Forever Banned: An Analysis of Permanent Disbarment in Arkansas After In re Madden

I. INTRODUCTION

The term “disbarment” often carries the connotation that an attorney has been forever banned from the practice of law.1 In most jurisdictions, an attorney may apply for readmission after waiting for a statutorily prescribed period of time2 and proving to the court he has the good moral character and fitness required by the bar.3 However, a minority of states, including Arkansas, maintain a procedure that permanently prohibits attorneys from gaining readmission to the bar.4 The 2012 Arkansas Supreme Court decision In re Madden affirmed Arkansas’s commitment to a “per se”5 ban on readmitting attorneys who commit certain crimes.6 The ban applies to an attorney who surrenders his law license after committing a “serious crime” that did not involve the culpable mental state of negligence or recklessness.7

* The author thanks Professor Stephen M. Sheppard, Associate Dean for Research and Faculty Development, University of Arkansas School of Law, for his advice, guidance, and feedback throughout the drafting of this note.


2. See, e.g., PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 24(B)(1) (establishing a five-year waiting period before an attorney can reapply for admission to the bar); GA. R. GOVERNING ADMISSION TO PRACTICE LAW pt. A, § 10(a) (establishing a five-year waiting period before an attorney can reapply for admission to the bar); R. REGULATING FL. BAR 3-5.1(f).

3. See, e.g., Statewide Grievance Comm. v. Rapoport, 987 A.2d 1075, 1083 (Conn. App. Ct. 2010); In re Allen, 509 N.E.2d 1158, 1160-61 (Mass. 1987); In re Application of Matthews, 462 A.2d 165, 176 (N.J. 1983) (“Rehabilitation is pertinent because the Court is interested in an applicant’s present fitness to practice law.”).


5. The terms “per se” or “per se rule,” as used in this note, refer to a rule that permanently bans an attorney from readmission to practice law upon the attorney’s commission of specifically prohibited conduct. See, e.g., In re King, 136 P.3d 878, 882 (Ariz. 2006) (using the term “per se” in the context of readmission proceedings).

6. In re Madden, 2012 Ark. 279, at 14-15, ___S.W.3d ___, ___.

7. Id.
Procedures of the Arkansas Supreme Court Regulating Professional Conduct defines the term “serious crime” as follows:

(1) any felon; (2) any lesser crime that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects; or (3) any crime a necessary element of which, as determined by the statutory or common law definition of the crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft or an attempt, conspiracy or solicitation of another to commit a “serious crime.”

In Madden, the petitioning attorney, Harold Madden, was convicted of one count of misprision of a felony, which constituted a serious crime. The majority opinion used a per se approach to readmission by permanently banning Madden from readmission to the Arkansas Bar upon his conviction. However, in the dissenting opinion, Justices Danielson and Corbin believed that Madden had sufficiently rehabilitated himself and had proved himself worthy of readmission to the bar. Justice Danielson commented that the court should reexamine the rules regarding sanction, disbarment, and readmission.

This note begins in Part II by summarizing the events that led to Harold Madden’s lifetime ban from practicing law in Arkansas. Next, Part III explains Arkansas’s

---

8. PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 2(J).

9. Madden, 2012 Ark 279, at 1, ___ S.W.3d at ___. 18 U.S.C. § 4 defines misprision of a felony as follows:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.


10. PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 2(J).

11. See Madden, 2012 Ark. 279, 14-15, ___ S.W.3d at ___.

12. Id. at 15-16, ___ S.W.3d at ___ (Danielson, J., dissenting). This note refers to the readmission philosophy advanced by Justices Danielson and Corbin as the “rehabilitative approach.”

13. Id. at 16 n.1, ___ S.W.3d at ___. 
procedures governing readmission to the bar. Part IV then analyzes the strengths and weaknesses of the Madden majority’s “per se approach” to readmission and the dissent’s proposed “rehabilitative approach” to readmission. Finally, Part V argues that Arkansas should generally adhere to the “per se approach” but that the Arkansas Supreme Court should allow a narrow exception.

II. FACTS OF IN RE MADDEN

On July 5, 2000, Harold Wayne Madden voluntarily surrendered his law license to the Arkansas Supreme Court.14 Madden surrendered his license because he was convicted on April 27, 2000, for one count of misprision of a felony.15 On July 13, 2010, the Arkansas Supreme Court accepted the surrender of Madden’s license and barred him from practicing law in Arkansas.16

The events leading up to Madden’s felony conviction are as follows. In the late 1990s, Madden began to associate with a group of friends that used recreational drugs.17 Subsequently, Madden became aware that one of his friends, Jody Greenlee, participated in a transaction for the sale of cocaine.18 Initially, Madden failed to report the criminal activity to the police.19 However, when the FBI approached Madden and questioned him about his knowledge concerning Mr. Greenlee’s involvement with drug distribution, Madden explained what he knew about a drug transaction between Greenlee and Shannon Steinmetz.20 Ultimately, in January 2000, Madden pled guilty to one count of misprision of a felony and surrendered his license to practice law.21

Ten years later, on November 1, 2010, Madden filed an application with the Arkansas State Board of Law Examiners seeking readmission to the Arkansas Bar.22 In

14. Id. at 1, ___ S.W.3d at ___ (majority opinion).
15. Id. at 1, 5, ___ S.W.3d at ___.
16. Madden, 2012 Ark. 279, at 1, ___ S.W.3d. at ___.
17. Id. at 2-3, ___ S.W.3d at ___.
18. Id. at 3, ___ S.W.3d at ___.
19. Id. (explaining that Madden “‘turned a blind eye’” to the drug activity).
20. Id.
21. Madden, 2012 Ark. 279, at 5, ___ S.W.3d at ___.
22. Id. at 1, ___ S.W.3d at ___.
his application, Madden recognized that one provision of the Procedures of the Arkansas Supreme Court Regulating Professional Conduct (Procedures) states that an application for readmission to the Arkansas Bar “shall not be allowed” if the disbarment resulted from conviction of a “serious crime.” The Procedures define “serious crime” as “any felony [or] any lesser crime that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” However, section 24(B) of the Procedures allows an attorney to petition for readmission where his felony offense involved the culpable mental state of recklessness or negligence.

Madden argued that his conviction for misprision of a felony involved a mental state of recklessness or negligence and, thus, fell within the exception to permanent disbarment created by section 24(B)(2). Further, Madden argued that he did not actively conceal the crime but, instead, that he informed federal agents of all the information he knew about the drug transaction between Greenlee and Steinmetz. In support of his petition, Madden provided the Board of Law Examiners with several letters of recommendation as well as verbal testimony attesting to his good character. Madden’s former business associates and members of the legal community supplied these recommendations.

After conducting a hearing and evaluating all of the evidence, the Board of Law Examiners determined:

[A]lthough Madden had been convicted of a felony, which fits within the definition of a ‘Serious Crime’ and which would otherwise foreclose his readmission to the Bar, the crime committed by Madden involved the mental state of negligence or recklessness, and,

---

24. Madden, 2012 Ark. 279, at 2, ___ S.W. 3d at ___.
27. Madden, 2012 Ark. 279, at 2, ___ S.W.3d at ___.
28. Id. at 12-13, ___ S.W.3d at ___.
29. Id. at 5-6, ___ S.W.3d at ___.
30. Id. at 5, ___ S.W.3d at ___.

therefore, his circumstances fell within the exception to the rule.\footnote{Id. at 7, ___ S.W.3d at ___}

Furthermore, the Board found that Madden was rehabilitated and had successfully established present mental and emotional stability and good moral character.\footnote{Madden, 2012 Ark. 279, at 7, ___ S.W.3d at ___}

After reviewing the Board’s recommendation to reinstate Madden’s license, the Arkansas Supreme Court determined that Madden’s offense was a serious crime that did not involve the mental state of recklessness or negligence and, therefore, precluded Madden from applying for readmission under section 24 of the Procedures.\footnote{Id. at 14-15, ___ S.W.3d at ___} The court dismissed Madden’s argument that he did not meet the active-concealment element of misprision of a felony and concluded that Madden was bound by his guilty plea.\footnote{Id. at 13, ___ S.W.3d at ___; see also PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 15(C)(3). ("A certified copy of the judgment of conviction or of evidence of a plea of guilty or nolo contendere shall be conclusive evidence of the attorney's guilt.")}

The court refused to consider evidence regarding Madden’s intent to commit misprision of a felony and emphasized that an “attorney subject to discipline may not offer evidence inconsistent with the essential elements of the crime for which he or she was convicted.”\footnote{Madden, 2012 Ark. 279, at 13-14, ___ S.W.3d at ___; see also PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 15(C)(4).} Ultimately, Madden’s plea resulted in the entry of a judgment and conviction order in the United States District Court for the Eastern District of Arkansas.\footnote{Madden, 2012 Ark. 279, at 13, ___ S.W.3d at ___}

Importantly, Madden’s rehabilitation and existing moral character did not impact the Arkansas Supreme Court’s majority opinion. The majority held steadfast to the per se bar on readmitting someone who has been convicted of a “serious crime.”\footnote{Id. at 15, ___ S.W.3d at ___}
III. THE LAW GOVERNING READMISSION IN ARKANSAS

The Arkansas Supreme Court derives its authority to regulate the practice of law and the conduct of attorneys from amendment 28 to the Arkansas Constitution.\textsuperscript{38} The Arkansas Supreme Court has stated that the practice of law is a privilege, not a right, and “those who receive that privilege must adhere to the standards of conduct prescribed for the profession.”\textsuperscript{39} “Once a lawyer has lost his license to practice law, either through surrender or disbarment, there is a presumption against readmission.”\textsuperscript{40} However, the court has stated that a disbarment proceeding is not for the purpose of punishment\textsuperscript{41} and that “each case must be examined on its own set of facts.”\textsuperscript{42} Further, the Arkansas Supreme Court has held that its primary considerations on the question of readmission are the integrity of the bar and the courts and the public’s interest in readmitting the disbarred attorney.\textsuperscript{43} The court emphasizes that when considering an application for readmission to the bar, it gives only “due consideration” to rehabilitation and places the most emphasis on public trust and the honor of the profession.\textsuperscript{44} Although procedures exist for gaining readmission to the bar, disbarred attorneys or those who have surrendered their licenses often face “impossible[] barriers” to gaining readmission to the bar.\textsuperscript{45} Specifically, individuals who have committed felonies are

\begin{itemize}
  \item \textsuperscript{38} ARK. CONST. amend. 28; \textit{In re Anderson}, 312 Ark. 447, 452, 851 S.W.2d 408, 410 (1993) (“The constitutional amendment was adopted in 1928 to make it absolutely clear that this court could make rules regulating both the practice of law and the conduct of attorneys.”).
  \item \textsuperscript{39} Wilson v. Neal, 341 Ark. 282, 297, 16 S.W.3d 228, 237 (2000) (Smith, J., concurring in part and dissenting in part).
  \item \textsuperscript{40} \textit{Anderson}, 312 Ark. at 452, 851 S.W.2d at 410.
  \item \textsuperscript{41} \textit{In re Shannon}, 274 Ark. 106, 108-A, 621 S.W.2d 853, 855 (1981) (per curiam) (explaining that the court should not conduct a readmission proceeding through the lens of punishment).
  \item \textsuperscript{42} \textit{In re Lee}, 305 Ark. 196, 199, 806 S.W.2d 382, 384 (1991) (per curiam).
  \item \textsuperscript{43} \textit{Anderson}, 312 Ark. at 452, 851 S.W.2d at 410.
  \item \textsuperscript{44} Id. at 453, 851 S.W.2d at 411.
\end{itemize}
An attorney seeking readmission to the Arkansas Bar must file a petition with the Board of Law Examiners (Board). To establish eligibility for reinstatement to the bar, the applicant must prove by a preponderance of the evidence that he is “of good moral character” and that he is mentally and emotionally stable. The court conducts the character assessment for attorneys seeking readmission on a case-by-case basis. The court holds former attorneys to an extremely high standard when applying for readmission. This standard for former attorneys is more stringent than the standard applied to individuals seeking admission to the bar for the first time.

After the Board has recommended an attorney’s reinstatement to the Arkansas Bar, it refers the matter to the Arkansas Supreme Court for review. The supreme court reviews reinstatement cases de novo and will not reverse the Board’s determination unless the Board’s findings of fact were clearly erroneous or its decision was arbitrary or groundless. The court has established that clear error exists when, although evidence may support the
Board’s findings, the supreme court is left with a “definite and firm conviction that a mistake has been committed.”

Most important to the court’s analysis is section 24 of the Procedures. Section 24 stipulates that an application for readmission to the Arkansas Bar will be disallowed permanently when an attorney’s disbarment resulted from conviction of a serious crime or the grounds for disbarment reflect adversely on the attorney’s honesty or trustworthiness, even if no conviction occurred. Section 24 contains an exception to this permanent-disbarment rule when the attorney’s underlying offense only requires a culpable mental state of negligence or recklessness. State courts across the nation have extensively evaluated this type of per se ban on readmission, and Arkansas is in the minority of jurisdictions that enforce such a ban.

IV. THE DIVERGENT APPROACHES TO REGULATING READMISSION TO THE BAR

In the 1970s, the American Bar Association conducted a study of lawyer-discipline systems around the country and released the Special Committee on Evaluation and Disciplinary Enforcement Report—better known as the “Clark Report.” The Clark Report’s results were shocking and revealed “a host of deficiencies with underfinanced, bar-controlled disciplinary systems that investigated relatively few complaints, sanctioned few of the lawyers investigated, imposed sanctions secretly and inconsistently, and protected the bar’s elite.” These findings prompted states to closely evaluate their disciplinary enforcement procedures and to make

---

59. See Finkelstein, supra note 4, at 590-91.
61. Id.
adjustments that would best achieve the goals of their disciplinary and enforcement systems. Consequently, in the decades following the Clark Report, the American legal community has taken two different approaches to regulating readmission to state bars.

First, fifteen states maintain some method of permanent disbarment. Many of these states, including Arkansas, allow for per se disbarment when an attorney commits certain prohibited acts. Generally, the offenses that will trigger per se disbarment involve acts of “moral turpitude.” Acts of moral turpitude include felony theft, fraud, deceit, and obstruction of justice. Proponents of permanent disbarment commonly justify its use as “an effective and efficient method by which the public is protected from unscrupulous attorneys, and honesty and integrity are maintained in the legal profession.”

Second, thirty-five states and the District of Columbia do not have a procedure to permanently disbar lawyers. Many of these states adhere to the American Bar Association’s philosophy that “[r]einstatement is appropriate when a lawyer shows rehabilitation.” Further,
states adhering to the rehabilitative approach do not impose bright-line rules establishing classes of conduct that trigger per se bans on readmission. Instead, these states generally believe that every case for readmission deserves scrutiny on its own merits. States that adhere to the rehabilitative approach apply a presumption against readmission once a lawyer loses his license to practice law. Nonetheless, an applicant for readmission can produce evidence demonstrating he has good moral character and fitness to practice at the time he reapplies to the bar. When determining whether an applicant is rehabilitated, courts often ask if the applicant “has undergone such a moral change as now to render him a fit person to enjoy the public confidence and trust once forfeited.”

Ultimately, the efficacy of lawyer-discipline systems is unclear. A precise evaluation of such systems is difficult because of: “[i]nadequate record-keeping by many jurisdictions; differing reporting methods; uninformative published opinions; private discipline; limited empirical research; and the failure to report much lawyer misconduct.” Nevertheless, existing data makes one fact very clear: jurisdictions across the country must continue improving their disciplinary programs to protect the public and maintain public confidence in the legal system.

71. See In re Hamm, 123 P.3d 652, 656 (Ariz. 2005); Florida Bd. of Bar Exam’rs re J.J.T., 761 So. 2d 1094, 1096 (Fla. 2000) (“The more serious the misconduct, the greater showing of rehabilitation that will be required [to gain readmission].”); In re Johnson, 259 S.E.2d 57, 59 (Ga. 1979) (“All that we can require is a showing of rehabilitation and of present moral fitness.” (quoting Resner v. State Bar, 433 P.2d 748, 755-56 (Cal. 1967))).

72. See Hamm, 123 P.3d at 656 (“[T]he rules and standards governing admission to the practice of law in Arizona include no per se disqualifications . . . .”); Stevens v. State Bar, 794 P.2d 925, 928 (Cal. 1990) (“There is no fixed formula in deciding the appropriate discipline.”).

73. Rotunda & Devlin, supra note 1 (citing MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 25 cmt. (1996)).

74. See, e.g., Statewide Grievance Comm. v. Rapoport, 987 A.2d 1075, 1083 (Conn. App. Ct. 2010); In re Allen, 509 N.E.2d 1158, 1160-61 (Mass. 1987); In re Application of Matthews, 462 A.2d 165, 176 (N.J. 1983) (“Rehabilitation is pertinent because the Court is interested in an applicant’s present fitness to practice law.”).

75. In re Singer, 735 N.W.2d 698, 703 (Minn. 2007) (quoting In re Jellinger, 728 N.W.2d 917, 922 (Minn.2007)).

76. Levin, supra note 60, at 6.

77. Id. at 6-7.
A. "Per Se" Permanent Disbarment

A few centuries ago in England, barristers who misbehaved were subjected to public censure and were “physically thrown over the wooden railing—‘the bar,’ and hence the term ‘disbarment’—that separated the judges’ and lawyers’ half of the courtroom from the spectators.”

Today, the physical censure of lawyers no longer exists, but some states still inflict severe punishment on attorneys through permanent disbarment.

Disciplinary measures like permanent disbarment are useful for state supreme courts, which must maintain the integrity and public confidence of their bars. To promote public confidence and high integrity, some courts specify particular conduct that they will not tolerate and prescribe that such conduct will result in a permanent ban to readmission. Proponents of this approach reason that permanent disbarment makes sense when an individual commits a crime that is totally incompatible with practicing law. A classic example of such conduct is the misappropriation of clients’ funds. The immoral character of such an offense is extremely clear to the public, and the court’s treatment of the offense readily affects the public’s confidence in the bar.

Louisiana, for example, has composed detailed guidelines illustrating the types of conduct that might warrant permanent disbarment. The Louisiana Supreme Court is not bound by these guidelines when making permanent-disbarment decisions, but the court has made

80. See In re Deokaran, 855 So. 2d 733, 735 (La. 2003); In re Ramsey, 301 S.E.2d 470, 471 (S.C. 1983) (holding that distributing marijuana and cocaine involved moral turpitude and warranted permanent disbarment).
82. Zazzali, supra note 81, at 316-17.
83. Id.
84. LA. SUP. CT. R. 19 app. E.
85. LA. SUP. CT. R. 19 app. E.
clear the types of conduct that it refuses to tolerate.\footnote{See, e.g., In re Quaid, 865 So. 2d 28, 32-33 (La. 2003) (holding that the court will not tolerate conduct that was “intended to frustrate the administration of justice”).} Guidelines like Louisiana’s communicate clearly the expectations of the bar and establish concrete standards of conduct that the bar expects attorneys to observe.

Permanent bars to readmission have five general justifications: (1) the risk of recidivism; (2) protecting the public’s perception of the bar; (3) fairness; (4) saving judicial resources; and (5) deterrence.\footnote{See David E. Johnson, Jr., The Case for Permanent Disbarment, PROF. LAW., Feb. 1994, at 22, 26-27.}

1. The Risk of Recidivism

Often times, if an offending attorney is readmitted, he may go on to harm new clients and commit new wrongs.\footnote{Rotunda & Devlin, supra note 1.} Numerous lawyers have been disbarred twice, and at least one attorney has been disbarred three times.\footnote{Johnson, supra note 87, at 27 & n.8. (citing La. State Bar Ass’n v. Krasnoff, 515 So. 2d 780 (La. 1987); La. State Bar Ass’n v. Krasnoff, 502 So. 2d 1018 (La.1987); La. State Bar Ass’n v. Krasnoff, 488 So. 2d 1002 (La. 1986)).} Moreover, even if an attorney is disbarred in a state that applies a per se ban on readmission, that attorney may be admitted to practice law in another state with more flexible readmission guidelines and, thus, may subsequently injure new clients.\footnote{See Kimberly A. Lacey, Second Chances: The Procedure, Principles, and Problems with Reinstatement of Attorneys After Disbarment, 14 GEO. J. LEGAL ETHICS 1117, 1131 (2001).}

For instance, Louisiana reported that ten out of every twenty-three lawyers, or forty-four percent, who had been readmitted to the bar after disbarment found themselves facing new disciplinary charges.\footnote{Finkelstein, supra note 4, at 595; see also Terry Carter, Bounced from the Bar, A.B.A. J., Oct. 2003, at 56, 60 (noting that during a twenty-five-year period, spanning from 1975 to 2000, “85 percent of the lawyers who applied for readmission succeeded and that 44 percent of them were disciplined again”).} Additionally, a study covering a thirty-four year period in New Jersey revealed that over twenty-seven percent of attorneys who were disciplined for financial violations were subsequently disciplined for additional financial violations.\footnote{Johnson, supra note 87, at 26.} At one
point, the State of Michigan reported that three out of every four lawyers that received an official reprimand subsequently engaged in additional acts of misconduct.\(^9\)

Even in jurisdictions where recidivism rates are lower, the fact remains that a few instances of attorney misconduct can cause substantial damage.\(^4\) Although these statistics may not “translate equally to every other state or to every type of misconduct,” they exemplify the danger of not instituting a per se bar to readmission where attorneys engage in repeated acts of misconduct or commit serious offenses.\(^5\)

2. Protecting the Public’s Perception of the Bar

When disbarred attorneys gain readmission to the bar and subsequently engage in misconduct, the public perception is that “lawyers, members of a self-regulated profession, are merely ‘protecting themselves’ by not utilizing permanent disbarment.”\(^6\) Exacerbating this problem is that the public often has difficulty accessing records that document an attorney’s past punishment.\(^7\) As a result, in some instances, clients may have the false impression that they are working with credible lawyers where, in reality, an attorney may have been punished, but the client cannot access records of the attorney’s past misconduct.\(^8\) If a client were to discover, after working with an attorney for several months, that his attorney had engaged in past misconduct, that client would likely lose confidence “in the system that permitted the deception.”\(^9\)

Each instance of attorney misconduct undermines the reputation and honor of the legal system. Attorney misconduct also harms the public image of lawyering, “whether it be in national media, churches, classrooms, courtrooms, local coffee shops or even in our own


\(^4\) Rotunda & Devlin, *supra* note 1.


\(^6\) Finkelstein, *supra* note 4, at 594-95.

\(^7\) Levin, *supra* note 60, at 15.

\(^8\) Finkelstein, *supra* note 4, at 594.

\(^9\) *Id.*
conscience.”  

When an attorney’s wrongdoings cross into the realm of illegal activity, the attorney damages both the legal system and the profession.  

The public perception of the bar will improve if the public is aware that a state bar is punishing serious misconduct through permanent disbarment. Hence, permanent disbarment is an extremely effective means of solidifying confidence in the judicial system because such per se disbarment ensures that the public will not suffer additional harm from an attorney who has previously engaged in misconduct.  

3. Fairness  

A major criticism of the rehabilitative approach to lawyer discipline is that it typically involves a very vague set of guidelines for imposing sanctions on offending attorneys. Guidelines such as the American Bar Association’s Model Rules for Disciplinary Enforcement are often “descriptive, not prescriptive” and allow for substantial use of judicial discretion. Courts adhering to the rehabilitative approach commonly weigh aggravating factors against mitigating factors to determine the appropriate sanction for an offending attorney. One major problem with utilizing these factors is that they generally are not accompanied by useful guidelines that spell out the significance of a particular factor. Instead,  

100.  Farris v. State, 764 So. 2d 411, 437 (Miss. 2000).  
101.  Id.  
102.  Finkelstein, supra note 4, at 594.  
103.  Lacey, supra note 90, at 1134.  
105.  See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10 cmt. (2013); see also In re Hamm, 123 P.3d 652, 659 (Ariz. 2005) (explaining that when making a rehabilitation determination, the court “weigh[s] those factors tending to show rehabilitation against those tending to show a lack thereof”). Examples of aggravating factors include: prior disciplinary offenses; dishonest or selfish motive; and a pattern of misconduct. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10 cmt. Mitigating factors include: absence of prior disciplinary records; absence of a dishonest or selfish motive; and personal or emotional problems. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10 cmt.  
106.  Levin, supra note 60, at 49.
courts merely list the factors, allowing disciplinary authorities to attach their own weight to the presence or absence of a factor. This approach results in inconsistent application of the factors, producing dissimilar treatment of similar conduct. On the other hand, a rule establishing a per se ban on readmission when an attorney commits specific conduct achieves uniformity and consistency for treatment of similarly situated offenders.

Furthermore, the presentation of character and reputation evidence during readmission proceedings produces inconsistent treatment for similar rule-breaking attorneys. When considering whether an attorney has been successfully rehabilitated from prior misconduct, courts often rely on character and reputation evidence presented by judges and other influential members of the legal community. This consideration provides an advantage for those lawyers who have high-profile contacts and unfairly disadvantages lawyers who are not as well connected in the legal community. Additionally, the value of character and reputation evidence is suspect because, often times, the individuals testifying on behalf of the offending attorneys “have no knowledge of the specifics of a lawyer’s practice or of the wrongdoing alleged.”

Finally, by considering a wide range of “individual circumstances” when making rehabilitation determinations, decision makers are susceptible to providing preferential treatment to attorneys with whom they identify. Thus, when a court predetermines conduct that is incompatible with membership to its bar and creates a per se ban on readmission if that conduct occurs, the court can ensure

107. See id.

108. See id. at 50.

109. See In re Wigoda, 395 N.E.2d 571, 575 (Ill. 1979) (“Just as a degree of ‘uniformity’ or ‘degree of consistency in the selection of sanctions’ is required in disciplinary proceedings, so too is consistency required in reinstatement proceedings.” (internal citations omitted)).

110. See Miriam D. Gibson, Comment, Proving Rehabilitation, J. LEGAL PROF., 1995-96, at 239, 243-44.

111. See id. at 244 (“Letters or testimony from prominent officials or those eminent in the law and business appear to be given special weight.”).

112. Levin, supra note 60, at 55.

113. Id. at 31.
that prejudicial collateral matters do not affect disciplinary decisions.

4. Conserving Judicial Resources

Disbarred attorneys sometimes apply for readmission multiple times, “pushing until a tired bar relents.” Hearing multiple readmission cases, especially when attorneys have minimal chances of gaining readmission, deprives the judicial system of valuable resources. States could allocate these resources to make improvements elsewhere in the judicial system. But states that follow the rehabilitative approach waste resources on processing hundreds of hopeless readmission applications and conducting costly evidentiary hearings. When a court is certain that it will not readmit an offending attorney due to the nature of the attorney’s conduct, the court should not allow that attorney to apply for readmission. Moreover, the absence of a per se bar to readmission harms the offending attorney by providing him with false hope that he may be readmitted. An attorney may believe he can prove rehabilitation and gain readmission, but in reality, a court will perpetually deny him readmission due to the nature of his misconduct.

5. Deterrence

Deterring harmful attorney conduct is one of the most beneficial features of a per se ban on readmission. The per se approach specifically deters offending attorneys from harming new clients and also provides general deterrence to those attorneys who “might be tempted to engage in

---

114. Lacey, supra note 90, at 1132; see also Carter, supra note 91, at 59 (reporting that an attorney sought readmission ten times before succeeding).
115. Badgley, supra note 104, at 735.
116. See Johnson, supra note 87, at 27.
117. Id. at 27.
118. See, e.g., In re Massey, 670 So. 2d 843, 846 (Miss. 1996) (McRae, J., concurring in part and dissenting in part) (explaining that a per se bar to readmission provides the petitioning attorney with an unrealistic hope of rehabilitation).
119. Id.
120. See Fl. Bar v. Liberman, 43 So. 3d 36, 39 (Fla. 2010).
[similar] violations.” A rule establishing permanent disbarment, which is likely contained in a state’s rules governing readmission to the bar, provides notice to all attorneys of the consequences that will result from certain misconduct. An attorney’s behavior will be more heavily influenced when he knows the consequences of committing specified conduct. Vague and unpredictable rules, such as the rehabilitative approach to readmission, simply fail to deliver the same deterrence.

B. The Rehabilitative Approach to Readmission

Currently, thirty-five states and the District of Columbia do not have mechanisms for permanently banning attorneys from readmission to the practice of law. Further, the American Bar Association’s Model Disciplinary Rules (Model Rules) do not provide a procedure for permanently disbaring an individual; instead, the Model Rules explain that “[r]einstatement is appropriate when a lawyer shows rehabilitation.” States that adhere to this rehabilitative approach tend to agree that “the nature of the misconduct leading to disbarment . . . is not the most significant [factor] in determining whether an attorney should be reinstated.” These courts believe that an individual can reform his character and that the “fact that one has transgressed does

121. Id.
122. See In re Martin, 506 N.W.2d 101, 107 (S.D. 1993) (Amundson, J., concurring in part and dissenting in part) (explaining that the State strives to maintain consistency in its disciplinary procedures to make the practicing bar aware of the consequences of their actions).
123. See id.
125. Finkelstein, supra note 4, at 591.
126. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 25 cmt. (2013); see also In re Stein, 721 S.E.2d 898, 899 (Ga. 2012) (reinstating an attorney who was disbarred after a criminal conviction when he demonstrated by clear and convincing evidence that he was fit to practice law, given his age, his candor, his credibility, and his rehabilitation through his personal struggles and volunteer work).
not forever place him beyond the pale of respectability.” 128 Advocates for the rehabilitative approach argue that readmission decisions should: (1) consider an individualized balancing test for each applicant; (2) incentivize disbarred attorneys to reform their lives after disbarment; (3) maintain flexibility and fairness; and (4) better protect the public and the integrity of the bar.

1. An Individualized Assessment

Courts that promote the rehabilitative approach tend to be more forward looking 129 and adhere to the philosophy that the ultimate readmission determination is whether the applicant presently has the good moral character required for admission to the bar. 130 These courts reason that if dangers to the public no longer exist, and the attorney has demonstrated by clear and convincing evidence that he is fit to regain the “‘public confidence and trust once forfeited,’” the attorney should be allowed to resume the practice of law. 131

When evaluating an attorney’s application for readmission, courts often engage in a balancing test that weighs the nature and seriousness of the offense against the evidence of the attorney’s rehabilitation. 132 For example, courts typically consider the following factors: “(1) the petitioner’s recognition of the wrongfulness of his conduct; (2) the length of time since the original misconduct and the suspension; (3) the seriousness of the original misconduct; (4) the existence of physical or mental illness or pressures

128. Id. (quoting Greene, 904 S.W.2d at 235).
129. Lacey, supra note 90, at 1119.
131. In re Holker, 765 N.W.2d 633, 638 (Minn. 2009) (per curiam) (quoting In re Jellinger, 728 N.W.2d 917, 922 (Minn. 2007)); see also In re Ellis, 930 N.E.2d 724, 726 (Mass. 2010); Lacey, supra note 90, at 1119.
132. Fl. Bd. of Bar Exam’rs ex rel. McMahan, 944 So. 2d 335, 337 (Fla. 2006) (quoting Fl. Bd. of Bar Exam’rs re D.M.J., 586 So. 2d 1049, 1051 (Fla. 1991)).
that are susceptible to correction; and (5) the petitioner’s intellectual competency to practice law.”

In practice, the seriousness of an attorney’s past misconduct significantly affects the balancing test; the more egregious the attorney’s misconduct, the further the scales tip against readmission. For example, the defendant in the Arizona case *In re King* previously pled guilty to one count of murder, and as a result of that conviction, the court noted that the attorney would have to make an “extraordinary showing” of evidence to prove his rehabilitation. Although the crime committed by the attorney was extremely egregious, the court would not apply a per se bar to readmission “out of respect for and belief in rehabilitation.” The Arizona Bar was able to maintain the integrity of, and public confidence in, its bar by conducting an individualized assessment of the offending attorney and by determining that he was still unfit to practice law. Thus, advocates of the rehabilitative approach argue that this approach is no less effective in maintaining the integrity and public confidence of a state’s bar than a per se ban on readmission for convicted murderers.

2. Life After Disbarment

Allowing an attorney to apply for readmission incentivizes an offending attorney to reform the character flaw that caused his initial disbarment. This character reformation could include paying restitution to victims who may otherwise go unpaid if the attorney is permanently

---

133. *In re Mose*, 754 N.W.2d 357, 360-61 (Minn. 2008) (per curium) (quoting *In re Singer*, 735 N.W.2d 698, 703 (Minn. 2007); see *In re Arrotta*, 96 P.3d 213, 216 (Ariz. 2004); LaQuey v. People, 180 P.3d 1031, 1037 (Colo. O.P.D.J. 2008); *In re Pier*, 561 N.W.2d 297, 300-01 (S.D. 1997).


135. Id. at 882-83.

136. Id. at 886.

137. Cf. *Finkelstein*, supra note 4, at 597 (“If permanent disbarment is meant to protect the reputation of the profession as well as to protect the public in general, why not simply allow judges to use their discretion to serve this goal?”).

138. See id.

Moreover, permanent disbarment could push a lawyer into criminal activities, especially those for which his education may make him particularly well-suited.\(^\text{141}\) Even if the lawyer does not resort to criminal activity, the stigma of being permanently disbarred makes the former attorney less attractive to employers than he would be if he had never become a lawyer.\(^\text{142}\) Further, some states prohibit a disbarred lawyer from working in any “law work activity customarily done by law students, law clerks or other paralegal personnel.”\(^\text{143}\) Some states even prohibit disbarred attorneys from “maintaining a presence or occupying an office where a law practice is being conducted.”\(^\text{144}\) Thus, in some instances, a per se ban on readmission permanently forecloses the attorney from making a living in any law-related area—even if the attorney has spent his entire life working in the legal field and possesses no other professional skills.

3. Flexibility and Fairness

Another troubling effect of the per se ban on readmission is that it may negatively impact the way an attorney chooses to defend himself after being charged with a felony offense.\(^\text{145}\) For example, under the per se approach, if a state charges an attorney with a felony, he may face severe pressure to accept a plea bargain for a misdemeanor, even if he did not commit the offense.\(^\text{146}\) Because of the unpredictability of jurors and their common lack of sympathy for attorneys, an attorney may forego his “constitutional privilege to defend himself in court” because he risks permanent disbarment if he is convicted of a felony.\(^\text{147}\) By accepting a misdemeanor plea, the attorney can at least participate in a hearing and present evidence

\(^{140}\) Lacey, supra note 90, at 1127.

\(^{141}\) Finkelstein, supra note 4, at 596.


\(^{143}\) Id. (citing WISC. SUP. CT. R. OPERATING & PROCEDURES 22.26).

\(^{144}\) Id. (citing ILL. S. CT. R. 764(b)).


\(^{146}\) Id. at 429.

\(^{147}\) Id. at 428.
and testimony supporting his fitness to practice law.\footnote{148} A strong argument exists that a rigid per se rule disbarring an attorney upon a felony conviction is too inflexible when the attorney, in order to ensure his livelihood, feels strongly compelled to sacrifice his right to defend himself.\footnote{149}

Additionally, the per se rule’s problems become apparent when a court applies the rule to similar acts of misconduct that differ greatly in their degree of reprehensibility. For example, the misuse of client funds is one of the most common types of misconduct that will lead to permanent disbarment.\footnote{150} If a court has imposed a rule that triggers a per se bar to readmission when an attorney misuses client funds, the rule will bar from readmission both the attorney who has converted $50,000 of client money and the attorney who has converted only $50 of client money.\footnote{151} Although this rigid rule achieves consistent punishment, it disregards the punishment’s proportionality for offenses involving varying degrees of reprehensibility. Additionally, a per se rule barring readmission when an attorney commits a felony will bar a lawyer from practicing law even if the felony offense does not correlate to practicing law responsibly.\footnote{152}

\textit{4. Protecting the Public and the Integrity of the Bar}

Some scholars have suggested that, by requiring readmitted attorneys to obtain malpractice insurance and bonding, courts can reduce the financial impact on disciplinary authorities, which exist to monitor readmitted attorneys.\footnote{153} By obtaining malpractice insurance and bonding, readmitted attorneys become financially responsible for their actions.\footnote{154} Such a requirement would

\begin{footnotesize}
\footnote{148. Id.} \footnote{149. Id.} \footnote{150. See LA. SUP. CT. R. 19 app. E, guideline 1; Ky. Bar Ass’n v. Watson, 821 S.W.2d 812, 812 (Ky. 1992); In re Hall, 574 A.2d 951, 951 (N.J. 1989); In re Pierson, 571 P.2d 907, 907 (Or. 1977) (en banc) (per curiam).} \footnote{151. See Levin, supra note 60, at 30-31.} \footnote{152. See Craig Epifanio, Letter, \textit{Bar Admissions and Felons}, FLA. BAR NEWS, Apr. 30, 2009, at 2 (raising questions of whether a felony DUI conviction should bar an individual from offering legal services).} \footnote{153. Rotunda & Devlin, \textit{supra} note 1, at 13.} \footnote{154. Id.}
\end{footnotesize}
also provide extra protection for an attorney’s clients and give the readmitted attorney an additional incentive to conform his behavior to established professional standards. Of course, courts would first need to determine that the attorney was successfully rehabilitated and fit to practice before considering the bonding and insurance requirements.

Ultimately, if the true purposes of lawyer discipline are protecting the public and the integrity of the bar, a strong argument exists that courts should allow attorneys to resume practicing once they have been rehabilitated and no longer pose a threat to the public. The following standard exemplifies such a rehabilitative test:

[The attorney] must show through such evidence that when placed in a position of responsibility, he can act honestly and truthfully and with trustworthiness and reliability in his dealing with others. Further, this evidence must show that he has an understanding of and commitment to the proper administration of justice that may transcend his personal interests as well as the interests of particular clients. He must demonstrate an unquestioned capacity to comport himself properly as a lawyer in full conformity to [the] Disciplinary Rules.

Courts should be careful not to favor a per se approach over a rehabilitative approach solely because the stricter per se rule would improve the perception of the bar. Although maintaining a positive perception of the bar is important, a court should impose a standard because it believes that the standard is right. If a court adopts a rehabilitative approach to readmission, and the public misunderstands the aim of rehabilitation, the court must educate the public about the benefits and rationale of such an approach.

155. Id.
157. Rotunda, supra note 139.
158. Id.
159. Id. at 24.
V. ARKANSAS’S APPROACH: A RECOMMENDATION

Ultimately, the Arkansas Supreme Court is tasked with protecting the public, maintaining the integrity of the courts, and sustaining the honor of the legal profession. As demonstrated by In re Madden, the supreme court believes that it can best protect the public and maintain the integrity of Arkansas courts by adhering to the per se approach. This approach bans individuals who purposefully commit serious crimes from applying for readmission to the Arkansas Bar. Arkansas should continue to apply this general approach.

However, the Arkansas Supreme Court should consider creating a narrow exception to the current rule. The exception would allow a disbarred attorney who pleads guilty to a crime that does not involve the mental state of recklessness or negligence to petition the court for the opportunity to apply for readmission. To qualify for this exception, the petitioning attorney must produce strong evidence indicating that he did not actually meet the intent element of the offense underlying his guilty plea. After reviewing the evidence, the court could still retain the discretion to ban the attorney from applying for readmission. If the court found that the attorney committed the offense in a knowing or purposeful manner, an absolute ban would remain appropriate. This proposed exception respects the uniqueness of each readmission case that comes before the Arkansas Supreme Court, and it allows the court to achieve rehabilitative ends within the confines of the per se approach. Further, the exception

161. In re Madden, 2012 Ark. 279, at 14-15, ___ S.W.3d. ___, ___.
162. PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 24(B)(2). However, Arkansas appreciates rehabilitation by recognizing that individuals who do not commit serious crimes or engage in conduct that reflects adversely on the individual’s honesty or trustworthiness can be rehabilitated and readmitted. See Redden v. Ark. State Bd. of Law Exam’rs, 371 Ark. 584, 589, 269 S.W.3d 359, 362 (2007) (holding that a disbarred attorney had not sufficiently proven rehabilitation to meet the “good moral character” required for admission to the Bar); see also Smith v. State Bd. of Law Exam’rs, 357 Ark. 628, 634, 187 S.W.3d 842, 846 (2004) (“Experience teaches that true reformation does occur. With the passage of time, this applicant may mature; his insight may develop; he may be able to show that good moral character requisite to admission to the Bar.” (quoting In re Crossley, 310 Ark. 435, 445, 839 S.W.2d 1, 6 (1994))).
balances the imprecision of the plea function in the criminal-justice system with the need for precision in regulating attorneys’ professional conduct.

A. Per Se Prevails

The Arkansas Supreme Court reiterated in *Madden* that “the practice of law is a privilege and not a right.”\(^{163}\) Each member of the bar should respect this privilege by conforming his life and legal practice to strict ethical standards. The supreme court provides Arkansas attorneys with an ethical template by identifying certain conduct—including serious crimes—that an attorney should never commit.\(^{164}\) The court describes this conduct in its rules regulating readmission to the bar.\(^{165}\) Therefore, the court has forewarned each attorney of the bar’s expectations and the consequences of failing to meet those expectations.

The clear standards spelled out in Arkansas’s rules governing readmission—and the court’s strict adherence to those standards in *Madden*—serve important deterrence functions. By specifying the consequences for committing certain misconduct, the per se rule barring readmission strongly deters Arkansas attorneys from engaging in serious crimes and harming society, their clients, or their own professional reputations. A rehabilitative rule that does not establish clear consequences for the commission of unacceptable behavior fails to deliver the same deterrence.\(^{166}\)

Further, statistics show that disbarred attorneys who are readmitted to practice pose the risk of committing future wrongs and harming their clients and society.\(^{166}\) Even where the risk for recidivism is not overwhelming, a few instances of attorney misconduct can cause significant damage.\(^{167}\) Section 2(J) of the Procedures deters the commission of serious crimes;\(^ {168}\) thus, a rigid rule is very

---

163. *Madden*, 2012 Ark. 279, at 8, ___ S.W.3d at ___.
164. PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 24(B)(2).
165. PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 2(J).
166. See supra Part IV.A.1.
168. See PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 2(J).
In addition to protecting the public, the Arkansas Supreme Court emphasizes “maintain[ing] the integrity of the courts and the honor of the profession” when making its readmission determinations. In addition to protecting the public, the Arkansas Supreme Court emphasizes “maintain[ing] the integrity of the courts and the honor of the profession” when making its readmission determinations. The public’s trust in the profession may diminish where courts have flexible readmission rules for attorneys who have been disbarred for knowingly or intentionally committing serious crimes. The court most effectively maintains the integrity of the Arkansas Bar by specifying conduct that it finds incompatible with the practice of law and by warning attorneys of the consequences for engaging in such conduct.

Section 24 of the Procedures—as applied in Madden—provides such a warning. This section specifies that the court will not tolerate a lawyer’s knowing or purposeful commission of a serious crime and explains that the consequence of engaging in such conduct will be a permanent ban on readmission. Consequently, the public perception of the bar will improve where the public is aware that courts are punishing misconduct severely through permanent disbarment. Moreover, attorneys and the public will hold the bar in higher esteem when the bar applies consistent punishment for similar offenses. Section 24 of the Procedures, as applied by the Arkansas Supreme Court in Madden, provides uniform punishment for all individuals who have surrendered their licenses or have been disbarred after purposefully committing serious crimes. Unlike the rehabilitative approach to readmission, which may produce dissimilar punishments for two attorneys who have committed the same offense, the per se approach uniformly and consistently treats similarly situated offenders.

Additionally, the Arkansas Judiciary has a strong interest in maximizing judicial efficiency. By maintaining a

---

170. In re Madden, 2012 Ark. 279, at 8, ___ S.W.3d ___, ___.
171. PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 24(B)(2).
172. Finkelstein, supra note 4, at 594.
173. See PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 24.
clear, per se ban on readmission for attorneys who knowingly or purposefully commit serious crimes, the Board of Law Examiners and the Arkansas Supreme Court will use their time and resources more efficiently. For example, the Executive Secretary to the Arkansas State Board of Law Examiners, Chris Thomas, testified that after overseeing approximately 6000 applications for admission over an eighteen-year time span, he could only remember one applicant with a felony conviction that was admitted to the bar.\(^\text{174}\) When the court is certain that it will not readmit an offending attorney due to the nature of his conduct, the court should not allow the attorney to apply for readmission.\(^\text{175}\)

Ultimately, Arkansas will best promote confidence in its courts, protect the public, and maintain integrity of the bar by retaining its current procedure of permanent disbarment for individuals who knowingly or purposefully commit serious crimes. However, the foremost consideration behind implementing a per se ban to readmission should not be promoting judicial economy or sending a message to the public. Rather, the Arkansas Supreme Court should adhere to the per se approach because the court believes that approach is right.\(^\text{176}\)

**B. A Proposed Exception to Section 24 of the Arkansas Supreme Court Procedures Regulating Professional Conduct**

Although Arkansas’s per se approach to readmission is preferable to a rehabilitative approach, it is not perfect. Arkansas’s current approach has room for a narrow exception. In readmission cases, such as *In re Madden*, the court has stated clearly that an attorney is permanently banned from readmission to the Arkansas Bar when a certified copy of the conviction establishes that the attorney

---


\(^\text{175}\) See In re Haynes, 2013 Ark. 102, at 7, ___ S.W.3d ___, ___ (granting an individual readmission to the Arkansas Bar where he pled *nolo contendere* to two felonies but had committed the felonies with reckless intent and proved his rehabilitation over a ten-year period).

\(^\text{176}\) See Rotunda, *supra* note 139.
committed a felony offense that does not involve the culpable mental state of recklessness or negligence. Therefore, an attorney who has pled guilty to such an offense cannot introduce evidence demonstrating that he did not actually meet the intent element of the offense. Banning such evidence prevents an attorney from arguing that he should be exempt from permanent disbarment under section 24(B) of the Procedures. Section 24(B) allows an attorney to petition for readmission where his felony offense involves the culpable mental state of recklessness or negligence.

One can argue that the formality of a guilty plea should not foreclose the court from analyzing a petitioning attorney’s intent to commit an offense. The court should be able to investigate the petitioning attorney’s intent when: (1) considerable uncertainty exists as to the petitioner’s intent to commit the offense; and (2) applying an absolute ban to readmission hinges upon the petitioner’s intent to commit that offense.

_in re Madden_ is an example of where the court could have applied an exception to the strict requirements of section 24 of the Procedures. Whether Madden actually committed misprision of a felony in a non-negligent manner was unclear; therefore, the court, using its discretion,

---

177. _In re Madden_, 2012 Ark. 279, at 13, ___ S.W.3d ___, ___.
178. _Madden_, 2012 Ark. 279, at 13-14, ___ S.W.3d at ___.
179. PROCEDURES ARK. SUP. CT. REGULATING PROF’L CONDUCT ATTORNEYS AT LAW § 24(B)(2).
180. The court reasoned that Madden committed misprision of a felony in a knowing or purposeful manner because he pled guilty to the offense and because “an affirmative act of concealment” was an essential element of the offense. _Madden_, 2012 Ark. 279, at 14, ___ S.W.3d at ___. Consequently, by pleading guilty to a crime that involves the element of active concealment, Madden was bound by his plea. _Id._ at 13, ___ S.W.3d at ___. The court explained that “[b]ecause an affirmative act of concealment is an element of the offense of misprision of a felony, it cannot be said that the offense of misprision of a felony requires a culpable mental state of negligence or recklessness.” _Id._ at 14, ___ S.W.3d at ___. However, Madden contended that he did not actively conceal the drug transaction and, therefore, the court should have determined that he negligently committed the crime, bringing him within the exception to permanent disbarment for crimes negligently committed. _Id._ at 12, ___ S.W.3d at ___. Madden pointed to the following facts to support this argument. First, during his initial meeting with the FBI and the United States Attorney, Madden spoke truthfully and informed the federal agents of all the information he knew concerning the drug transaction between Greenlee and Steinmetz. _Id._ at 13, ___ S.W.3d at ___. Second, the court suggested that the
could have applied an exception to section 24(B) by allowing Madden to apply for readmission. The court could then determine whether the evidence of Madden’s intent to commit misprision of a felony was sufficient to justify a lifetime ban from readmission to the Arkansas Bar.

Failing to look beyond a guilty plea will negatively impact attorneys’ abilities to defend themselves when they are charged with felony offenses. Furthermore, the prospect of being forever banned from practicing law may discourage attorneys from agreeing to plea bargains for felony offenses that involve a mental state other than recklessness or negligence. By foregoing a plea bargain, these attorneys will be compelled to defend themselves against elevated charges in court. Ultimately, an attorney is left without a good choice. The attorney may either accept the plea and be forever banned from practicing law or he can defend himself against elevated charges in a courtroom filled with unpredictable jurors who are commonly “unsympathetic to lawyers accused of [a] crime.”

Thus, the Arkansas Supreme Court should retain its per se approach to readmission, but it should also consider amending section 24 of the Procedures. This exception would allow a disbarred attorney to petition the court for an opportunity to apply for readmission where strong evidence shows the petitioning attorney did not actually meet the elements of the offense underlying his guilty plea. If the proposed exception existed when the Arkansas Supreme Court reviewed Madden’s petition, the court may have found that Madden did not meet the intent element of misprision of a felony. Consequently, Madden would not have been banned from applying for readmission. Moreover, he would have had the opportunity to prove that he was rehabilitated, mentally and emotionally stable, and that he had good moral character. Ultimately, by applying the proposed exception, the Arkansas Supreme Court

---

statement of facts prepared by the United States Attorney’s office might not have contained any allegation that Madden had taken affirmative steps to conceal the crime. Madden, 2012 Ark. 279, at 13, ___ S.W.3d at ___. Finally, the State never charged or convicted Greenlee or Steinmetz of the underlying crime. Id. Despite Madden’s argument, the court concluded that Madden’s guilty plea was determinative of his intent. Id.

181. Abramovsky, supra note 145.
could have achieved rehabilitative ends within the confines of the per se approach.

MARK T. DAVEN