. Upon release, he misappropriated a widow's assets. Mr. Thompson's only character witness acknowledged that truth-telling was not among his virtues. Even if Mr. Thompson might some day replace corruption with virtue, the Court could never confidently certify to the public his fitness to handle their most intimate and important affairs."

Thompson was not reinstated, but neither was his disbarment made permanent. In the years after *Thompson*, a remarkable chapter has been written in Minnesota jurisprudence, both in reinstatement and bar admission cases. The chapter is nearly scriptural in its subject and its vocabulary. The Court and its boards have made numerous and difficult judgments about whether lawyers' souls have been lost and restored.

"Redeemable" and "cruel hoax" are typical of the resonant, even religious, language that the Court has used in reinstatement cases. Words like "contrition," "atonement," "remorse," and "repentance" are common in these cases. A Lawyers Board hearing panel recently agreed with a character witness that a petitioner had "restored her soul."

After *Thompson*, the Court has reinstated four disbarred lawyers.[2] Echoing Justice Kelley, the Court has said, "If human beings, generally, are redeemable, and this is the premise of reinstatement, … then, it seems to us, this petitioner has made the necessary showing to be allowed the opportunity to again practice law in this state."[3] The Court has repeatedly said that it would be a "cruel hoax" to deny reinstatement of a worthy petitioner.[4]

Disbarment offenses are inherently serious, but none are too serious to preclude proof of redemption altogether. "We have reinstated attorneys to the practice of law who have been disbarred for misappropriating client funds, stealing, or dishonesty in general."[5] The Court has repeatedly rejected arguments that "reinstatement can be denied based solely on the seriousness of the misconduct," even where petitioner's "misconduct struck at the heart of the administration of justice" or where the attorney had involved clients in a marijuana-smuggling scheme.[6] Only once has the seriousness of an offense by itself precluded reinstatement, and it is doubtful that on similar facts the judgment would be repeated.[7]

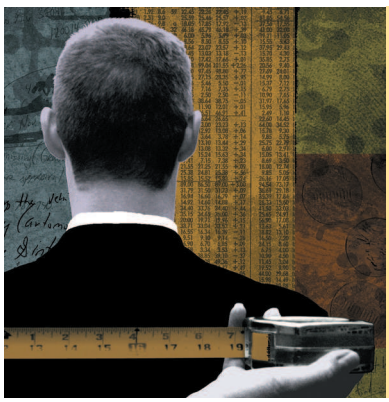
Daunting Tasks

Proof of redemption and reinstatement are, however, daunting tasks. The great majority of attorneys who are disbarred or suspended for lengthy periods never petition for reinstatement. Some petitions are denied, most recently that of a lawyer who in many ways restored his character, but nonetheless was denied reinstatement because he issued numerous NSF checks after filing a reinstatement petition.[8] Most reinstatement denials have not been close cases—the lawyers denied original misconduct, committed additional misconduct, or made bizarre claims, such as that forging an indictment was "a mere joke."[9]

The Court's reinstatement and admission requirements begin with philosophical concepts, but they extend to specific and comprehensive criteria. For reinstatement: "In addition to proof of moral change, we consider five factors: (1) the attorney's recognition that her conduct was wrong; (2) the length of time since the misconduct and disbarment; (3) the seriousness of the original misconduct; (4) the attorney's physical or mental illness or pressures that are susceptible to correction; and (5) the attorney's intellectual competency to practice law."[10] For bar admission: "We hold that good moral character, for the purposes of bar admission, shall be determined from the applicant's pattern of conduct or behavioral record. To overcome a finding of lack of good moral character by the Board, an applicant may submit any evidence reasonably tending to explain or show reform and rehabilitation from the acts or conduct upon which the negative moral character determination was based."[11]

Bar Admission

The Board of Law Examiners has admitted applicants who demonstrated good character notwithstanding offenses that included felony securities fraud, misappropriation, civil fraud, and theft. The



"Fitness" refers to freedom from, or control over, factors that would disable someone from the practice of law, such as active abuse of chemicals or disabling mental illness.

Board has addressed issues of character, albeit with a more secular vocabulary than the Court's: "Good character and fitness" must be demonstrated for bar admission, including such virtues as "honesty, trustworthiness, diligence and reliability."[12] Lest there be any doubt, an "essential eligibility requirement" was codified by a 2007 rule amendment—"The ability to be honest and candid with clients, lawyers, courts, the Board, and others."

The Court's reviews of admissions cases have adopted as a fundamental criterion proof of "present moral character."[13] When will serious misconduct be eclipsed by good behavior? Five years is a bare minimum after disbarment, with at least eight years being common for successful petitioners. A criminal probation after a felony should have ended several years before application. Unfortunately, many applicants convert past misconduct into present questions about fitness by incompletely or inaccurately describing the misconduct on their bar applications. The Board will frequently regard such failings, at least presumptively, as false statements reflecting adversely on present moral character.

The Court's direct holdings on bar admissions criteria ended in 1993, when the Court ceased writing opinions when ruling on appeals from adverse determinations of the Board of Law Examiners.[14] The Court now issues orders without opinion when an applicant appeals the Board's denial of admission.

One Moral Universe

Although the Court no longer issues bar admissions opinions, its discipline and reinstatement opinions provide indirect sources for bar admissions jurisprudence. Reinstatement and bar admission character and fitness cases apply nearly identical standards, but at a higher level for reinstatement. "The petitioning attorney is required to provide stronger proof of good character and trustworthiness than is required in the original application for admission to practice."[15] A bar applicant can argue that reinstatements show that conduct similar to the applicant's, or even more serious, does not preclude readmission and, *a fortiori*, cannot absolutely preclude initial admission.

Attorney disciplinary precedents can also influence bar admissions proceedings. For example, a bar applicant who was convicted of securities fraud many years before bar application successfully argued that his conviction should not bar his admission, because a lawyer convicted of securities fraud was readmitted after five years' suspension.[16] Because admissions, suspensions, disbarments, and reinstatements are all determined by the Supreme Court and its boards, there is one universe of moral standards, applied at somewhat different levels.

Recognition of Wrongdoing

Recognition of wrongful conduct is a general requirement for reinstatement, but it is not absolute. *In re Alger Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975) ordered reinstatement notwithstanding Hiss's claim of innocence of the perjury for which he was famously convicted. The court explained, "Simple fairness and fundamental justice demand that the person who believes he is innocent though convicted should not be required to confess guilt to a criminal act he honestly believes he did not commit."[17] The Minnesota Supreme Court followed *Hiss* in rejecting the contention that rehabilitation could not be demonstrated by a convicted felon who refused to acknowledge his guilt. The Court explained further that, although it necessarily deemed the facts to be those found by the court that convicted Hiss, "We also take cognizance of Hiss's argument that miscarriages of justice are possible."[18]

The Minnesota Supreme Court held that maintaining innocence creates no negative character inference whatsoever: "Thus, while the failure to repent may be an aggravating circumstance in some cases, we do not consider it so here since Hedlund merely maintains that he did not commit the acts for which he was convicted."[19] Of course, if a bar applicant or a lawyer pleads guilty, or testifies to the facts constituting the crime, but later claims innocence, the claim may become a factor counting against the person.[20]

A Minnesota bar applicant who, after jury trial, was convicted of securities fraud was recently admitted to practice, notwithstanding his protestation of innocence. The Board was required to regard him as guilty, but apparently regarded his claim of innocence as sincere and, therefore, as not counting against his admission. The applicant presented limited evidence of the circumstances of his conviction, not to relitigate the criminal trial, but to show that his claim of innocence was not bizarre or contradicted by his own actions in the criminal trial.

Redemption and Imperfections

The Court has reinstated disbarred lawyers whose conduct after disbarment has been less than perfect. "Furthermore, we have previously reinstated attorneys whose conduct since disbarment was not without blemish and/or who continued to struggle with undesirable character traits." One reinstated lawyer did not "show any symptoms of major psychopathology or psychopathy" but would nonetheless "benefit from continued psychological counseling." Another's unauthorized practice of law since his disbarment did not preclude reinstatement, and a third was reinstated notwithstanding "less-than-accurate statements in an employment application."[21] Demonstrating fundamental moral change does not require demonstrating perfection.

The Court recently distinguished between tolerable blemishes and disqualifying misconduct. The petitioner issued numerous NSF checks, a few of which bounced and most of which resulted in overdraft fees. In denying reinstatement, the Court emphasized that the pattern of NSF checks was both similar in general (short term use of others' money) to that which caused suspension and was committed after a reinstatement petition was filed.[22]

Fitness Issues

"Fitness" refers to freedom from, or control over, factors that would disable

someone from the practice of law, such as active abuse of chemicals or disabling mental illness. The three reinstatements from disbarment preceding *Ramirez* in 2006 all involved lawyers with chemical dependency problems, or psychological problems, or both. At oral argument in *Ramirez*, the Court questioned whether Ramirez's lack of certification of fitness from a treatment professional was problematic for her reinstatement. Counsel responded that, while Ramirez and the prior petitioners all had to prove moral change, the prior petitioners had an additional burden—proving that they were in recovery from dependency or were no longer disabled. Put differently, the fact that a person has a disability does not mean that he or she does not also have a character deficiency.

The disbarment orders for the prior petitioners did not find that their misconduct was caused by their dependency. If there had been such findings, they would not have been disbarred. In one case the Court specifically found that the misconduct was so artful that it was not caused by dependency. In another case, the petitioner gave arguably inconsistent testimony about whether his trafficking in drugs was caused by love of cocaine or love of money.

Investigations and Hearings

Before a petition or application can be filed, a substantial fee must be paid and several preconditions established by rule must be satisfied.[23] Petitions and applications are investigated by Board staff. Although staff members thoroughly review both details and the overall picture, applicants' counsel must carefully review investigation findings. Finding mistakes and misconceptions is useful not only for correcting the record, but for pointing out that even those with the best intentions may err—whether they are applicants or those investigating applicants.

The Board of Law Examiners staff regularly presents proposed findings that are intended to support denial of admission. Presenting alternative findings to the Board is essential. Although the Lawyers Board director has traditionally presented findings objectively, in at least one recent case the director took a more partisan tack: "The Director's Office is the devil's advocate. It must be the devil's advocate in disbarment cases, because we are the ones who must raise all of the questions and all of the doubts and all of the information that may weigh against reinstatement."[24]

Hearings are conducted by three-member panels of the Lawyers Board and by the full Board of Law Examiners. Both boards comprise volunteers, including lawyers and public members, appointed by the Minnesota Supreme Court. All relevant documents are marked, exchanged, and filed before hearing.

Anyone who has represented petitioners and applicants would vouch for the essential fairness of reinstatement and admission hearings, whether before the boards or the Court. An applicant may be skeptical that the same board that has initially denied admission will act fairly in hearing an appeal of its denial, but experience proves otherwise. Experience also proves, however, that there are sometimes procedural anomalies in these hearings, *e.g.*, a Lawyers Board panel recently made findings based on statements of persons quoted in the director's investigative report, even though those persons were never sworn, never testified, and were never cross-examined.[25]

Discipline and reinstatement are open processes, with publicly filed findings and opinions. Bar admissions are closed processes that have become still more closed with the Court's decision to cease issuing opinions when ruling on appeals from denials of admission.

Advocacy Issues

The obstacles to a law license are formidable for those who have committed serious misconduct. Although procedural hoops must be taken seriously, applicants must take to heart that the process fundamentally is not a matter of jumping through hoops. Before a moral change can be proven to fact-finders by clear and convincing evidence, it must actually have taken place. A convicted felon may well be incarcerated and later put on probation, for protection of the public. Some years later the same person is asking for a certification of trustworthiness to handle clients' intimate and important affairs. The proof of moral change required is a heavy burden indeed.

Character witnesses are extraordinarily important in character and fitness proceedings. They should be prepared by receiving from the applicant, well in advance of the hearing, the documents that officially describe the original misconduct. The character witness who does not know the essence and at least some of the particulars of the misconduct cannot testify effectively to moral change. Character witnesses should personally and carefully prepare to answer a question concluding their testimony, "What do you have to say to this hearing panel as to why the applicant should be a Minnesota lawyer?" Most memorably and effectively, a witness who testified that the applicant had "restored her soul" had himself searched his soul in preparing his testimony. On the other hand, a witness who minimizes the issues, or is combative toward the hearing panel, can do more harm than good.

Applicants who have a difficult past should not represent themselves. People generally tend to be too hard on themselves on some matters and too easy on others. Several essential tasks are difficult for the *pro se* petitioner: giving close and objective scrutiny to one's past; distinguishing between procedural rights that should be protected and perceived delays

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or injustices; and eliciting and giving testimony about one's own character. On the other hand, it is easy to describe the past inaccurately or to suppose that the lengthy and demanding process is punitive or biased.

Summing Up

Petitioners need patience and attentiveness to meet procedural requirements. Most importantly, they must come to terms with their serious misconduct and character defects and demonstrate genuine moral change. The Court, its boards, and their staffs have employed both carefully wrought legal concepts and deep moral philosophy in determining when a person who has morally failed can be certified as trustworthy.

The Court has set a tone that is both hopeful and demanding. The recidivism rate of those who have been reinstated by the Court after investigation and hearing before a Lawyers Board Panel is remarkably low. Twenty-five years of representing both sides in character and fitness proceedings leads me close to agreement with Justice Kelley and the Court. Although human beings, generally, are redeemable, few have the desire, resolve, and actual transformation needed to obtain certification of redemption. The Court and its boards, with care, can and do judge the deep things in people well enough to certify redemptions to the public. ▲

Notes

[1] *In re Thompson*, 365 N.W.2d 262 (Minn. 1985).
[2] *In re Wegner*, 417 N.W.2d 97 (Minn. 1987); *In re Trygstad*, 472 N.W.2d 137 (Minn. 1991); *In re Anderley*, 696 N.W.2d 380 (Minn. 2005); *In re Ramirez*, 719 N.W.2d 920 (Minn. 2006). These cases are distinguishable from older cases in which disbarment was not always regarded as presumptively permanent. *See* Betty M. Shaw, "Disbarment—Not Necessarily Forever in Minnesota," *Minnesota Lawyer* (08/01/05).
[3] *In Re Trygstad*, 472 N.W.2d 137, 140 (Minn. 1991).
[4] *In re Kadrie*, 602 N.W.2d at 877, citing *In re Swanson*, 343 N.W.2d 662, 664 (Minn. 1984). *See also In re Wegner*, 417 N.W.2d at 99.
[5] *In re Anderley*, 696 N.W.2d 380, 385, n. 6 (Minn. 2005).
[6] *In re Wegner*, 417 N.W.2d at 100. *In re Kadrie*, 602 N.W.2d 868, 871 (Minn. 1999).
[7] "Indecent assault upon a boy 15 years of age" precluded reinstatement of a disbarred attorney. *Application of Van Wyck*, 29 N.W.2d 654, 654-55 (1947), 290 N.W. 227 (Minn. 1940). In more recent years, criminal sexual contact with minors has been found to warrant approximately two years' suspension. *In re Kimmel*, 322 N.W.2d 224 (Minn. 1982), 347 N.W.2d 52 (Minn. 1984); *In re Vie*, 428 N.W.2d 565 (Minn. 1988).
[8] *In re Singer*, 735 N.W.2d 698 (Minn. 2007). Singer was suspended for a minimum of three years for misconduct including felony theft of client funds and failure to file tax returns for three years.
[9] *In re Swanson*, 405 N.W.2d 892 (Minn. 1987); *In re Hanson*, 454 N.W.2d 924 (Minn. 1990); *In re Peterson*, 274 N.W.2d 922 (Minn. 1979). Denials of reinstatement for disbarred lawyers include *In re Swanson*, 343 N.W.2d 662 (Minn. 1984); *In re Johnson*, 322 N.W.2d 616 (Minn. 1982); *In re Herman*, 293 Minn. 472, 197 N.W.2d 241 (Minn. 1972); *In re Strand*, 259 Minn. 379, 107 N.W.2d 518 (Minn. 1961).
[10] *In re Ramirez*, 719 N.W. 2d 920, 925 (Minn. 2006).
[11] *In re Haukebo*, 352 N.W.2d at 752.
[12] Rule 2.A.(6), Rules for Admission to the Bar.
[13] *In re Haukebo*, 352 N.W.2d 752 (Minn. 1984).
[14] *In re Cunningham*, 502 N.W.2d 53 (Minn. 1993), appears to be the last published bar admission opinion.
[15] *In re Ramirez*, 719 N.W. 2d 920, 925 (Minn. 2006). *See also In re Anderley*, 696 N.W.2d 380, 385 (Minn. 2005); *In re Porter*, 472 N.W.2d 654, 655-6 (Minn. 1991); *In re Swanson*, 343 N.W.2d 662, 664 (Minn.1984).
[16] *Matter of Scallen*, 269 N.W.2d 834 (Minn. 1978), 337 N.W.2d 694 (Minn. 1983).
[17] *In re Alger Hiss*, 368 Mass. 447, 458 (1975).
[18] *In re Hedlund*, 293 N.W.2d 63, 65-6 (Minn. 1980).
[19] *Id*. at 65-6. "Merely" was the Court's word for how little maintaining innocence notwithstanding a conviction reflects on suitability for reinstatement or admission. The Court has repeated the point. "A disbarred attorney is not required to admit his past misdeeds nor make a rote confession of remorse and repentance as a precondition for reinstatement." *In re Swanson*, 405 N.W.2d 892 (Minn. 1987).
[20] *In re Swanson*, 405 N.W.2d 892 (Minn. 1987). *See also In re Brown*, 467 N.W.2d 622 (Minn. 1991).
[21] *In re Anderley*, 696 N.W.2d at 383; *In re Trygstad*, 472 N.W.2d at 139; *In re Ramirez*, 719 N.W.2d at 927.
[22] *In re Singer*, 735 N.W.2d 698 (2007).
[23] Reinstatement procedures are prescribed by Rule 18, Rules on Lawyers Professional Responsibility. Bar admissions proceedings are governed by Rules 5 and 15-17, Rules for Admission to the Bar.
[24] *In re Ramirez*, Panel hearing transcript, at 176-77.
[25] *In re Singer*, 735 N.W.2d 698, fn. 1 (2007).