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## Attorney Reinstatement Standards: A Proposal for Reform in Washington State

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# ATTORNEY REINSTATEMENT STANDARDS: A PROPOSAL FOR REFORM IN WASHINGTON STATE

Lawyers who have fallen from grace and attempted to redeem themselves have provoked dramatic statements from both the bench<sup>1</sup> and the public<sup>2</sup> in Washington State. In recent years, several widely debated cases involving well known public figures have cast the subject of reinstatement into the limelight.<sup>3</sup> These cases reveal a number of flaws in the State's current guidelines. As a result of the decisions made in these cases, the need for a new approach to this problem has become increasingly urgent.

This Comment reviews the background leading to Washington's present reinstatement guidelines and analyzes the approach taken by the Washington Supreme Court in deciding reinstatement petitions. Three recent cases are discussed to illustrate the problems created by the current approach.<sup>4</sup> This Comment suggests that the court adopt a new approach in deciding reinstatement cases. The proposed approach establishes uniform disbarment periods for specific offenses and clarifies the qualifications expected of individual reinstatement applicants. This approach utilizes the categories of offenses set forth in the proposal drafted by the American Bar Association (hereinafter ABA) Standards for Imposing Lawyer Sanctions.<sup>5</sup> The proposed changes are applied to a set of facts drawn from *In re Rosellini*,<sup>6</sup> a reinstatement case recently decided by the Washington Supreme Court.

## I. BACKGROUND

### A. Attorney Reinstatement Process in Washington

Since 1927, there have been 21 reported reinstatement proceedings in Washington State involving 18 attorneys.<sup>7</sup> Sixteen of these cases resulted in

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1. See, e.g., *In re Rosellini*, 97 Wn. 2d 373, 382, 646 P.2d 122, 127 (1982) (Dolliver, J. dissenting). Justice Dolliver argues in his dissent that Rosellini should not be disbarred. He states "John Rosellini, after having committed unpardonable acts, is a person who is of such a character that he is subject to redemption: He has fallen, but he can be saved."

2. *Astonishing decision in Walgren case*, Seattle Times, Oct. 19, 1985, at A13, col. 1; *Honest lawyers, speak up!*, Seattle Times, Jan. 15, 1985, at A7, col. 3; *Walgren gets VIP treatment from the bar*, Seattle Times, Dec. 28, 1984, at A7, col. 1; *Walgren case could weaken public's trust of lawyers*, Seattle Times, Aug. 9, 1981, at A14, col. 1.

3. *In re Rosellini*, 108 Wn. 2d 350, 739 P.2d 658 (1987); *In re Walgren*, 104 Wn. 2d 557, 708 P.2d 380 (1985); *In re Krogh*, 93 Wn. 2d 504, 610 P.2d 1319 (1980).

4. *Id.*

5. STANDARDS FOR IMPOSING LAWYER SANCTIONS (Approved Draft 1986).

6. *Rosellini*, 108 Wn. 2d 350, 739 P.2d 658 (1987).

7. *Id.*; *In re Walgren*, 104 Wn. 2d 557, 708 P.2d 380 (1985); *In re Bowden*, 99 Wn. 2d 684, 663

rulings favorable to the petitioning attorneys.<sup>8</sup> Of the five attorneys denied reinstatement,<sup>9</sup> three eventually were reinstated.<sup>10</sup>

The Washington Supreme Court has the right to determine who may practice law within Washington State.<sup>11</sup> Attorneys permitted to practice in Washington must abide by the rules set forth in the Rules of Professional Conduct<sup>12</sup> and the Rules for Lawyer Discipline.<sup>13</sup> A violation of these rules subjects an attorney to the State disciplinary process.<sup>14</sup> Disbarment is the harshest form of discipline imposed under these rules.<sup>15</sup>

Currently, an attorney is required to wait a minimum period of three years after the date of disbarment before filing a petition for reinstatement with the Washington State Bar Association.<sup>16</sup> After receiving the petition,

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P.2d 1349 (1983); *In re Batali*, 98 Wn. 2d 610, 657 P.2d 775 (1983); *In re Egger*, 93 Wn. 2d 706, 611 P.2d 1260 (1980); *In re Krogh*, 93 Wn. 2d 504, 610 P.2d 1319 (1980); *In re Johnson*, 92 Wn. 2d 349, 597 P.2d 113 (1979); *In re Chantry*, 84 Wn. 2d 153, 524 P.2d 909 (1974); *In re Simmons*, 81 Wn. 2d 43, 499 P.2d 874 (1972); *In re Eddleman*, 79 Wn. 2d 725, 489 P.2d 174 (1971); *In re Eddleman*, 77 Wn. 2d 42, 459 P.2d 387, (dissenting opinion of Finley, J. at 461 P.2d 9) (1969); *In re Seijas*, 75 Wn. 2d 956, 454 P.2d 203 (1969); *In re Simmons*, 71 Wn. 2d 316, 428 P.2d 582 (1967); *In re Seijas*, 63 Wn. 2d 865, 389 P.2d 652 (1964); *In re Durham*, 59 Wn. 2d 185, 367 P.2d 126 (1961); *In re Shain*, 24 Wn. 2d 598, 166 P.2d 843 (1946); *In re Lonergan*, 23 Wn. 2d 767, 162 P.2d 289 (1945); *In re Greenwood*, 22 Wn. 2d 684, 157 P.2d 591 (1945); *In re Lillions*, 196 Wash. 272, 82 P.2d 571 (1938); *In re Bruener*, 178 Wash. 165, 34 P.2d 437 (1934); *In re Gowan*, 141 Wash. 523, 251 P. 773 (1927).

In comparison, 77 lawyers were disbarred in Washington State between 1965 and 1985. Telephone conversation with Robert T. Farrell, State bar counsel, Washington State Bar Ass'n (Mar. 12, 1987).

8. *Rosellini*, 108 Wn. 2d 350, 739 P.2d 658 (1987); *Walgren*, 104 Wn. 2d 557, 708 P.2d 380; *Bowden*, 99 Wn. 2d 684, 663 P.2d 1349; *Batali*, 98 Wn. 2d 610, 657 P.2d 775; *Egger*, 93 Wn. 2d 706, 611 P.2d 1260; *Krogh*, 93 Wn. 2d 504, 610 P.2d 1319; *Johnson*, 92 Wn. 2d 349, 597 P.2d 113; *Chantry*, 84 Wn. 2d 153, 524 P.2d 909; *Simmons*, 81 Wn. 2d 43, 499 P.2d 874; *Eddleman*, 79 Wn. 2d 725, 489 P.2d 174; *Seijas*, 75 Wn. 2d 956, 454 P.2d 203; *Shain*, 24 Wn. 2d 598, 166 P.2d 843; *Lonergan*, 23 Wn. 2d 767, 162 P.2d 289; *Greenwood*, 22 Wn. 2d 684, 157 P.2d 591; *Lillions*, 196 Wash. 272, 82 P.2d 571; *Bruener*, 178 Wash. 165, 34 P.2d 437.

9. *Eddleman*, 77 Wn. 2d 42, 459 P.2d 387, 461 P.2d 9; *Simmons*, 71 Wn. 2d 316, 428 P.2d 582; *Seijas*, 63 Wn. 2d 865, 389 P.2d 652; *Durham*, 59 Wn. 2d 185, 367 P.2d 126; *Gowan*, 141 Wash. 523, 251 P. 773.

10. *Simmons*, 81 Wn. 2d 43, 499 P.2d 874; *Eddleman*, 79 Wn. 2d 725, 489 P.2d 174; *Seijas*, 75 Wn. 2d 956, 454 P.2d 203.

11. *State ex rel. Schwab v. State Bar Ass'n*, 80 Wn. 2d 266, 493 P.2d 1237 (1972).

[T]his court does not share the power of discipline, disbarment, suspension or reinstatement with either the legislature or the state bar association. The ultimate constitutional power clearly lies within the *sole jurisdiction* of the Supreme Court. [M]embership in the State bar association and authorization to continue in the practice of law coexist under the aegis of one authority, the Supreme Court.

*Id.* at 269, 493 P.2d at 1239 (emphasis in original).

12. Rules of Professional Conduct (RPC) (1985).

13. Rules for Lawyer Discipline (RLD) (1986).

14. RLD Rule 1.1.

15. RLD Rule 5.1; *In re Krogh*, 93 Wn. 2d 504, 509, 610 P.2d 1319, 1321 (1980) (Wright, J., dissenting).

16. RLD Rule 9.1(a). If a lawyer's petition for reinstatement is denied by the supreme court the lawyer only need wait two more years before reapplying. *Id.* Under a proposed amendment to the disciplinary rules a petition could not be filed until five years after the date of disbarment. The proposal

the Washington State Bar Association Board of Governors (hereinafter "Board") conducts an information gathering process.<sup>17</sup> The Board then makes a recommendation to the supreme court regarding the petitioner's suitability for reinstatement. A ruling by the Board to reinstate the attorney must be supported by a showing that the attorney's reinstatement will not be detrimental to the legal system or the public interest.<sup>18</sup> The petitioner also must possess the qualifications and fulfill the requirements set forth in the Admission to Practice Rules.<sup>19</sup> If the Board recommends in favor of reinstatement, the record and the recommendation are automatically submitted to the supreme court.<sup>20</sup> Unfavorable recommendations are not forwarded to the supreme court unless the petitioner so requests. The supreme court then reviews the briefs and hears oral arguments on the reinstatement. Although the supreme court takes into consideration the Board's conclusions, the court is not bound by them.<sup>21</sup>

### *B. Reinstatement Guidelines Used by the Washington State Supreme Court: Goals, Criteria, and Application*

The Washington Supreme Court has stated that the broad goals of attorney discipline are protection of the public and the preservation of public confidence in the legal system.<sup>22</sup> The goal of protecting the public

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allows the petitioner to reapply two years after an adverse decision of the supreme court, or one year after an adverse recommendation of the Board of Governors if that recommendation is not submitted to the supreme court. RLD Rule 9.1(a) (Proposed Rules of Court Jan. 7, 1987).

17. RLD tit. 9. The Board evaluates the petition to determine if an investigation and/or a public hearing is necessary. If a public hearing is scheduled, the Board invites written statements on the matter. These statements may be submitted on or before the date of the hearing. Also, the petitioners or their counsel are allowed to make an oral statement to the Board.

18. RLD Rule 9.6(a).

19. *Id.*, Admission to Practice Rules (1986) require that an applicant fulfill educational requirements, pass the bar examination and establish good moral character.

20. RLD Rule 9.6(b).

21. *In re Rosellini*, 108 Wn. 2d 350, 364, 739 P.2d 658, 665 (1987) "The recommendations of the bar association, although given great weight, are advisory only and the ultimate decision lies with the court." *Id.*; see also *Eddleman*, 77 Wn. 2d 42, 43, 459 P.2d 387, 388 (1969). The supreme court has decided five final reinstatement appeals contrary to the Board's recommendation. All five lawyers were reinstated against the Board's recommendation. *Rosellini*, 108 Wn. 2d 350, 739 P.2d 658; *In re Shain*, 24 Wn. 2d 598, 166 P.2d 843 (1946); *In re Greenwood*, 22 Wn. 2d 684, 157 P.2d 591 (1945); *In re Lillions*, 196 Wash. 272, 82 P.2d 571 (1938); *In re Bruener*, 178 Wash. 165, 34 P.2d 437 (1934).

Justice Dolliver of the Washington Supreme Court suggests that the differing decisions may be attributed to the perspectives of the two bodies. Judges represent the general public. The Board represents the bar association. In light of these respective responsibilities, the Board's perspective may be somewhat narrower than the supreme court's perspective. Interview with James Dolliver, Justice of the Washington Supreme Court, in Olympia, Washington (Mar. 2, 1987).

22. *In re Rentel*, 107 Wn. 2d 276, 282, 729 P.2d 615, 618 (1986) (citing *In re Kumbera*, 91 Wn. 2d 401, 403, 588 P.2d 1167, 1169 (1979)); *In re Rosellini*, 97 Wn. 2d 373, 378, 646 P.2d 122, 125 (1982) (citing *In re Zderic*, 92 Wn. 2d 777, 787, 600 P.2d 1297, 1302 (1979)). This statement is in accord with

includes the protection of clients<sup>23</sup> and the general public<sup>24</sup> from legal and ethical offenses by attorneys. Preservation of public confidence in the legal system refers to the public's perception that discipline is adequately and fairly administered.<sup>25</sup> To achieve these goals, the court considers three objectives when deciding an application for reinstatement: the interest of the public, the integrity of the legal system, and fairness to the individual petitioner.<sup>26</sup> The court has held that attorneys should not be readmitted unless they can show that they are rehabilitated, competent, fit to practice, and in compliance with all disciplinary orders.<sup>27</sup> Attorneys must meet these requirements by clear and convincing evidence.<sup>28</sup>

The criteria considered by the Washington court in determining an attorney's eligibility for reinstatement were set forth in *In re Eddleman*.<sup>29</sup> These factors are: (a) the applicant's character, standing, and professional reputation in the community in which the applicant resided and practiced prior to disbarment; (b) the ethical standards observed by the applicant in the practice of law; (c) the nature and character of the charge leading to disbarment; (d) the sufficiency of the punishment undergone in connection therewith; (e) the applicant's attitude, conduct, and reformation subsequent to disbarment; (f) the time that has elapsed since disbarment; (g) the applicant's current proficiency in the law; and (h) the sincerity, frankness, and truthfulness of the applicant in presenting and discussing the factors

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the American Bar Association's definition of the purpose of lawyer discipline proceedings "to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, and the legal profession." STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 1.1 (Approved Draft 1986).

23. *In re Batali*, 98 Wn. 2d 610, 657 P.2d 775 (1983) (disbarred for trust fund violations).

24. *In re Walgren*, 104 Wn. 2d 557, 708 P.2d 380 (1985) (former majority leader of the Washington State Senate stipulated to disbarment after being sentenced to jail for his conviction on RICO violations).

25. *Id.* at 573, 708 P.2d at 389; *In re Rosellini*, 97 Wn. 2d 373, 380, 646 P.2d 122, 125 (1982).

26. *In re Eddleman*, 77 Wn. 2d 42, 43, 459 P.2d 387, 388 (1969) (citing *In re Seijas*, 63 Wn. 2d 865, 868, 389 P.2d 652, 654 (1964)). The consideration regarding fairness to the individual applicant is difficult to reconcile with the first two considerations and some dispute has arisen over which factor should carry the most weight. See *In re Walgren*, 104 Wn. 2d 557, 573, 708 P.2d 380, 389 (1985).

27. *In re Johnson*, 92 Wn. 2d 349, 350, 597 P.2d 113, 113 (1979). These requirements are consistent with those stated in the Rules for Lawyer Discipline:

Reinstatement may be recommended by the Board of Governors only upon an affirmative showing that the petitioner possesses the qualifications and meets the requirements as set forth in the Admission to Practice Rules . . . and that . . . reinstatement will not be detrimental to the integrity and standing of the judicial system or to the administration of justice, or be contrary to the public interest.

RLD Rule 9.6.

28. *Johnson*, 92 Wn. 2d at 350, 597 P.2d at 113.

29. *In re Eddleman*, 79 Wn. 2d 42, 44, 459 P.2d 387, 388 (1969). The complete list of factors cited in *Eddleman* originally was introduced in *In re Seijas*, 63 Wn. 2d 865, 868, 389 P.2d 652, 654 (1964). However, they are consistently referred to as the "*Eddleman* factors."

relating to disbarment and reinstatement. The core group of these factors was introduced in one of the earliest reinstatement decisions.<sup>30</sup> Additional factors were included as more reinstatement cases were presented to the court.<sup>31</sup> The court is keeping the door open for future alterations to this set of factors as they become necessary.<sup>32</sup>

### C. Recent Cases

The supreme court applied the *Eddleman* factors in three recent cases: *In re Krogh*,<sup>33</sup> *In re Walgren*,<sup>34</sup> and *In re Rosellini*.<sup>35</sup> The decisions in these cases elicited vigorous dissents<sup>36</sup> and stirred public protest.<sup>37</sup> The decisions were criticized for their inconsistent application of the reinstatement standards and perceived favoritism toward public figures.<sup>38</sup>

*In re Krogh*<sup>39</sup> concerned Egil Krogh, Jr., a government employee who was disbarred after his conviction for committing a federal crime in connection with the Watergate scandal.<sup>40</sup> Krogh pleaded guilty to involvement in a burglary committed with the assistance of the office of the President of the United States. He applied for reinstatement five years after his disbarment, two years less than the average period of disbarment.<sup>41</sup> In

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30. *In re Bruener*, 178 Wash. 165, 34 P.2d 437 (1934). The factors considered were the applicant's character and standing in the community prior to disbarment, the attorney's ethical standards in the practice of law, the nature of the attorney's offense, the attorney's conduct since disbarment and the time period since disbarment. *Id.* at 167, 34 P.2d at 438.

31. *In re Durham*, 59 Wn. 2d 185, 186, 367 P.2d 126, 126 (1961) (present proficiency in the knowledge of law); *In re Lonergan*, 23 Wn. 2d 767, 771, 162 P.2d 289, 291 (1945) (reform demonstrated by establishing a new reputation); *In re Greenwood*, 22 Wn. 2d 684, 686, 157 P.2d 591, 592 (1945) (importance of sincerity and candor in presenting factors related to disbarment); *In re Lillions*, 196 Wash. 273, 279, 82 P.2d 571, 574 (1938) (sufficiency of punishment).

32. The *Eddleman* factors have been employed for several years. However, the supreme court has not ruled out change if necessary. "If a case comes along where they prove to be inadequate, then we will make some changes. This is the genius of the common law. The system lays out the principles and when the principles come face to face with the facts you may have to [modify] the principle." Interview with James Dolliver, Justice of the Washington Supreme Court, in Olympia, Washington (Mar. 2, 1987).

33. *In re Krogh*, 93 Wn. 2d 504, 610 P.2d 1319 (1980).

34. *In re Walgren*, 104 Wn. 2d 557, 708 P.2d 380 (1985).

35. *In re Rosellini*, 108 Wn. 2d 350, 739 P.2d 658 (1987).

36. *Walgren* at 574, 708 P.2d at 389 (Goodloe, J., and Durham, J., dissenting); *Krogh*, 104 Wn. 2d at 508, 610 P.2d at 1321 (Wright, J., dissenting).

37. See, e.g., articles cited *supra* note 2.

38. See, e.g., comments quoted *infra* notes 67-68, 70. The commentary to Rule 1.2 of the Standards for Imposing Lawyer Sanctions discusses the importance of demonstrating a lack of favoritism. "Where the lawyer sanctioned is particularly prominent, a public identification demonstrates that the system does not play favorites."

39. *In re Krogh*, 93 Wn. 2d 504, 610 P.2d 1319 (1980).

40. *In re Krogh*, 85 Wn. 2d 462, 536 P.2d 578 (1975).

41. Prior to the reinstatement decision in *Krogh*, the average length of disbarment in Washington

granting his petition,<sup>42</sup> the supreme court noted Krogh's satisfactory fulfillment of each of the *Eddleman* requirements.<sup>43</sup> However, few of the factors are discussed individually and mitigating circumstances are cited to justify the decision.<sup>44</sup>

In *In re Walgren*<sup>45</sup> the Washington Supreme Court reinstated Gordon L. Walgren, a former majority leader of the Washington State Senate.<sup>46</sup> Walgren was disbarred for violating federal racketeering laws stemming from his alleged agreement to receive funds for promoting gambling legislation in Washington State. His reinstatement came three years after his disbarment, four years less than the average. At the time the decision was rendered, Walgren was still on parole.<sup>47</sup> Despite his conviction, Walgren continues to maintain that he is innocent of all crimes.<sup>48</sup>

The third case, *In re Rosellini*,<sup>49</sup> involved trust fund violations by a well-known lawyer. In 1977, John Rosellini received \$10,000 for deposit in a client's trust fund.<sup>50</sup> On fourteen separate occasions during the following year, Rosellini withdrew funds from the account for his personal use.<sup>51</sup> Rosellini then withdrew money from another client's trust fund to pay off the first debt. Rosellini compounded his offense by lying to the Bar Association<sup>52</sup> and filing an apparently frivolous lawsuit.<sup>53</sup> Following an

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was approximately seven and one-half years. *In re Bowden*, 99 Wn. 2d 684, 663 P.2d 1349 (1983) (disbarred eight years); *In re Batali*, 98 Wn. 2d 610, 657 P.2d 775 (1983) (same); *In re Egger*, 93 Wn. 2d 706, 611 P.2d 1260 (1980) (same); *In re Johnson*, 92 Wn. 2d 349, 597 P.2d 113 (1979) (disbarred 11 years); *In re Chantry*, 84 Wn. 2d 153, 524 P.2d 909 (1974) (disbarred nine years); *In re Simmons*, 81 Wn. 2d 43, 499 P.2d 874 (1972) (disbarred eight years); *In re Eddleman*, 79 Wn. 2d 725, 489 P.2d 174 (1971) (disbarred seven years); *In re Seijas*, 75 Wn. 2d 956, 454 P.2d 203 (1969) (disbarred 12 years); *In re Shain*, 24 Wn. 2d 598, 166 P.2d 843 (1946) (disbarred seven years); *In re Lonergan*, 23 Wn. 2d 767, 162 P.2d 289 (1945) (reinstated seven years after resignation); *In re Greenwood*, 22 Wn. 2d 684, 157 P.2d 591 (1945) (disbarred four years); *In re Lillions*, 196 Wash. 272, 82 P.2d 571 (1938) (same); *In re Bruener*, 178 Wash. 165, 34 P.2d 437 (1934) (same).

42. The supreme court decision is in accord with the Board's recommendation in favor of reinstatement. *Krogh*, 93 Wn. 2d at 504, 610 P.2d at 1319.

43. *Id.* at 508, 610 P.2d at 1321.

44. *Id.* at 506, 610 P.2d at 1320. These mitigating circumstances included "[Krogh's] lack of experience as a lawyer, his position of subordination to the President, and the 'frantic atmosphere' in the White House at that time." *Id.*

45. *In re Walgren*, 104 Wn. 2d 557, 708 P.2d 380 (1985).

46. The court's decision was consistent with the Board's recommendation. The Board voted seven to two to recommend reinstatement. *Id.* at 558, 708 P.2d at 381.

47. *Id.* at 568, 708 P.2d at 388.

48. *Id.* at 562, 708 P.2d at 383.

49. *In re Rosellini*, 108 Wn. 2d 350, 739 P.2d 658 (1987).

50. *In re Rosellini*, 97 Wn. 2d 373, 374, 646 P.2d 122, 123 (1982).

51. *Id.* at 376, 646 P.2d at 123.

52. When the client filed a complaint with the Bar Association indicating that these transactions were occurring, Rosellini signed an affidavit with the Bar Association stating that he maintained his trust account in accordance with Disciplinary Rule 9-102 of the Code of Professional Responsibility. *Id.* at 376, 646 P.2d at 124.

53. Rosellini filed a five million dollar lawsuit against the *Seattle Post-Intelligencer* (named

investigation by the Washington State Bar Association, Rosellini was disbarred on May 20, 1982, for mishandling trust funds.<sup>54</sup> In 1986, he applied for reinstatement.<sup>55</sup> The Board of Governors of the Bar Association recommended against reinstatement.<sup>56</sup> A crucial factor in the Board's recommendation was the insufficient length of the disbarment period (three years and nine months).<sup>57</sup> The supreme court ruled in favor of reinstatement and discussed each of the *Eddleman* factors within the opinion.<sup>58</sup>

The following critique of the *Eddleman* factors and suggested proposals for reform will focus upon the problems presented by these three cases.

## II. ANALYSIS OF CURRENT APPROACH TO ATTORNEY REINSTATEMENT

### A. *Present Standards Fail To Achieve Goals of Attorney Discipline*

#### 1. *Public Protection*

In pursuing the goal of public protection, the court is presented with a clash between two competing interests. On the one hand, the disciplinary process seeks to protect the public; on the other, it seeks to promote rehabilitation of the individual petitioner.<sup>59</sup> In weighing these two interests, the Washington Supreme Court's scale tips in favor of rehabilitation.<sup>60</sup>

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defendants were the Hearst Corporation and *Seattle Post-Intelligencer* reporters Tim Egan and Neil Modie) on October 31, 1980. His suit accused the newspaper of libel, defamation and damages due to "loss of reputation, humiliation and mental anguish." This lawsuit was filed shortly before an election in which Rosellini was a candidate for Attorney General for the State of Washington. Broom, *Rosellini fights back*, *Seattle Times*, Nov. 1, 1980, at A15, col. 2. The suit was dropped after Rosellini lost the election. Jacobi, *John Rosellini Drops His Suit Against P-I*, *Seattle Post-Intelligencer*, Jan. 20, 1981, at A1, col. 1.

54. *Rosellini*, 97 Wn. 2d at 374, 646 P.2d at 122.

55. Rosellini's petition for reinstatement was heard by the Washington Bar Association on February 15, 1986. The petition subsequently was submitted to the supreme court on November 12, 1986. *In re Rosellini*, No. 4974 (Wash. filed Aug. 22, 1986).

56. *In re Rosellini*, 108 Wn. 2d 350, 351, 739 P.2d 658, 659 (1987); Answering Brief of Washington State Bar Association app. A at 3, *In re Rosellini*, 108 Wn. 2d 350, 739 P.2d 658 (1987) (No. 4974) (hereinafter WSBAB Brief). The Board voted eight to one against reinstatement with one governor abstaining.

57. *See id.* app. A at 2, Individual Comments of Ted Zylstra at 2, Individual Comments of Frank H. Johnson at 2, Individual Comments of Jay V. White at 7.

58. *Rosellini*, 108 Wn. 2d 350, 739 P.2d 658.

59. *Id.* at 355, 739 P.2d at 660 ("The major consideration in reinstatement proceedings . . . is whether the petitioner has overcome those weaknesses which produced his earlier misconduct."); *see also In re Johnson*, 92 Wn. 2d 349, 350, 597 P.2d 113, 113 (1979).

60. *In re Krogh*, 93 Wn. 2d 504, 508, 610 P.2d 1319, 1321 (1980) ("The law looks with favor upon the reinstatement of former attorneys whose conduct and attitudes have been reformed.") (citing *In re Eddleman*, 77 Wn. 2d 42, 44, 459 P.2d 387, 388 (1969)).

The emphasis on rehabilitation presents potential risks. The most dangerous one is the possibility of



Although to date no reinstated lawyer has been disbarred a second time, statistical results may be deceiving since the number of reinstated attorneys is relatively small.<sup>61</sup> As the number of attorneys in Washington has increased,<sup>62</sup> so have complaints against members of the profession.<sup>63</sup> Should these figures continue to rise, the record for reinstated attorneys may not remain unblemished.

## 2. *Public Confidence in the Legal Profession*

The goal of preserving confidence in the legal system has not fared well under the present guidelines. The public's response to the *Walgren*<sup>64</sup> decision and the *Rosellini*<sup>65</sup> case reflects a diminished respect for the legal system. The court's decisions in the *Krogh*, *Walgren*, and *Rosellini* cases were inconsistent with judgments in prior reinstatement and admissions cases.<sup>66</sup> Absent reasonable explanations for the court's inconsistent decisions, the public has devised its own interpretations. Lenient decisions are attributed to political favoritism.<sup>67</sup> The court's predisposition toward rehabilitation at the risk of public protection is interpreted as weak self-

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reinstating an attorney who commits another violation. However, the only absolute guarantee against future abuses is permanent disbarment. This alternative exacts a heavy price from the individual attorney in terms of the attorney's freedom to market and practice a profession which requires a large educational investment. Most states traditionally have allowed a disbarred attorney to apply for reinstatement. Annotation, *Reinstatement of Attorney after Disbarment, Suspension or Resignation*, 70 A.L.R. 2d 268, 277 (1960). The body of Washington law supports the position allowing reinstatement. *Rosellini*, 108 Wn. 2d at 364, 739 P.2d at 665.

61. See *supra* notes 7-10 and accompanying text.

62. In 1966, there were 3,849 lawyers in Washington. The total rose to 11,901 in 1986. This is an increase of over 300% during the past 20 years. Telephone conversation with Robert T. Farrell, State bar counsel, Washington State Bar Ass'n (Mar. 12, 1987).

63. The number of complaints per lawyer received by the Washington State Bar Association increased by 36% between 1981 and 1986. The number of complaints in 1981 was 982 (10.8 complaints per 100 active in-state lawyers). The number received in 1986 was approximately 1748 (14.7 complaints per 100 active in-state lawyers). Statistics compiled by the Washington State Bar Ass'n (copy on file with the Washington Law Review). Nationally, complaints in 35 states rose 37.6% from 1984 to 1985. ABA Survey of Lawyer Discipline System (1986).

64. See *infra* notes 67, 70.

65. See *infra* notes 68, 70.

66. See *infra* notes 72-80 and accompanying text.

67. See *Walgren gets VIP treatment from the bar*, Seattle Times, Dec. 28, 1984, at A7, col. 1 ("Why the special treatment for a convicted felon? Because Gordon Walgren has friends in high places, that's why."); *Astonishing decision in Walgren case*, Seattle Times, Oct. 19, 1985, at A13, col. 1:

Because of Walgren's prominence as a political figure, [his reinstatement] also raises questions about the consistency of standards applied to lawyers denied the right to practice because of wrongdoing. The court has been tougher on lesser-known attorneys and Walgren himself says he thinks his reputation as a legislative leader helped his case with the high bench.

*Id.*

regulation of the legal system.<sup>68</sup> The court's response is that public opinion is not an appropriate factor in deciding individual cases.<sup>69</sup> This response, however, overlooks the fact that public opinion is an important reflection of the court's success in preserving public confidence in the legal system.<sup>70</sup> A perception of impropriety may significantly damage this confidence.<sup>71</sup> The perception of impropriety is especially harmful when attorneys in positions of public trust and authority are involved.

### *B. Present Standards Lack Uniform Application*

The court has not applied present standards uniformly. This problem is rooted in the vagueness of the *Eddleman* factors. These factors are simply a list of elements which do not establish minimum performance standards for reinstatement. They are descriptive, not prescriptive, and do not set limits on judicial discretion. Often the court selects certain *Eddleman* factors to justify its decisions while minimizing or ignoring others.<sup>72</sup>

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68. See *Like Walgren, Rosellini proved himself unworthy*, Seattle Times, Mar. 14, 1986, at A9, col.1:

I was angered when the Washington State Bar Association recommended and the state Supreme Court allowed Gordon Walgren to practice law again. Now the bar is considering allowing John Rosellini back into the association and I am even more angry. . . . To consider either Walgren or Rosellini fit to be a part of the bar is a travesty to justice. . . . This is a question, and a test, of the ethics and morals of the Washington State Bar Association and the entire legal profession. We should not let time dilute the gravity of their actions or allow misplaced sympathies to guide this decision.

*Id.*

69. Justice Dolliver believes that public opinion should not play a role in individual cases. However, he states that public opinion is reflected through the briefs presented to the court and thus has an impact in creating the atmosphere under which the court functions. Interview with James Dolliver, Justice of the Washington Supreme Court, in Olympia, Washington (Mar. 2, 1987).

70. See *Bar feels its reputation is at stake in Rosellini case*, Seattle Times/Seattle Post-Intelligencer, Feb. 16, 1986, at D1, col. 1 ("State bar association officials indicated yesterday that they are worried about their organization's reputation if they allow attorney John Rosellini to practice law again."); *Walgren case could weaken public's trust of lawyers*, Seattle Times, Aug. 9, 1981, at A14, col.1. ("[T]he public's perception of and confidence in the legal system [are] key issue[s] for consideration in weighing the conduct of lawyers. Especially those who, like Walgren, have risen to positions of political power and public trust.").

71. *In re Goldman*, 179 Mont. 526, 588 P.2d 964 (1978), held that the court could not expect the public to comply voluntarily with the legal system if officers of the court were allowed to break the law. "Unless we keep clean our own house—. . . we cannot expect the public to have confidence in the integrity of the bar and our system of justice." 588 P.2d at 985.

72. Justice Dolliver explained this selective application of the elements to individual cases by noting that:

[I]n many of the cases some of [the *Eddleman* factors] are easily disposed of; some of them may not apply. Generally there are three or four of the *Eddleman* points which are absolutely crucial to the case. Either there is no particular issue on the other points or no one wants to argue them, so they are dismissed.

Interview with James Dolliver, Justice of the Washington Supreme Court, in Olympia, Washington

The major weakness of the *Eddleman* factors originates from the failure to establish minimum time periods before reinstatement. This weakness is highlighted by the application of the *Eddleman* factors in the *Walgren* and *Krogh* cases. In both *Krogh* and *Walgren*, the court brushed over the length-of-time-since-disbarment criterion. Prior to *Krogh*, the average period of disbarment was seven and one-half years. The supreme court granted reinstatement to *Krogh* after only five years<sup>73</sup> and to *Walgren* just three years from the time he was disbarred.<sup>74</sup> Although the court is not required to abide by previous disbarment terms, its departure from precedent underscores the problem with the lack of fixed criteria established by the *Eddleman* factors. Prior to *Rosellini*, out of the number of disbarments in Washington involving misuse of client trust funds, only four lawyers have been reinstated. The average period of disbarment for these offenses was eight years.<sup>75</sup> At the time the supreme court heard his petition, *Rosellini* had been disbarred for four years and five months. Even if all the other *Eddleman* factors were satisfied, prior to the *Krogh* and *Walgren* decisions the disbarment time factor alone probably would have resulted in a denial of *Rosellini*'s petition.

The *Walgren* decision opened the door to further inconsistent applications of the *Eddleman* factors. At the time the decision was rendered, *Walgren* was still on parole.<sup>76</sup> In the past, the court required that a petitioner complete parole to establish rehabilitation before applying for reinstatement.<sup>77</sup> In addition, the court disregarded *Walgren*'s failure to show remorse for his

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(Mar. 2, 1987). Although, in *Rosellini* the court appeared to recognize this problem and carefully addressed all *Eddleman* factors individually. *In re Rosellini* 108 Wn. 2d 350, 739 P.2d 658 (1987).

73. *In re Krogh*, 93 Wn. 2d 504, 610 P.2d 1319 (1980). *Krogh* was disbarred in 1975 and granted reinstatement in May 1980 subject to his completion of the bar exam. A number of mitigating factors were mentioned to justify this decision. The court cited *Krogh*'s "lack of experience as a lawyer, his position of subordination to the President, and the 'frantic atmosphere' in the White House at that time." *Id.* at 506, 610 P.2d at 1320.

74. *In re Walgren*, 104 Wn. 2d at 558, 708 P.2d at 380 (*Walgren* was disbarred in June 1982 and granted reinstatement in October 1985 subject to completion of parole and passing of the bar exam).

The *Walgren* opinion also illustrates a problem regarding the calculation of disbarment periods. Presently these dates may be manipulated to lend support to an argument for or against reinstatement of an individual. In some cases the court calculates the relevant time period from the date an attorney is suspended from practice. *See id.* at 566, 708 P.2d at 385. In other situations, the court starts the clock at the official date of disbarment although the lawyer's practice effectively ended before that date. *In re Seijas*, 63 Wn. 2d 865, 866, 389 P.2d 652, 653 (1964) (*Seijas* was sentenced for tax evasion in 1955 and officially disbarred in 1957). To reduce confusion and provide consistency, one of these dates (time of sentencing or disbarment) should be designated as the starting point for measuring removal from practice. When the date is selected all future opinions should calculate their terms accordingly.

75. *In re Batali*, 98 Wn. 2d 610, 657 P.2d 775 (1983) (eight years); *In re Johnson*, 92 Wn. 2d 349, 597 P.2d 113 (1979) (11 years); *In re Chantry*, 84 Wn. 2d 153, 524 P.2d 909 (1974) (nine years); *In re Lillions*, 196 Wash. 272, 82 P.2d 571 (1938) (four years).

76. *Walgren*, 104 Wn. 2d at 571, 708 P.2d at 388.

77. *In re Lonergan*, 23 Wn. 2d 767, 162 P.2d 289 (1945).

crime.<sup>78</sup> Prior to *Walgren*, if a petitioner committed an illegal act the court demanded a measure of repentance.<sup>79</sup> The effect of these inconsistencies was apparent in *Rosellini*. A decision denying reinstatement to Rosellini would have been difficult to justify when compared to the facts in *Walgren*.<sup>80</sup> In deference to these contrasting cases, the court chose a middle road and granted reinstatement contingent upon the successful completion of a probation period.<sup>81</sup>

### C. Present Standards Fail To Satisfy Other Reinstatement Considerations

#### 1. Integrity of the Legal Profession

The court's present reinstatement standards fail to maintain the integrity of the legal profession in that the standards allow for the reinstatement of attorneys who arguably are not fit to practice. This situation is illustrated by the court's employment of a double standard whereby requirements for reentry to the bar are more lenient than admission standards.<sup>82</sup> Differing applications of the "good moral character" requirement contained in the Admission to Practice Rules are at the root of this double standard.<sup>83</sup>

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78. *Walgren*, 104 Wn. 2d at 563, 708 P.2d at 384.

79. See, e.g., *In re Simmons*, 71 Wn. 2d 316, 321, 428 P.2d 582 585 (1967) ("[T]he evidence presented by . . . [Simmons] . . . falls short of a positive showing that he truly recognized the disservice which his conduct did to the legal profession.")

80. Although Rosellini's and Walgren's transgressions are distinguishable on several bases, they do not support a significant difference in disbarment periods. Rosellini's violations involved the performance of his duties as an attorney and Walgren's involved his actions as a public official. Walgren was convicted of a crime and Rosellini's offense did not result in a conviction. Finally, Rosellini has shown evidence of rehabilitation and was not on parole at the time of his petition. In contrast, Walgren was on parole at the time of his petition and maintains his innocence. See generally *In re Rosellini*, 108 Wn. 2d 350, 739 P.2d 658 (1987); *Walgren*, 104 Wn. 2d 557, 708 P.2d 380.

81. Given the renewed public outcry reinstatement might provoke, the court tempered the impact with a stipulation that Rosellini practice in a probationary capacity under the supervision of another lawyer. This proposal was suggested by the petitioner. Brief of Petitioner at 54, *In re Rosellini*, No. 4974 (Wash. filed Aug. 22, 1986). The state disciplinary rules stipulate a maximum two year probationary period. Rule of Lawyer Discipline 5.2(a). However, the court waived this rule and imposed a three year period. Rosellini agreed to this longer period and the bar association did not raise any objections. *Rosellini*, 108 Wn. 2d at 361, 739 P.2d at 663.

82. Justice Dolliver reconciles this difference by distinguishing prospective new attorneys from veteran attorneys on two grounds. First, a disbarred lawyer has a prior performance record for the court to review. This type of information is not available from initial applicants. Second, Justice Dolliver states that many of the controversial admission cases involved cumulative offenses, in contrast to the reinstatement cases which involved single incidents. Interview with James Dolliver, Justice of the Washington Supreme Court, in Olympia, Washington (Mar. 2, 1987).

83. Admission to Practice Rule 3. These admission requirements state that an applicant must fulfill educational requirements, pass the bar exam and establish good moral character. Reinstatement applicants also are required to meet these standards. RLD Rule 9.6(a).

Traditionally, the Washington Supreme Court defines "good moral character" as an absence of "moral turpitude." "Moral turpitude" is described as conduct contrary to justice, honesty, modesty, or good morals.<sup>84</sup> Such conduct includes acts which cause doubts about a person's honesty, fairness, and respect for the rights of others and for the law.<sup>85</sup> In applying the definition of moral turpitude to initial admission cases, the Washington Supreme Court has refused to admit applicants who had written a bad check,<sup>86</sup> murdered a person,<sup>87</sup> and placed a bomb in a car.<sup>88</sup> The most highly publicized of these cases, *In re Wright*,<sup>89</sup> involved a law student who was convicted of second degree murder and drug possession. Potentially mitigating circumstances surrounded these charges.<sup>90</sup> Following the completion of a prison sentence, Wright overcame difficult odds by returning to school and obtaining his law degree. More than eleven years after committing these crimes he applied for admission to the bar.<sup>91</sup> The supreme court denied his petition based upon his lack of good moral character.<sup>92</sup> Four justices strongly dissented, pointing out that although Wright's offenses were serious other factors warranted his admission. The offenses were committed many years prior to the time he requested admission to the bar. They involved mitigating circumstances. They did not include violations of his duties as a lawyer and Wright willingly acknowledged his guilt.<sup>93</sup>

A comparison of the facts in *Wright* to those in *Walgren* highlights the double standard. In *Walgren* the court granted reinstatement despite the fact that the petitioner was disbarred for only three years at the time of his application,<sup>94</sup> was still on parole<sup>95</sup> and showed no remorse for his crime.<sup>96</sup> Certainly, Walgren's illegal activities cast doubts upon Walgren's

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84. *In re Hopkins*, 54 Wash. 569, 572, 103 P. 805, 806 (1909).

85. *In re Wright*, 102 Wn. 2d 855, 858, 690 P.2d 1134, 1136 (1984).

86. Unreported case of Madison King. See *Seattle Times*, Apr. 14, 1985, at A1, col. 2.

87. See *In re Wright*, 102 Wn. 2d 855, 690 P.2d 1134 (1984).

88. *In re Belsher*, 102 Wn. 2d 844, 689 P.2d 1078 (1984).

89. *Wright*, 102 Wn. 2d 855, 690 P.2d 1134.

90. Wright claims he acted in self defense in shooting his girlfriend's husband. *Id.* at 863, 690 P.2d at 1138. He also explains that the drugs he was convicted of possessing were concealed in a birthday gift. To avoid being labeled a "snitch" if his murder conviction required a jail sentence, he pled guilty to drug possession. *Id.* at 865, 690 P.2d at 1139.

91. The Board of Governors voted in favor of his admission, finding that his behavior following his crimes was exemplary. *Id.* at 862, 690 P.2d at 1138.

92. *Id.* at 860, 690 P.2d at 1137.

93. *Id.* at 869-70, 690 P.2d at 1141-42.

94. *In re Walgren*, 104 Wn. 2d 557, 708 P.2d 380 (1985).

95. *Walgren*, 104 Wn. 2d 557, 574, 708 P.2d 380, 390 (The court was unable to locate any other case in the nation which had granted reinstatement to a petitioner on parole at the time of the application review.)

96. *Walgren*, 104 Wn. 2d at 562, 708 P.2d at 383. This fact underscores the distinctions between

honesty, fairness and respect for the rights of others and for the law. These doubts were reflected in the court's decision to disbar him. The question raised by this comparison is whether an initial applicant, in Walgren's situation, would be considered for entry to the bar? The answer appears to be "no." If the court denied entry to an applicant who had exhibited eleven years of good behavior since his offense, certainly it would not admit a person who was still on parole and refused to show any remorse for the crime of which he was convicted. Yet the court did allow Walgren's reinstatement. Although the court does have the power to set its standards at any level, the court rules and basic principles of fairness require that these applicants be evaluated on an equal basis.

### 2. *Fairness to the Individual Applicant*

Present reinstatement standards are not fair to individual petitioners. Although the court attempts to be fair by evaluating each case individually,<sup>97</sup> the resulting decisions provide very vague and uncertain guidelines to potential applicants. In evaluating the probability of reinstatement, petitioners are confronted with a line of cases producing unpredictable disbarment periods<sup>98</sup> and inconsistent applications of the *Eddleman* factors.<sup>99</sup> These decisions fail to furnish disbarred attorneys with guidance about the performance standards required to establish eligibility for reinstatement and do not indicate the appropriate time for filing petitions in individual cases. This situation encourages multiple attempts for reinstatement and results in wasted time and resources for both the petitioners and the court.

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reinstatement and initial admissions decisions. The court has held that in considering a reinstatement petition, the court must treat the petitioner's guilt as an established fact. *In re Lonergan*, 23 Wn. 2d 767, 771, 162 P.2d 289, 291 (1945). In both reinstatement and initial admissions cases, the court has required remorse for an offense to demonstrate rehabilitation. *See, e.g., In re Wright*, 102 Wn. 2d 855, 870, 690 P.2d 1134, 1142 (1984); *In re Simmons*, 71 Wn. 2d 317, 319, 428 P.2d 582, 585 (1967). Although the court should have treated Walgren's guilt as established fact based upon this principle and required remorse, the court did not compel Walgren to conform to this requirement and expressed confusion about his conviction. *Walgren*, 104 Wn. 2d at 562, 568, 708 P.2d at 383, 386. Admittedly this requirement presents problems for the court. *See infra* note 116. However, fairness demands that if the court is willing to disregard this element in reinstatement cases, the same benefit should be extended to admission cases.

97. *In re Rosellini*, 108 Wn. 2d 350, 359, 739 P.2d 658, 663 (1987).

98. Simmons applied and was rejected after three years. He eventually was reinstated after eight years. *In re Simmons* 81 Wn. 2d 43, 499 P.2d 874 (1972); *In re Simmons*, 71 Wn. 2d 316, 428 P.2d 582 (1967). Eddleman applied and was rejected after five years. His reinstatement petition was granted after seven years. *In re Eddleman*, 79 Wn. 2d 725, 489 P.2d 174 (1971); *In re Eddleman*, 77 Wn. 2d 42, 459 P.2d 387 (1969). Seijas applied and was denied reinstatement after seven years. His petition was granted after 12 years. *In re Seijas*, 75 Wn. 2d 956, 454 P.2d 203 (1969); *In re Seijas*, 63 Wn. 2d 865, 389 P.2d 652 (1964).

99. *See supra* notes 72–80 and accompanying text.

*In re Rosellini* illustrates the problem created by the lack of clear guidelines. Although Rosellini undoubtedly was pleased with the court's decision, the result was not a predictable one. First, in previous cases the court often weighed the relative seriousness of crimes in different manners. For example, in one situation an IRS violation warranted disbarment for 12 years,<sup>100</sup> while in another case a federal racketeering conviction resulted in the granting of reinstatement after only three years.<sup>101</sup> Second, Rosellini only could have guessed at the appropriate time to apply for reinstatement. In earlier opinions the court emphasized the gravity of a trust fund violation and denied reinstatement for an average of eight years.<sup>102</sup> Rosellini's reinstatement after five years, therefore, could not have been predicted in advance with any degree of accuracy. The third problem confronting Rosellini was how the court would interpret the *Eddleman* factor regarding the ethical practices he had observed in his law practice. Prior to *Rosellini*, the court and the Board wavered over whether to consider the misconduct leading to disbarment when evaluating a petitioner's legal ethics. The court resolved future confusion about this factor by explicitly excluding information regarding the misconduct.<sup>103</sup> However, the Board included the misconduct in evaluating this factor, adding to Rosellini's difficulties in predicting the outcome of his petition. All of these inconsistencies are problems which make the reinstatement process more difficult, confusing and ultimately less fair than a set of clear, explicit standards.

### III. NEW DIRECTIONS FOR ATTORNEY REINSTATEMENT

#### A. Proposed Changes

The problems with the current reinstatement standards could be resolved by the development of more structured sets of disbarment and reinstatement guidelines. These guidelines would minimize the potentially excessive use of judicial discretion and eliminate petitioner speculation regarding the appropriate time to submit an application. Confusion over the requirements for reinstatement may be reduced by revising the remaining *Eddleman* factors and eliminating those that do not further the disciplinary goals. The revised factors would serve as objective criteria for the petitioner to fulfill during the disbarment period.

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100. *In re Seijas*, 75 Wn. 2d 956, 454 P.2d 203 (1969). Seijas's earlier attempt at reinstatement was rejected. *In re Seijas*, 63 Wn. 2d 865, 389 P.2d 652 (1964) (reinstatement refused after seven years).

101. *Walgren*, 104 Wn. 2d 855, 690 P.2d 1134 (1984).

102. *See supra* note 75 and accompanying text.

103. *In re Rosellini*, 108 Wn. 2d 350, 356, 739 P.2d 658, 661 (1987). The clarification of this factor is one instance where the court has assisted future reinstatement petitioners by eliminating confusion or inconsistencies in interpreting the *Eddleman* factors.

1. *Uniform Disbarment Guidelines for Specific Offenses*

The establishment of uniform disbarment time periods for various types of offenses would provide the certainty lacking in the present system.<sup>104</sup> The court could adopt the classifications of offenses proposed in the Standards for Imposing Lawyer Sanctions to gauge the gravity of ethical violations.<sup>105</sup> Although these classifications were devised to provide the states with general assistance in imposing discipline, application of the ABA classifications also can be extended to the reinstatement situation.

The ABA classifications include violations of duties falling into four general categories. These are, in order of severity, duties owed to clients,<sup>106</sup> to the public,<sup>107</sup> to the legal system,<sup>108</sup> and to the legal profession.<sup>109</sup> In determining disbarment periods, the severity of the individual offenses within these categories could be measured according to several factors set forth in the ABA proposal.<sup>110</sup> The ABA proposal indicates that the most

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104. Justice Dolliver objects to restricting judicial discretion in the reinstatement area and believes that the court should hold a "fairly fluid stance." Interview with James Dolliver, Justice of the Washington Supreme Court, Olympia, Washington (Mar. 2, 1987).

105. STANDARDS FOR IMPOSING LAWYER SANCTIONS (Approved Draft 1986). These standards furnish guidelines for state courts to use in establishing uniformity in discipline cases. The ABA's goal in issuing these recommendations was to increase the effectiveness of the disciplinary system through clearly developed standards. *Id.* at I.A. The purpose is similar to that of mandatory sentencing guidelines used in criminal cases. *See infra* note 113.

These standards are a step forward in dealing with the problem of attorney discipline. However, they do not thoroughly address the issue of reinstatement. The only significant recommendation relating to reinstatement advocates increasing the mandatory period of disbarment from three to five years. STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 2.10 commentary (Approved Draft 1986). *See supra* note 16.

A preliminary step before revising the reinstatement standards may be to adopt this ABA proposal in its entirety. Although Washington has not officially adopted these guidelines, the Washington Supreme Court appears to be considering them. *See ABA Offers Uniform Standards for Imposing Sanctions*, Nat'l L.J., Oct. 27, 1986, at 32, col. 1 (adoption of the proposed ABA sanctions standards in Washington State would be immensely helpful according to Dolliver, J.). The court also has employed the guidelines in a recent disciplinary decision. *In re Rentel*, 107 Wn. 2d 276, 729 P.2d 615 (1986).

106. STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 4.0 (Approved Draft 1986). Violations include failure to preserve client property, failure to preserve client confidences, failure to avoid conflicts of interest, lack of diligence, lack of competence, and lack of candor.

107. STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 5.0 (Approved Draft 1986). Violations include failure to maintain personal integrity and failure to maintain the public trust.

108. STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 6.0 (Approved Draft 1986). Violations include false statements, fraud, misrepresentation, abuse of the legal process, and improper communications with individuals in the legal system.

109. STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 7.0 (Approved Draft 1986). Violations include false or misleading communications about the lawyer or the lawyer's services, improper solicitation, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation and failure to report professional misconduct.

110. The four factors suggested by the ABA proposal are the duty violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's misconduct, and the existence of aggravating or mitigating factors. STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 3.0 (Approved Draft 1986).



serious offenses within each category are those which involve knowing violations of ethical duties to clients resulting in potentially serious injury, absent mitigating circumstances.<sup>111</sup> The least serious are those caused by mistakes, involving mitigating circumstances, or resulting in minor injuries to people other than clients.<sup>112</sup>

Standard disbarment ranges may be developed and applied by the court in a manner similar to the method provided in the Washington Criminal Sentencing Reform Act, which seeks to assign punishment in proportion to the crime.<sup>113</sup> The element of punishment inherent in the attorney disciplinary process facilitates this comparison.<sup>114</sup> The supreme court, with the

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111. STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 4.1 (Approved Draft 1986).

112. See generally STANDARDS FOR IMPOSING LAWYER SANCTIONS Rule 9.3 (Approved Draft 1986).

113. Washington Sentencing Reform Act of 1981, WASH. REV. CODE § 9.94A.010 (1981). The Act is designed to make the criminal justice system accountable by developing a system which assigns punishment in proportion to the crime, to encourage respect for the law, to encourage consistency in court decisions and to protect the public. *Id.* The criminal offenses are divided into fourteen levels of seriousness. The severity of the offense is added to information regarding the offender's past criminal record. The resulting score indicates the appropriate punishment. WASH. REV. CODE § 9.94A.

However, attorney disbarment periods cannot be as narrowly defined as criminal sentencing periods due to the nature of the offenses. Attorney offenses do not fall into categories as easily as criminal acts. With attorney violations it also is difficult to anticipate every situation and designate disbarment periods for the wide range of offenses which might occur. Finally, in criminal sentencing release is mandatory at the end of the sentencing period. In contrast, a disbarred attorney is not automatically reinstated at the end of the disbarment period. As a result, the procedure applied in the criminal context may not be applied in all aspects and a significant element of judicial discretion will necessarily remain.

114. Application of the criminal sentencing framework is appropriate because of the nature of disciplinary sanctions. Lawyer discipline can be considered a method of punishment and has been interpreted by some courts as "quasi-criminal" in nature. *In re Ruffalo*, 390 U.S. 544, 551 (1968); *In re Little*, 40 Wn. 2d 421, 430, 244 P.2d 255, 259 (1952). In fact, it is difficult to discuss disbarment and reinstatement without including the objective of punishment, although the Washington Supreme Court denies this objective. *In re Greenwood*, 22 Wn. 2d 684, 689, 157 P.2d 591, 593 (1945); see also *In re Noble*, 100 Wn. 2d 88, 95, 667 P.2d 608, 612 (1983) (discipline is not punishment; the primary concern is protecting the public and deterring other lawyers). In spite of these statements, the court appears to contradict itself with references to punishment in the *Eddleman* factors and in individual opinions. *In re Walgren*, 104 Wn. 2d 557, 572, 708 P.2d 380, 388 (1985); *In re Krogh*, 93 Wn. 2d 504, 507, 610 P.2d 1319, 1320 (1980). Although Justice Dolliver believes that punishment is an element which should be acknowledged, he indicates that the contradictory statements may be the result of conflicting views within the court. Interview with James Dolliver, Justice of the Washington Supreme Court, in Olympia, Washington (Mar. 2, 1987).

The objective of punishment may be more acceptable to the other members of the court if it is explained in terms of reprobation rather than retribution. Although the result may be the same, the motivations behind the two goals are very different. Retribution reflects a desire for revenge or retaliation. See W. LAFAVE & A. SCOTT, CRIMINAL LAW 25-26 (1986). Reprobation looks to the future and discourages potential offenders by identifying those acts which society deems unacceptable. See C. WOLFRAM, MODERN LEGAL ETHICS 81-82 (1986).

An example of the use of punishment to achieve reprobation may be found in the trust fund violation situations. The court consistently has designated the misuse of client's funds as the worst offense against the profession by an attorney. The nearly automatic response to this act is disbarment of the offending attorney. *In re Rosellini*, 97 Wn. 2d 373, 377, 646 P.2d 122, 124 (1982). Through this response, the court sends a message to lawyers and the public that the legal profession will not tolerate

possible assistance of an advisory committee, could make the specific determination of the time period for each offense.

Although the court rejects the utilization of “statistical averages,”<sup>115</sup> consideration of this information is inevitable in maintaining a line of consistent decisions for petitioners and the public to consult for guidance. The members of the court and the Board change over time. The criteria and the standards for reinstatement should not shift accordingly. Through the implementation of more narrowly defined disbarment periods, the court would prevent these fluctuations.

### 2. *Revised Criteria for Reinstatement*

Under this proposed system, the court would discontinue consideration of five *Eddleman* factors. The remaining *Eddleman* factors would be revised to take into account additional relevant information as follows: (1) demonstration by petitioner of knowledge that the incident leading to disbarment was improper lawyer conduct;<sup>116</sup> (2) demonstration that the petitioner successfully handled responsible positions during the disbarment period;<sup>117</sup> (3) restitution of all property improperly taken by the lawyer;<sup>118</sup> (4) proof of completion of all jail sentences and parole periods;<sup>119</sup> and (5) demonstration of current proficiency in the law.<sup>120</sup> Lawyers who fail to measure up to these minimum standards would not be reinstated. However, they would have the right to reapply in the future.<sup>121</sup>

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this kind of activity by its members and reaffirms the actions of those lawyers obeying the profession's ethical code. Dissemination of this information achieves the goals of deterring inappropriate conduct and increasing public confidence in the legal system.

115. *Rosellini*, 108 Wn. 2d at 360, 739 P.2d at 663.

116. The goal of this requirement is to demonstrate the integrity and reformation of the attorney. The method of demonstration would vary for different offenses. Generally, petitioners would be required to acknowledge the wrongfulness of the offenses for which they were disbarred. No admission of guilt would be required because of the conflict presented to lawyers who maintain their innocence. A rule requiring admission of guilt may force attorneys to admit to perjury at a prior proceeding or admit guilt when in fact they do not believe that they are guilty. This result would be counterproductive to the goal of the requirement if attorneys are forced to compromise their principles to restore their status in the profession. See *Walgren*, 104 Wn. 2d at 563, 708 P.2d at 384; *In re Eddleman*, 77 Wn. 2d 43, 45, 459 P.2d 387, 389 (1969).

117. This requirement is an extension of the requirement that a petitioner establish a “new reputation” during the disbarment period to demonstrate rehabilitation. *Walgren*, 104 Wn. 2d at 567, 708 P.2d at 386; *Loneragan*, 23 Wn. 2d at 771, 162 P.2d at 291.

118. The court consistently has required restitution where applicable. See *In re Batali*, 98 Wn. 2d 610, 619, 657 P.2d 775, 780 (1983); *In re Johnson*, 92 Wn. 2d 349, 351, 597 P.2d 113, 114 (1979); *In re Chantry*, 84 Wn. 2d 153, 154, 524 P.2d 909, 910 (1974); *In re Lillions*, 196 Wash. 272, 279, 82 P.2d 571, 574 (1938).

119. See *supra* note 77 and accompanying text.

120. *In re Bowden*, 99 Wn. 2d 684, 689, 633 P.2d 1349, 1351 (1983).

121. See *supra* note 16.

Mandatory periods of disbarment for specific categories of ethical breaches would eliminate the need to consider the charge leading to disbarment, the sufficiency of the punishment, and the time that has elapsed since disbarment. Completion of the disbarment period would establish a presumption that these factors had been adequately addressed. Two other *Eddleman* factors would be dropped: standing in the community prior to disbarment, and the petitioner's ethical standards prior to disbarment. These factors neither establish rehabilitation during the disbarment period,<sup>122</sup> nor are they relevant to the appropriate degree of discipline since they relate to the attorney's conduct prior to the offense. In addition, consideration of these factors encourages the uneven application of the law to individual offenders.

### *B. Benefits of Proposed Changes*

A uniform approach to disbarment and reinstatement would diminish the current problems with the attorney reinstatement process and assist the court in achieving the goals of lawyer discipline. First, standard disbarment periods would promote public protection by disbarring offenders for a length of time which the court has determined is sufficient to allow for the demonstration of rehabilitation. The standard disbarment periods also would deter potential violators by guaranteeing certain punishment. Second, the proposed approach would preserve and increase public confidence in the legal system by reducing inconsistencies in sentencing and providing explicit guidelines to explain decisions. Third, the system would be fairer to petitioners. It notifies them of the penalties for transgressions before they commit ethical breaches and informs them when to reapply to the bar, reducing the wasted effort of repeated applications. The system also establishes a performance standard for the petitioner to achieve during the disbarment period. Finally, this system would solve problems of unpredictable sentences and inconsistent decisions in the current reinstatement process.

### *C. Application to Rosellini Case*

Under the proposed approach, Rosellini should have applied for reinstatement only after completing the mandatory disbarment period designated for his specific ethical breach.<sup>123</sup> Assuming that Rosellini applied at

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122. Although the court has not narrowed its scope to the disbarment period, the logical assumption is that the court's emphasis on rehabilitation would require the focus of attention on the petitioner's activities during this period. Interview with James Dolliver, Justice of the Washington Supreme Court, in Olympia, Washington (Mar. 2, 1987).

123. Rosellini's misconduct involved misuse of client property. The ABA proposal considers this

the appropriate time, he would move on to the next step; consideration under the revised *Eddleman* factors. First, he would have to prove himself worthy of reinstatement by passing a test examining his knowledge of the rules of professional conduct, specifically those applicable to the management of trust funds.<sup>124</sup> Second, he would have to provide recommendations vouching for his ability to hold responsible positions.<sup>125</sup> Third, he would have to make full restitution to his former clients.<sup>126</sup> Finally, he would have to retake and pass the bar examination to demonstrate his current proficiency in the law.<sup>127</sup> Since no jail sentence was imposed on Rosellini, the factor relating to the completion of jail and parole does not apply.

The decision applying the proposed system would hinge upon the length of the disbarment period because Rosellini would qualify under the revised set of *Eddleman* factors. If the court had relied upon the disbarment time periods imposed in other similar cases, Rosellini would not have been reinstated.

#### IV. CONCLUSION

The current common law standards for attorney reinstatement in Washington State are flawed. They fail to promote the goals of the disciplinary process and diminish the integrity of the legal profession. In addition, the standards do not provide sufficient guidance to attorneys regarding the court's expectations regarding the qualifications for reinstatement. Finally, the resulting decisions lack uniformity.

These problems call for the implementation of a new approach to attorney reinstatement. As the number of lawyers in Washington continues to grow and the number of discipline cases increases, the court is likely to address the issue of reinstatement more frequently. The need for a new system thus will become more pressing.

The supreme court took advantage of the *Rosellini* case to explain its position on reinstatement. Although the decision perpetuates many of the

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violation to be one of the most serious. *See supra* text accompanying notes 106–10. The average period of disbarment for past cases of trust fund violations was eight years.

Although the court unanimously voted in favor of Rosellini's reinstatement, several judges voiced concern over the three year minimum disbarment period. *Rosellini*, 108 Wn. 2d at 365, 739 P.2d at 665–66 (Callow, J., Anderson, J. & Noe, J. Pro tem., concurring). The recommendation of the Board of Governors also reflects this concern. *See supra* note 57 and accompanying text.

124. The test would cover the Washington Rules of Professional Conduct, with special emphasis on trust fund responsibilities.

125. Ideally, this recommendation would involve the responsible handling of other persons' money. Rosellini provided such recommendations. *Rosellini*, 108 Wn. 2d at 356, 739 P.2d at 661.

126. Rosellini reimbursed all debts to his clients prior to his application for reinstatement. WSBA Brief, *supra* note 56, at 6–7.

127. At the time of the supreme court hearing, Rosellini had not retaken the bar examination. *See generally, Rosellini*, 108 Wn. 2d 350, 739 P.2d 658.

potential problems with judicial discretion, the thoroughness of the opinion signals a concern for explaining the court's reasoning to attorneys, the Board and the public. The challenge now is for the court to maintain consistency among its opinions. Adoption of the revised guidelines suggested in this Comment would serve this goal and establish a strong foundation for future reinstatement decisions.

*Anne Badgley*