

2011

Disbarment of Impaired Lawyers: Making the Sanction Fit the Crime

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Rush, Judith M. (2011) "Disbarment of Impaired Lawyers: Making the Sanction Fit the Crime," *William Mitchell Law Review*: Vol. 37: Iss. 2, Article 18.

Available at: <http://open.mitchellhamline.edu/wmlr/vol37/iss2/18>

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**DISBARMENT OF IMPAIRED LAWYERS: MAKING THE
SANCTION FIT THE CRIME**

Judith M. Rush[†]

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I. INTRODUCTION

The Minnesota Supreme Court's decisions in *In re Mayne*¹ and *In re Rodriguez*² may easily escape the notice of lawyers who do not take particular interest in lawyer discipline cases or lawyer impairment³ issues. Neither stands out as a case contrary to disciplinary case law or unjust in result⁴—Ms. Mayne and Mr. Rodriguez were both disbarred for theft.⁵ For those who are particularly cognizant of the plight of our colleagues who suffer from chemical dependency or mental illness, however, the decisions are tragic, since they announce the end of the legal careers of lawyers who engaged in misconduct while they were impaired.

The fact that neither was entitled to mitigation of their disciplinary sanction despite the impairments that led to their misconduct raises the question of whether our mitigation jurisprudence has led us closer to punishment and farther from compassion or hope of rehabilitation. This comment explores how lawyer impairment is addressed in Minnesota's disciplinary process,⁶ obstacles to achieving just and right decisions in cases involving impairment,⁷ and the compatibility of compassion and rehabilitation with the goals of lawyer discipline.⁸

II. BACKGROUND: MINNESOTA'S DISCIPLINARY SYSTEM

A. *Determining the Appropriate Disciplinary Sanction*

The purpose of lawyer discipline is to protect the public and the administration of justice from lawyers who do not properly discharge their professional duties to clients, the legal system, and the legal profession.⁹ Discipline is imposed not to punish the

1. *In re Mayne*, 783 N.W.2d 153 (Minn. 2010).

2. *In re Rodriguez*, 783 N.W.2d 170 (Minn. 2010).

3. As used in this comment, "impairment" describes a mental impairment, which may include or be a result of alcoholism or other addiction. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-429, 1 n.2 (2003).

4. *In re Rodriguez*, 783 N.W.2d at 170 (Anderson, J., dissenting) (stating that the decision appears "just" but it is not "right"). The same might be said of *In re Mayne*. See *In re Mayne*, 783 N.W.2d 153; *infra* Part IV.

5. *In re Rodriguez*, 783 N.W.2d at 170; *In re Mayne*, 783 N.W.2d at 163.

6. See *infra* Parts II and III.

7. See *infra* Part IV.

8. See *infra* Part V.

9. STANDARDS FOR IMPOSING LAWYER SANCTIONS 1.1 (1991).

lawyer, but to safeguard the administration of justice, protect the public, the courts, the profession, and deter future misconduct.¹⁰ The Minnesota Supreme Court's ultimate focus is on what sanction will best serve these interests.¹¹

Determining the appropriate sanction requires analysis of three factors: 1) the nature of the misconduct; 2) the cumulative weight of the disciplinary violations; and 3) the harm to the public, the legal profession, and the administration of justice.¹² The court looks at each case on its facts, considers both aggravating and mitigating circumstances, and looks to similar cases for guidance.¹³

10. See *In re Stanbury*, 561 N.W.2d 507, 512 (Minn. 1997) ("Discipline is imposed not to punish the lawyer, but to protect the public, to safeguard the administration of justice, and to deter potential future misconduct."); *In re Hanson*, 258 Minn. 231, 233, 103 N.W.2d 863, 864 (1960) ("The purpose of disciplining an attorney is not to punish him, but to guard the administration of justice and to protect the courts, the legal profession, and the public.");

11. See *In re Andrade*, 736 N.W.2d 603, 609 (Minn. 2007) (Page, J., dissenting) ("[M]y analysis of the case starts not from the presumption of disbarment, but with an analysis of what sanction best serves the purposes of attorney discipline."); see also *In re Jellinger*, 728 N.W.2d 917, 922–23 (Minn. 2007) ("To further [the purposes of the disciplinary system], we have imposed conditions on reinstatement in many previous cases, and often those conditions have been as rigorous . . ."); *In re Rudawski*, 710 N.W.2d 264, 271 (Minn. 2006) ("The purpose of disciplinary sanctions for professional misconduct is not to punish the attorney, but rather to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys." (internal quotation marks omitted) (quoting *In re Vaught*, 693 N.W.2d 886, 890 (Minn. 2005))); *In re Pierce*, 706 N.W.2d 749, 755–56 (Minn. 2005) ("The purposes of disciplinary sanctions for professional misconduct are to protect the public, to protect the judicial system, and to deter future misconduct by the disciplined attorney as well as by other attorneys." (internal quotation marks omitted) (quoting *In re Oberhauser*, 679 N.W.2d 153, 159 (Minn. 2004))); *In re Otis*, 582 N.W.2d 561, 565 (Minn. 1998) (holding that disbarment was not necessary to protect the public); *In re Milloy*, 571 N.W.2d 39, 46 (Minn. 1997) (stating the court has "not only a right to discipline disabled attorneys who engage in misconduct, but a duty to impose discipline when it is necessary to protect the public").

12. *In re Pyles*, 421 N.W.2d 321, 325 (Minn. 1988) (citing *In re Agnew*, 311 N.W.2d 869, 872 (Minn. 1981)); *In re Franke*, 345 N.W.2d 224, 228 (Minn. 1984) (citing *In re Agnew*, 311 N.W.2d at 872 (Minn. 1981)). The ABA model approach considers: 1) the duty violated; 2) the lawyer's mental state; 3) the potential or actual injury caused by the misconduct; and 4) the existence of aggravating or mitigating factors. STANDARDS FOR IMPOSING LAWYER SANCTIONS 3.0 (1991).

13. *In re Rooney*, 709 N.W.2d 263, 268 (Minn. 2006) (citing *In re Wentzell*, 656 N.W.2d 402, 408 (Minn. 2003)); *In re Thedens*, 557 N.W.2d 344, 347 (Minn. 1997) ("This court looks to similar cases to assist it in determining proper discipline for attorney misconduct."); *In re Wyant*, 533 N.W.2d 397, 401 (Minn. 1995) ("Although this court strives to be consistent with its sanctions, prior disciplinary case law is helpful only as analogy; the facts of each case independently dictate the appropriate discipline.").

While the court strives for consistency and has occasionally indicated it relies on prior decisions to arrive at an appropriate sanction and *only* deviates under unusual or special circumstances,¹⁴ the court's decisions reflect careful consideration of the factual circumstances of each case and recognition that the nature of the misconduct will not always dictate a particular sanction.¹⁵

For example, while prior cases as well as the American Bar Association (ABA) Standards provide that misappropriation of client funds generally warrants disbarment,¹⁶ the court nonetheless compares the severity of the misconduct to prior cases, the cumulative weight of the violations, and the mitigating or aggravating factors that may render the usual discipline inappropriate.¹⁷ Whether a lawyer will be reprimanded, placed on probation, suspended, or disbarred is therefore dependent on the reasoned judgment of the Minnesota Supreme Court, which has the final responsibility for determining the appropriate discipline.¹⁸

B. *The Nature of the Misconduct*

The nature of the lawyer's misconduct involves identifying the particular violations of the Rules of Professional Conduct and with reference to prior cases and standards, determining the

14. See *In re Pyles*, 421 N.W.2d at 325 (“By analogy prior decisions are helpful to us in arriving at the appropriate sanction. However, on occasion, unusual or special circumstances may justify some deviation from the holdings of those precedents.” (citing *In re Gubbins*, 380 N.W.2d 810, 812 (Minn. 1986))).

15. See *In re Rooney*, 709 N.W.2d at 269 (citations omitted) (“[A]ttorney discipline cases are decided on a case-by-case basis, making the specific factual circumstances of each case particularly important.”).

16. See *In re Berg*, 741 N.W.2d 600, 604 (Minn. 2007) (“We have generally said that cases involving misappropriation result in disbarment.”); *In re Jellinger*, 655 N.W.2d at 316; *In re Rooney*, 709 N.W.2d at 268 (“Misappropriation of client funds constitutes serious misconduct that generally warrants disbarment.”); *In re Samborski*, 644 N.W.2d 402, 407 (Minn. 2002); *In re Shoemaker*, 518 N.W.2d 552, 555 (Minn. 1994); *In re Anderley*, 481 N.W.2d 366, 369 (Minn. 1992) (“This court usually orders disbarment in cases of extensive misappropriation of client funds.”); *In re Olsen*, 487 N.W.2d 871, 874 (Minn. 1992); STANDARDS FOR IMPOSING LAWYER SANCTIONS 5.11(a) (1991).

17. *In re Rooney*, 709 N.W.2d at 269–70.

18. *In re Edinger*, 700 N.W.2d 462, 467 (Minn. 2005). A petition for public discipline is initially brought by the director of the Office of Lawyers Professional Responsibility (OLPR), reviewed for probable cause by members of a panel of the Board of Lawyers Professional Responsibility, and heard by a referee appointed by the Minnesota Supreme Court. See MINNESOTA RULES OF COURT VOLUME I—STATE, RULES ON LAWYERS PROFESSIONAL RESPONSIBILITY, R. 4, 9, 12, 14 (West 2010).

appropriate range of discipline assessing the lawyer's mental state.¹⁹ The lawyer's mental state relates directly to the seriousness of the misconduct.²⁰ The lawyer's mental state may have already been determined in an underlying criminal or other proceeding, may be admitted or stipulated, or may be disputed.²¹

A lawyer's misconduct may be intentional, knowing, or negligent.²² Intent, the "most culpable mental state," means the lawyer acted with the "conscious objective or purpose to accomplish a particular result"; knowledge means the lawyer acted with "conscious awareness of the nature" and circumstance of conduct but without the "conscious objective or purpose to accomplish the particular result"; and negligence means the lawyer failed to be "aware of a substantial risk that circumstances exist or that a result will follow"²³ A lawyer's mental state can significantly impact the sanction imposed, since it may not only suggest a particular sanction, but determine the extent to which mitigating factors such as lawyer impairment may ameliorate the sanction.²⁴

C. Mitigating Factors

Mitigating factors are "considerations or factors that may justify a reduction in the degree of discipline to be imposed."²⁵ They are not defenses or factors that "excuse" or "justify"

19. Violation of the Minnesota Rules of Professional Conduct constitutes misconduct. MINN. R. PROF. CONDUCT 8.4(a) (2010). The violation must be established by clear and convincing evidence. See *In re Waite*, 782 N.W.2d 820, 823 (Minn. 2010). While the Minnesota cases have not explicitly followed the two-step approach of the ABA Standards on Imposing Lawyer Discipline by identifying the nature of the ethical duty violated and the lawyer's state of mind, they do so implicitly. See, e.g., *In re Berg*, 741 N.W.2d at 604-05 (analyzing the nature of the misconduct, misappropriation, and the attorney's depressed state of mind); STANDARDS FOR IMPOSING LAWYER SANCTIONS 3.0 (1991) (outlining factors to be considered when imposing a section).

20. See STANDARDS FOR IMPOSING LAWYER SANCTIONS 3.0(a) (1991).

21. See, e.g., *In re Pugh*, 710 N.W.2d 285, 287 (Minn. 2006) (admitting previous conviction for fraud without the opportunity to relitigate the underlying conviction).

22. See, e.g., STANDARDS FOR IMPOSING LAWYER SANCTIONS, *Theoretical Framework* (1991).

23. *Id.*

24. See, e.g., *In re Madsen*, 526 N.W.2d 373, 375 (Minn. 1995) (weighing attorney's intentional fraud in determining his sanction); *In re Isaacs*, 406 N.W.2d 526, 529 (Minn. 1987) (analyzing the attorney's alcoholism as a mitigating factor).

25. STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.3 (1991).

misconduct; they are circumstances considered in determining what discipline will best serve the public interest.²⁶ The Minnesota decisions have recognized all or substantially all of the mitigating factors identified by the ABA,²⁷ which include the following: “[A]bsence of prior discipline, absence of dishonest or selfish motive, personal or emotional problems, timely effort to make restitution, cooperation with disciplinary proceedings, inexperience in the practice of law, good reputation, physical or mental disability, delay in disciplinary proceedings, imposition of other penalties, remorse, and remoteness of prior offenses.”²⁸

26. See *In re Heffernan*, 351 N.W.2d 13, 15 (Minn. 1984); *In re Hedlund*, 293 N.W.2d 63, 67 (Minn. 1980).

27. “Most states have adopted some form of the ABA Standards for Imposing Lawyer Sanctions or have cited them for support.” ABA/BNA, *LAWYER’S MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL* 101:3101 (1998) [hereinafter ABA/BNA]. The Minnesota Supreme Court has relied on the ABA Standards in identifying aggravating and mitigating factors and appropriate discipline. *In re Ward*, 726 N.W.2d 497, 498 (Minn. 2007) (considering failure to make restitution as an aggravating factor); *In re Pugh*, 710 N.W.2d 285, 288 (Minn. 2006) (identifying the appropriate discipline for felony); *In re Rooney*, 709 N.W.2d 263, 270 (Minn. 2006) (consideration of aggravating or mitigating circumstances for misconduct); *In re Giberson*, 581 N.W.2d 351, 355 (Minn. 1998) (identifying appropriate discipline for knowingly violating a court order or rule); *In re Shoemaker*, 518 N.W.2d 552, 555 (Minn. 1994) (identifying appropriate discipline for misappropriating funds); *In re Swerine*, 513 N.W.2d 463, 467 (Minn. 1994) (identifying aggravating factors to consider such as victim’s vulnerability and attorney’s failure to make restitution); *In re Lochow*, 469 N.W.2d 91, 97 (Minn. 1991) (identifying appropriate discipline for misconduct).

28. ABA/BNA, *supra* note 27, at 101:3101; see *STANDARDS FOR IMPOSING LAWYER SANCTIONS* 9.32 (1991); see, e.g., *In re Rooney*, 709 N.W.2d at 271–72 (recognizing several mitigating factors: lack of prior disciplinary history, restitution, remorse, cooperation with director, good character and contributions to community, pro-bono work, extraordinary stress, and receipt of counseling for personal problems); *c.f. In re Aitkin*, 787 N.W.2d 152, 162 (Minn. 2010) (determining lack of prior disciplinary history is absence of aggravating factor rather than mitigating factor); *In re Mayne*, 783 N.W.2d 153, 162 (Minn. 2010) (considering a number of mitigating factors including psychological disorder); *In re Albrecht*, 779 N.W.2d 530, 538–39 (Minn. 2010) (explaining compliance with rules of professional conduct is not a mitigating factor and weighing a number of other mitigating factors); *In re Farley*, 771 N.W.2d 857, 862 (Minn. 2009) (explaining cooperation is not a mitigating factor, but remorse is); *In re Q.F.C.*, 728 N.W.2d 72, 80–81 (Minn. 2007) (determining procedural error in discipline case can prejudice the attorney, making it necessary to dismiss disciplinary hearing); *In re Moulton*, 721 N.W.2d 900, 906 (Minn. 2006) (explaining mere compliance with obligation to cooperate not mitigating factor); *In re Letourneau*, 712 N.W.2d 183, 189 (Minn. 2006) (deciding prior private probation for failure to cooperate with director should be treated as a “neutral factor” and not given greater weight in determining attorney discipline); *In re Singer*, 541 N.W.2d 313, 316 (Minn. 1996) (excluding past financial misfortune and present lack of

The court considers mitigating factors regardless of the seriousness of the misconduct.²⁹ As a result, the presence of numerous mitigating circumstances, none of which would be sufficient alone to avoid disbarment, may permit the court to determine that disbarment is not necessary to achieve the goals of attorney discipline.³⁰ On the other hand, the severity or extent of the misconduct and harm may dictate disbarment as the appropriate sanction, despite the strength of the mitigating factors.³¹ The court weighs the result of the three factors (nature, cumulative weight, and harm flowing from the conduct) and the aggravating or mitigating factors and ultimately determines what discipline serves the public's interest.³²

business expertise as mitigating functions); *In re Jensen*, 468 N.W.2d 541, 545 (Minn. 1991) (recognizing inexperience as a mitigating factor); *In re Pokorny*, 453 N.W.2d 345, 348 (Minn. 1990) (weighing cooperation with proceedings and attorney's motive as mitigating factors); *In re Klein*, 442 N.W.2d 317, 320 (Minn. 1989) (including lack of selfish or dishonest motive as aggravating factors); *In re Panel File No. 87-22*, 425 N.W.2d 824, 827 (Minn. 1988) (recognizing delay in bringing action and prosecuting does not warrant reversal); *In re Getty*, 401 N.W.2d 668, 671 (Minn. 1987) (reducing sanction as a recognition of attorney's inexperience); *In re Beal*, 374 N.W.2d 715, 716 (Minn. 1985) (recognizing cooperation can be mitigating circumstance); *In re N.P.*, 361 N.W.2d 386, 393 (Minn. 1985) (requiring prejudice to attorney before a dismissal of an action for failure to prosecute promptly).

29. *In re Rooney*, 709 N.W.2d at 270 (citing *In re LaChapelle*, 491 N.W.2d 17, 21 (Minn. 1992)); see STANDARDS FOR IMPOSING LAWYER SANCTIONS 4.11 & cmt. (1991) (rejecting argument that disbarment results from misappropriation in the absence of lack of intent, reasoning that disbarment is the usual discipline for misappropriation but does not foreclose consideration of mitigating factors that may render the usual discipline inappropriate). The court has similarly rejected a per se disbarment rule for felony convictions. See *In re Olkon*, 324 N.W.2d 192, 195 (Minn. 1982); *In re Hedlund*, 293 N.W.2d at 67; *In re Scallen*, 269 N.W.2d 834, 841-42 (Minn. 1978).

30. *In re Rooney*, 709 N.W.2d at 272.

31. *Id.* (explaining that "whether the presence of mitigating circumstances will allow an attorney to avoid disbarment for misappropriation depends on the severity of the misconduct and the strength of the mitigating factors").

32. See *In re Hanvik*, 609 N.W.2d 235, 240-41 (Minn. 2000). Whether the presence of mitigating circumstances will allow a lawyer to avoid disbarment for misappropriation depends on the severity of the misconduct and the strength of the mitigating factors. The court weighs "the nature of the misconduct, the cumulative weight of the disciplinary rule violations, and the potential harm to the public, to the legal profession, and to the administration of justice." *Id.* at 240 (citing *In re Pyles*, 421 N.W.2d 321, 325 (Minn. 1988)).

III. LAWYER IMPAIRMENT AND THE DISCIPLINARY PROCESS

A. *Lawyers in Crisis*

Chemical dependency and mental health impairments present a significant problem for lawyers and the discipline system. The American Bar Association³³ estimates that 15% to 20% of U.S. lawyers suffer from alcoholism,³⁴ which is nearly twice the approximate 9% abuse and dependency rate for adults in the United States.³⁵ One estimate suggests that as many as 18% of all U.S. lawyers, or nearly one in five, will develop problems related to substance abuse at some point in their careers.³⁶

The statistics regarding mental health issues are even more startling. A 1990 Johns Hopkins study found that of twenty-eight professions, lawyers are the most likely to suffer from depression; a rate more than three times that of the general population.³⁷

33. The ABA, through its Commission on Lawyer Assistance Programs (CoLap), provides resources to “educate the legal profession concerning alcoholism, chemical dependencies, stress, depression and other emotional health issues and assist and support all bar associations and lawyer assistance programs in developing and maintaining methods of providing effective solutions for recovery.” *Commission on Lawyer Assistance Programs*, A.B.A., <http://www.abanet.org/legalservices/colap/> (last updated Nov. 19, 2010).

34. Alcoholism is defined as follows:

[A] primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with the drug alcohol, use of alcohol despite adverse consequences, and distortions in thinking, most notably denial.

Robert M. Morse & Daniel K. Flavin, *The Definition of Alcoholism*, 268 JAMA 1012, 1014 (1992).

35. See Connie J.A. Beck et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 50–51 (1995–1996).

36. G. Andrew H. Benjamin et al., *The Role of Legal Education in Producing Psychological Distress Among Law Students and Lawyers*, 1986 AM. B. FOUND. RES. J. 225, 243 (1986); John W. Clark, Jr., *We’re from the Bar and We’re Here To Help You*, GPSOLO MAG., Oct./Nov. 2004, available at <http://www.abanet.org/genpractice/magazine/2004/oct-nov/werefromthebar.html>; JOAN BIBELHAUSEN, LAWYERS CONCERNED FOR LAWYERS, MENTAL HEALTH AND ADDICTION IN THE LEGAL PROFESSION 12 (2009).

37. William W. Eaton et al., *Occupations and the Prevalence of Major Depressive Disorder*, 32 J. OCCUPATIONAL MED. 1079, 1079 (1990). A study of Washington lawyers confirmed a 19% rate of depression as compared to a 3% to 9% rate of depression in Western industrialized countries. G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse and Cocaine Abuse Among United States Lawyers*, 13 INT’L J.L. & PSYCHIATRY 233, 240–41 (1990).

Another study showed that lawyers suffer from generalized anxiety disorder at a rate between five to seven times greater than the general population and obsessive compulsiveness at ten to thirteen times the general population.³⁸

Thus, it should come as no surprise that alcoholism or alcohol abuse has been estimated to be a factor in at least 27% of lawyer discipline cases in the United States.³⁹ Precise statistics regarding the prevalence of chemical dependency and mental health impairments in the discipline system are hard to discern because lawyers do not always raise the issue.⁴⁰ However, chemical dependency or mental health was a factor for four of the twenty-nine, or approximately 14%, of lawyers who were placed on probation in Minnesota in 2009.⁴¹ This is a reduction from 2008, when 28% of the probations involved chemical dependency or mental health concerns.⁴² More than one hundred cases involving suspensions or disbarments have involved alcoholism or alcohol abuse since 1982, and more than fifty have required lawyers to prove psychological fitness to be reinstated.⁴³

The impact of lawyer impairment was addressed on a national level more than three decades ago by the ABA's promulgation of standards aimed at addressing impairment in the disciplinary process.⁴⁴ It has since created the ABA Commission on Lawyer Impairment (now known as the Commission on Lawyer Assistance Programs or CoLap);⁴⁵ has adopted mitigation standards for

38. See Beck et al., *supra* note 35, at 50–51.

39. G. Andrew H. Benjamin et al., *supra* note 36, at 243.

40. The prevalence of denial in chemically dependent lawyers impacts reporting in the disciplinary process. See Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, MICH. B.J. 152, 152 (1991). Stigma and uncertainty of how disciplinary authorities and the profession will treat addiction or mental illness almost certainly affects the statistics as well. See BIBELHAUSEN, *supra* note 36, at 22.

41. ANNUAL REPORT OF THE LAWYERS PROFESSIONAL RESPONSIBILITY BOARD AND THE OFFICE OF LAWYERS PROFESSIONAL RESPONSIBILITY 13 (2010), available at <http://lprb.mncourts.gov/AboutUs/Documents/2010%20Annual%20Report.pdf>.

42. *Id.*

43. See BIBELHAUSEN, *supra* note 36, at 14.

44. See STANDARDS FOR IMPOSING LAWYER SANCTIONS, *Preface* (1991) (referencing the ABA's 1979 Standards for Lawyer Discipline and Disciplinary Proceedings).

45. The ABA created the Commission on Impaired Attorneys in 1988, and its name was changed in August 1996 to the Commission on Lawyer Assistance Programs to emphasize a broader reach and to avoid any stigma the former name might imply. Myer J. Cohen, *The Impaired Lawyer*, A.B.A. EXPERIENCE, Winter 2002, at 6, 8, available at <http://www.nclap.org/article.asp?articleid=93>; see *Commission on Lawyers Assistance Programs*, A.B.A., <http://www.abanet.org/legalservices/colap/>

impairment,⁴⁶ Model Rules of Professional Conduct,⁴⁷ and opinions addressing lawyer impairment;⁴⁸ and has most recently adopted a Model Rule on Conditional Admission to the practice of law.⁴⁹

Lawyers in Minnesota were the first in the nation to form a lasting organization to assist lawyers with chemical abuse and addiction problems.⁵⁰ Although Minnesota was one of the last states to establish a lawyer-funded Lawyer Assistance Program and adopt the language of Model Rule 8.3(c),⁵¹ its current mitigation test for lawyer impairments predates the ABA mitigation standard,⁵² as does its conditional admission process.⁵³ Minnesota's court decisions reflect early recognition of alcoholism as a disease⁵⁴ that

(last updated Aug. 12, 2010).

46. See STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.3 (1991).

47. See MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 5 (2009) (added in 2002 to suggest a need for a solo practitioner to plan for death or disability); *Id.* at 8.3(c) (amended in 1991 to except from Rule 8.3's disclosure requirements information gained by a lawyer or judge in the context of a lawyer assistance program); *Id.* at 1.16(a) (requiring a lawyer to decline or withdraw from representation if the lawyer's mental condition materially impairs the lawyer's ability to represent the client).

48. See ABA Compendium of Prof'l Responsibility Rules and Standards, Formal Op. 03-429 (2003) (discussing firms' approach to lawyer impairment).

49. ABA House of Delegates, *Model Rule on Conditional Admission to Practice Law* (2009), available at http://www.abanet.org/legalservices/colap/downloads/model_rule_on_conditional_admission_aug2009.pdf.

50. The organization Lawyers Concerned for Lawyers, formed in 1976, has been administering Minnesota's lawyer-funded Lawyer Assistance Program to assist lawyers with chemical, mental health, and other concerns since the Minnesota Supreme Court approved its creation in 2000. See TED COLLINS, LAWYERS CONCERNED FOR LAWYERS: A 30 YEAR PARTNERSHIP WITH THE BAR (2006), available at <http://www.mnlcl.org/pdfs/30%20years%20of%20Help%20and%20Hope%20%28%29.pdf>.

51. See Order Amending the Rules of the Supreme Court for Registration of Attorneys and the Rules of Professional Conduct (C9-81-1206/C1-81-1206; C8-84-1650; C4-91-1728) (2000), available at www.mncourts.gov/rules/att_reg_prof_conduct.doc. Rule 8.3(c) exempts information received in the context of a lawyer assistance program from the mandatory disclosure requirements of Rule 8.3(a). See MINN. RULES OF PROF'L CONDUCT R. 8.3 (2010).

52. See *In re Johnson*, 322 N.W.2d 616, 618 (Minn. 1982) (mitigation standard for alcoholism adopted upon the recommendation of the director of the OLPR). Specific mitigation criteria such as that adopted in *In re Johnson* were not part of the Standards adopted by the ABA in 1986 and appear to have been part of amendments made to the Standards in February 1992. See STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.3 (1991).

53. See Order, *In re Rules for Admission to the Bar & In re Rules on Professional Responsibility* (C5-81-8139; C1-84-2140) (Aug. 10, 2005) (on file with author); Judith Rush, *Minnesota's Conditional Admission Rule*, WITNESS TO RECOVERY, Summer 2005, at 1, 1.

54. *State v. Fearon*, 283 Minn. 90, 97, 166 N.W.2d 720, 724 (Minn. 1969).

does not indicate a lack of moral character⁵⁵ and may be considered in imposing lawyer discipline.⁵⁶

Abuse or addiction to other chemicals has similarly been recognized as a mitigating factor.⁵⁷ While some court decisions reflected skepticism of psychological illness as a mitigating factor,⁵⁸ the court nonetheless suspended, rather than disbarred, lawyers to allow them to rehabilitate from mental illness even before it officially adopted a mitigation standard for psychological illness.⁵⁹

Fearon represents the court's first definitive ruling on the issue of whether a chronic alcoholic can be said to drink by choice. The court reversed *Fearon*'s conviction for voluntary public drunkenness, reasoning that *Fearon* "was no more able to make a free choice . . . than a person . . . who was forced to drink under the threat of physical violence," and therefore his drinking was due to his disease and therefore involuntary. See *Moeller v. Dep't of Transp.*, 281 N.W.2d 879, 882 (Minn. 1979).

55. *In re Haukebo*, 352 N.W.2d 752, 755–56 (Minn. 1984) (focus is on bar applicant's behavior rather than status as alcoholic).

56. See *In re Weyhrich*, 339 N.W.2d 274, 280 (Minn. 1983) (mitigation for psychological problems); *In re Johnson*, 322 N.W.2d at 618 (mitigation for alcoholism).

57. See *In re Getty*, 518 N.W.2d 18, 21 (Minn. 1994) (noting that cocaine is illegal and even if, arguably, the mitigation test applied, "a cocaine dependency should not lighten the discipline, or at least should lighten the discipline to a lesser extent than alcohol dependency would"); *In re Linnerooth*, 496 N.W.2d 408, 408–09 (Minn. 1993) (public reprimand and probation for possession of illegal drugs).

58. See *In re Bialick*, 298 Minn. 376, 378–79, 215 N.W.2d 613, 615 (1974) ("[A] careful examination of the record does not disclose sufficient evidence to sustain respondent's contention that any or all of these acts were the product of his mental illness . . ."); *In re Streater*, 262 Minn. 538, 542–43, 115 N.W.2d 729, 733 (1962) (treating mental illness to be an attempt to garner sympathy for unrelated matters).

59. See *In re Weyhrich*, 339 N.W.2d at 279 (adopting mitigation test); *In re Peters*, 332 N.W.2d 10, 17–18 (Minn. 1983) (suspending rather than disbaring lawyer to permit him to seek reinstatement after receiving psychological or psychiatric treatment and seeking to rehabilitate himself when he abandoned practice, failed to pay debt or refund client funds, and neglected clients while he was involved in a protracted dissolution proceeding and had sought psychiatric treatment); *In re O'Hara*, 330 N.W.2d 863, 865–73 (Minn. 1983) (holding indefinite suspension with opportunity to seek reinstatement within two years rather than disbarment where lawyer, because of his chronic alcoholism, neglected client matters and made misrepresentations to them, issued fraudulent checks, assaulted his wife, made false submissions to the court, and repeatedly failed to cooperate with the director); *In re Leali*, 320 N.W.2d 413, 414 (Minn. 1982) (holding indefinite suspension when lawyer failed to maintain trust account, neglected client matters, borrowed money from a client without adequate security, abandoned his clients, and failed to pay child support in light of lawyer's chemical dependency and successful treatment); *In re Iverson*, 305 N.W.2d 753, 755 (Minn. 1981) (holding indefinite suspension with reinstatement subject to establishing psychiatric and psychological fitness when lawyer's psychological condition was

Minnesota's discipline system does not allow for diversion⁶⁰ to address chemical dependency or mental illness, but it does allow disabled lawyers to be placed on inactive status to allow them to get the treatment they need to regain their competence as lawyers or to adequately defend a disciplinary proceeding.⁶¹ In addition, the Office of Lawyers Professional Responsibility (OLPR)⁶² will place lawyers on private probation if their chemical dependency or mental health disorders result in misconduct that does not require public discipline.⁶³ However, when the impaired lawyer has engaged in serious misconduct for which public discipline is appropriate or where inactive status is not available, the lawyer's impairment may be raised as a mitigating factor in response to the petition of the director of the OLPR to the court for public

such that it would have been difficult for him to carry out his professional duties, despite his lack of cooperation in making himself available for an evaluation).

60. Diversion programs generally result in removal of a matter from the disciplinary system to allow a lawyer to get treatment under appropriate supervision and guidelines for a specific period of time. *See also* ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G) (2007) (describing Alternatives to Discipline Program). *See generally* Kristy N. Bernard & Matthew L. Gibson, Note, *Professional Misconduct by Impaired Attorneys: Is There a Better Way to Treat an Old Problem?*, 17 GEO. J. LEGAL ETHICS 619 (2004) (describing how diversion programs provide more effective disciplinary methods).

61. *See* MINN. RULES ON LAWYERS PROF'L RESPONSIBILITY R. 28(a) (2010), <http://lprb.mncourts.gov/rules/RLPR/Rules%20on%20Lawyers%20Professional%20Responsibility.pdf>. A lawyer whose mental illness or deficiency or habitual use of alcohol, narcotics, or other drugs prevents the lawyer from competently representing clients must be placed on disability inactive status. *Id.* Disability inactive status is also permitted where disability is asserted in a disciplinary proceeding and prevents a lawyer from assisting in his or her defense. *Id.* at R. 28(b). In either case, a lawyer placed on disability inactive status must be reinstated to active practice and address his or her misconduct. *Id.* at R. 28(d); *see also* Betty M. Shaw, *The Rules Regarding Disability Inactive Status*, MINN. LAWYER, May 6, 2002, available at <http://www.mncourts.gov/lprb/fc02/fc050602.html> (explaining that when lawyers are transferred to disability status while serious allegations of misconduct are pending against them, the court ordinarily stays the disciplinary proceedings during the period of disability. The court then orders that the allegations of misconduct be considered at the reinstatement proceeding and that a recommendation for disciplinary sanctions, if any, be made to the court at that time).

62. The director of the OLPR has the responsibility to investigate, discipline, and bring public charges against lawyers. *See* MINN. RULES ON LAWYERS PROF'L RESPONSIBILITY R. 8 (2010), available at <http://lprb.mncourts.gov/rules/RLPR/Rules%20on%20Lawyers%20Professional%20Responsibility.pdf>.

63. *But see* Betty M. Shaw, *Balancing Compassion with the Need for Public Protection*, MINN. LAWYER, Aug. 28, 1998, available at <http://www.mncourts.gov/lprb/fc98/fc082898.html> (noting that private probation is not appropriate when the misconduct is very serious or likely to reoccur).

discipline.

B. Mitigation for Impaired Lawyers

The Minnesota Supreme Court has formulated two similar standards for mitigation involving impairment, one for alcoholism and one for psychological disabilities. A lawyer seeking to have alcoholism considered as a mitigating factor must establish four elements:

1. The accused attorney is affected by alcoholism;
2. The alcoholism caused the misconduct;
3. The accused attorney is recovering from alcoholism and from any other disorders which caused or contributed to the misconduct; and
4. The recovery has arrested the misconduct and the misconduct is not apt to reoccur.⁶⁴

Each element must be established by clear and convincing evidence.⁶⁵ Minnesota's alcoholism mitigation criteria are similar to the ABA's criteria.⁶⁶ However, while the ABA Standard requires

64. *In re Johnson*, 322 N.W.2d 616, 618 (Minn. 1982).

65. *Id.* at 618–19. The clear and convincing standard also applies to mitigation for psychological illness. *In re Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983). This standard is more commonly applied to disciplinary counsel in disciplinary proceedings except for petitions for reinstatement, readmission, or transfer to and from disability inactive status, when the petitioning lawyer has this burden. See ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 18(D) (2007). The states have adopted various approaches. See *In re Sullivan II*, No. 08-C-12029, 2010 WL 3196271, at *3 (Cal. Bar Ct. Aug. 12, 2010) (offering party bears the burden of proving aggravating or mitigating circumstances); *In re Zakroff*, 934 A.2d 409, 423 (D.C. 2007) (determining that a lawyer seeking mitigation must prove by clear and convincing evidence that he had a disability and that he has been substantially rehabilitated, but need only prove by a preponderance of the evidence that the disability substantially affected his misconduct); Attorney Grievance Comm'n v. Bleecker, 994 A.2d 928, 930 n.11 (Md. 2010) (lawyer asserting a matter in mitigation has burden of proof by a preponderance of the evidence); Lawyer Disciplinary Bd. v. Albers, 639 S.E.2d 796, 801 (W. Va. 2006) (no heightened standard).

66. STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i) (1992). See, e.g., *People v. Katz*, 58 P.3d 1176, 1193–94 (Co. 2002) (applying Rule 9.32(i) where attorney raised mental disability as a factor in mitigation); *In re Thompson*, 911 A.2d 373, 377 (Del. 2006) (upholding ruling that attorney's depressive disorder only given "some weight" under 9.32(i)); *In re Christian*, 135 P.3d 1062, 1065 (Kan. 2006) (holding that the attorney was unable to show that his mental disability caused misconduct as required by 9.32(i)); *In re Bernstein*, 966 So. 2d 537, 544 (La. 2007) (concluding that no "significant causal nexus existed" between attorney's mental disability and conduct under 9.32(i)); *In re Belz*, 258 S.W.3d 38, 44 (Mo. 2008) (finding that attorney's bipolar disorder satisfied four-prong test of

medical evidence,⁶⁷ the Minnesota Supreme Court has indicated that, while more than the testimony of the lawyer is required, medical evidence should not be the sole evidence to be considered.⁶⁸ As a result, the court has considered the testimony of spouses, family members, and other lay witnesses in addition to expert testimony and testimony of the respondent.⁶⁹ The ABA Standards also expressly recognizes mitigation for other forms of chemical and drug dependency,⁷⁰ while Minnesota has not.⁷¹

A lawyer who seeks to have a psychological disability considered as a mitigating factor must establish the following:

1. That the attorney has a severe psychological problem;
2. The psychological problem was the cause of the misconduct;
3. The attorney is undergoing treatment and is making progress to recover from the psychological problem that caused or contributed to the misconduct; and
4. The recovery has arrested the misconduct and the misconduct is not apt to recur.⁷²

Minnesota's imposition of a "severity" requirement is unique.⁷³ The ABA standard looks instead at whether the lawyer suffers from a "mental disability."⁷⁴

9.32(i)); *In re Coyner*, 149 P.3d 1118, 1123 (Or. 2006) (overturning trial panel's determination finding chemical dependency as a mitigating factor under § 9.32(i)); *Albers*, 639 S.E.2d at 801 (adopting STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i) (1992)).

67. STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i) (1) (1992).

68. *In re Johnson*, 322 N.W.2d at 619.

69. *See In re Isaacs*, 406 N.W.2d 526, 529 (Minn. 1987).

70. STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i) (1992).

71. *See In re Getty*, 518 N.W.2d 18, 21 (Minn. 1994) (suggesting that cocaine dependency may not lighten discipline to the same extent as alcohol dependency).

72. Later decisions have broken the fourth criteria into two separate factors. *See In re Jellinger*, 655 N.W.2d 312, 315 (Minn. 2002) (listing the fourth criterion as "recovery has arrested the conduct" and the fifth as "the misconduct is not apt to recur" (citing *In re Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983))).

73. The only other jurisdiction that appears to impose a severity requirement is North Dakota. *See In re Rau*, 533 N.W.2d 691, 695 (N.D. 1995) (noting that the lawyer's lack of remorse and restitution were significant in its decision to disbar the lawyer).

74. *See* STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i) (1992) (mitigating factors include when "the respondent is affected by a chemical dependency or mental disability").

The logic of the mitigation criteria is evident. A lawyer who is chemically dependent or has a psychological illness that is not being effectively treated poses a risk to clients and the public. Therefore, when a lawyer who has engaged in misconduct as a result of his or her illness can show progress in recovery that has arrested the misconduct and has made it unlikely to recur, the risk to clients and the public is reduced, allowing a less severe and more appropriate sanction to be fashioned that protects the public. On the other hand, when the impairment has no connection to the misconduct, the other criteria would appear to have little relevance and presumably the illness would be treated in mitigation like other personal or emotional problems.⁷⁵

5. Psychological Mitigation Applied: In re Mayne

Mayne was convicted of financial exploitation of a vulnerable adult,⁷⁶ a felony, as a result of her theft of approximately \$60,000 from her ill and elderly father's funds as his attorney-in-fact.⁷⁷ Mayne pleaded guilty and was sentenced to eighteen months in custody, stayed during a ten-year probation with conditions that included restitution and mental health counseling.⁷⁸ The director brought a petition seeking disbarment, alleging Mayne's actions violated Rule 8.4(b) and (c).⁷⁹

75. Mitigation for a "physical or mental disability or impairment" was specifically identified in the mitigation Standard approved by the ABA in February 1986 to distinguish it from other personal and emotional problems because it was the mitigating factor treated most inconsistently by the courts. See STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.3 (h) cmt. (1986). The Standard was later amended to its present form, which includes "mental disability or chemical dependency including alcoholism or drug abuse" and four criteria for its application. STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i) (1992).

76. *In re Mayne*, 783 N.W.2d 153, 156 (Minn. 2010). Mayne's father was in his mid-seventies and was in the early stages of Alzheimer's at the time of the theft. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* Mayne was suspended pending final discipline pursuant to stipulation. To access the order see the following link and type "Mayne" in the "Last Name" box: <http://lprb.mncourts.gov/LawyerSearch/Pages/default.aspx>; MINN. RULES ON LAWYERS PROF'L RESPONSIBILITY R. 16 (2010). A lawyer violates MINN. RULES OF PROF'L CONDUCT R. 8.4(b) by "commit[ing] a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;" and Rule 8.4(c) by "engag[ing] in conduct involving dishonesty, fraud, deceit, or misrepresentation." See MINN. RULES OF PROF'L CONDUCT R. 8.4 (2005).

Following a hearing on the issues of mitigation and appropriate discipline,⁸⁰ the referee appointed by the court found that Mayne had met some, but not all, of the psychological mitigation criteria.⁸¹ The referee found that Mayne satisfied two of the criteria: One, she suffered from a major depressive, recurrent, and obsessive-compulsive disorder, which is a severe psychological condition; and two, she was making progress in her treatment.⁸² However, the referee determined that Mayne did not meet the other three criteria “that her psychological condition caused the misconduct, that her treatment had arrested the misconduct, and that the misconduct is not likely to recur.”⁸³

The referee recommended that Mayne be suspended indefinitely, for a minimum of five years, with leave to apply for reinstatement upon expiration of her criminal probation.⁸⁴ The referee noted what it perceived as the court’s empathy in cases involving significant mental health issues and its reading of prior case law allowing for mitigation when some but not all of the factors had been met,⁸⁵ as well as other mitigating factors.

On review,⁸⁶ the Minnesota Supreme Court held that Mayne’s misconduct warranted disbarment.⁸⁷ While the court affirmed the referee’s conclusion that Mayne could not satisfy all of the psychological mitigation criteria, it disagreed with a number of the referee’s findings on the criteria. The court rejected the referee’s determination that Mayne failed to prove causation by showing she suffered from the psychological disorders at the time of the misconduct because the record as a whole showed that Mayne suffered for a lengthy period of time from disorders that “do not manifest themselves overnight.”⁸⁸

80. Mayne admitted the allegations of the petition. *In re Mayne*, 783 N.W.2d at 156.

81. *Id.* at 156, 157–58.

82. *Id.* at 157.

83. *Id.*

84. *Id.* at 158.

85. *Id.* at 161 (referring to *In re Berg*, 741 N.W.2d 600, 605 (Minn. 2007), for the proposition that, although the psychological disability in that case did not mitigate the intentional conduct, the disability could still be considered in mitigating the type of discipline).

86. Both the director and Mayne took exception to the referee’s findings and recommendations. *Id.* at 158.

87. *Id.* at 164.

88. *Id.* at 159.

The referee's second basis, that Mayne could not establish causation because she had the ability to tell right from wrong, had, according to the court, been rejected as mitigation criteria in an intervening case.⁸⁹ The court agreed with the referee's findings that Mayne's "disorders appear to have caused out-of-control hoarding behavior," the "financial strain of the hoarding may have provided Mayne with the motive to take money from her father," and that Mayne's "chaotic-decision making and deeply clouded judgment may have facilitated her misconduct."⁹⁰

However, because these facts showed that Mayne's illnesses were "at most, indirect causes of her misconduct, and indirect causation is not enough to justify a finding of causation" this criterion has not been met.⁹¹ The court distinguished between misconduct by omission and affirmative illegal actions:

If a lawyer's misconduct consists of failing to do something she is supposed to do—i.e., misconduct by omission—psychological disorders such as Mayne's might be considered the direct cause of such misconduct. But that is not the case here. Mayne's misconduct involved affirmative illegal actions, and she has not proven that her psychological disorders directly caused those actions.⁹²

The intentionality of Mayne's misconduct also dictated that all of the mitigating factors must be met for the psychological disorder to be considered in mitigation.⁹³

The Minnesota Supreme Court took the opportunity to clarify two additional mitigation criteria. For recovery to arrest misconduct, the lawyer must have stopped his or her current *propensity* to engage in similar misconduct rather than show the misconduct was stopped by the treatment itself.⁹⁴ The court also clarified that showing that misconduct is not likely to recur may be

89. *Id.* at 159 n.2 (citing *In re Farley*, 771 N.W.2d 857, 861–62 (Minn. 2009)).

90. *Id.* at 159–60 (internal quotation marks omitted).

91. *Id.*

92. *Id.* at 160 (citation omitted).

93. *Id.* at 161 ("[W]e have considered psychological disorders as mitigating factors in some cases where the lawyer has failed to prove all of the [mitigation criteria] . . . we only do so in the context of unintentional or passive misconduct." (citing *In re Berg*, 741 N.W.2d 600, 605 (Minn. 2007))).

94. *Id.* at 160 ("Thus we interpret this requirement to mean that the treatment sought by the lawyer must have stopped the lawyer's current propensity to engage in similar misconduct.").

demonstrated by expert opinion.⁹⁵

The court considered in mitigation that Mayne's conduct took place outside the practice of law: She was suffering from extreme stress as a result of her home being condemned and losing her personal property; she was making restitution; she had no prior discipline; and she acknowledged her problems and sought treatment.⁹⁶ However, the court held that these mitigating factors fell short of what was required to deviate from the sanctions generally imposed for similar misconduct and were simply not significant enough to outweigh the misconduct.⁹⁷ In light of the serious nature of misconduct, the great harm that resulted, and the need to deter future misconduct by lawyers acting as attorneys-in-fact, the court held that Mayne's misconduct warranted disbarment.⁹⁸

6. Mitigation for Alcoholism: In re Rodriguez

Rodriguez was an attorney with a nonprofit organization that provided low cost legal services to low income clients.⁹⁹ By misrepresenting the terms of retainer agreements to eight clients, he collected approximately \$650 that he misappropriated to his own use to buy drugs.¹⁰⁰ When he could not be located within the state, the court suspended him from the practice of law, giving him one year to move to vacate the order of suspension.¹⁰¹ When Rodriguez did not move to vacate, the court "deemed the allegations of the petition admitted and invited briefs . . ."¹⁰² Rodriguez submitted a memorandum in which he did not oppose the director's recommendation of disbarment, "accepting with gratitude the consequences of [his] addictive behavior" as a "devoted member of Alcoholics and Narcotics Anonymous . . ."¹⁰³

95. The referee had taken a "tested-in-real-life" approach and found "[n]o one can tell at this time whether misconduct is likely to recur. The only true test would be to give Respondent an opportunity to be tested in real life." *Id.*

96. *Id.* at 161–63.

97. *Id.* at 163.

98. *Id.* at 163–64.

99. Jane Friedmann, *Lawyer Disbarred for Misuse of Client Funds*, STAR TRIB. (Minneapolis), June 29, 2010, available at www.startribune.com/local/blogs/97396819.html.

100. *In re Rodriguez*, 783 N.W.2d 170, 170 (Minn. 2010) (Anderson, J., dissenting).

101. *Id.*

102. *Id.*

103. *Id.* at 171 (Anderson, J., dissenting) (alteration in original) (internal

Accordingly, the court ordered disbarment.¹⁰⁴ A strong dissent accompanied the court's summary opinion, reasoning that disbarment did no more to safeguard the public or deter future misconduct than an indefinite suspension would, and that suspension, which would allow the possibility of reinstatement, may aid in Rodriguez's recovery from his chemical addiction.¹⁰⁵ The dissent would have recognized Rodriguez's remorse and commitment to recovery from his addictions in determining the sanction.¹⁰⁶

IV. OBSTACLES TO REACHING "JUST" AND "RIGHT" DISCIPLINE DECISIONS FOR IMPAIRED LAWYERS

Both decisions appear to reach a just result based on current case law. Mayne and Rodriguez engaged in serious misconduct that undermines the trust and confidence reposed in members of the Minnesota bar.¹⁰⁷ Their actions harmed the public, the profession, and the administration of justice. Mayne failed to meet her burden to show that she was entitled to mitigation for her psychological disorder.¹⁰⁸ Rodriguez did not even attempt to meet the standard.¹⁰⁹ But a closer look at the decisions raises troubling issues about how the mitigation criteria are interpreted and how causation is determined, resulting in confusion, inconsistency, and denial of mitigation to lawyers whose misconduct results from their impairments.

A. *Severe Psychological Problem*

As indicated above, Minnesota's requirement of proof of a "severe" psychological problem is unique.¹¹⁰ The court's subsequent imposition of a requirement that the psychological problem be a "severe psychological disorder on a recognized psychological diagnostic scale,"¹¹¹ either reflects that the term

quotation marks omitted).

104. *Id.* at 170 (majority opinion).

105. *Id.* at 171 (Anderson, J., dissenting).

106. *Id.*

107. *See id.* 170–71; *In re Mayne*, 783 N.W.2d 153, 156 (Minn. 2010).

108. *In re Mayne*, 783 N.W.2d at 160.

109. *See In re Rodriguez*, 783 N.W.2d 170, 170 (Minn. 2010).

110. *See supra* note 74 and accompanying text.

111. *In re Farley*, 771 N.W.2d 857, 862 (Minn. 2009); *see In re Pyles*, 421 N.W.2d 321, 325 n.2 (Minn. 1988) (outlining the five psychological requirements needed

“problem” is too imprecise or that some mistrust of psychological illness remains.¹¹² Regardless of its source, the “severity” requirement has given rise to confusion,¹¹³ narrow distinctions,¹¹⁴ and a focus toward defining severe psychological disorders in theory rather than on whether the lawyer is affected by a mental disability.¹¹⁵

The ABA Standards simply require “medical evidence that the respondent is affected by chemical dependency or mental disability.”¹¹⁶ This approach to the first criterion has the benefits of giving appropriate deference to psychological diagnoses by qualified chemical dependency or mental health professionals and

to mitigate misconduct).

112. See *In re Bialick*, 298 Minn. 376, 378–79, 215 N.W.2d 613, 615 (1974); *In re Streater*, 262 Minn. 538, 544, 115 N.W.2d 729, 734 (1962).

113. For example, the court’s decision in *Farley* seems to suggest that “impairment of [Pyles’s] cognitive functions, his ability to direct actions, or to know right from wrong” is a factor in determining severity; parties believed it related to causation. *In re Farley*, 771 N.W.2d at 861 (alteration in original) (internal quotations omitted).

114. See *In re Albrecht*, 779 N.W.2d 530, 535–36 (Minn. 2010) (“moderate” adjustment disorder not “severe”); *In re Hanvick*, 609 N.W.2d 235, 240 (Minn. 2000) (“serious” depression testified to by expert which fell at “moderate” level of depression on diagnostic scale, not “severe”); *In re Shoemaker*, 518 N.W.2d 552, 554 (Minn. 1994) (“serious disorder” not “severe disorder”).

115. See STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i) (1991). “Disability” is not defined by the ABA, and a review of the case law reflects it apparently has not been a disputed issue in discipline cases. To the extent a definition is desired, the common definition of a disability is an “inability to perform some function.” BLACK’S LAW DICTIONARY 528 (9th ed. 2009). The Americans with Disabilities Act focuses on the extent to which a condition substantially limits “major life activities.” See 42 U.S.C. § 12102(2) (2006 Supp. II 2007–2009). In the lawyer discipline context, the focus could be on whether a psychological condition has interfered with a lawyer’s ability to practice in an ethical manner. See *Toledo Bar Ass’n v. Baker*, 907 N.E.2d 1172, 1177 (Ohio 2009) (addressing language of the Ohio’s Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline (Ohio Supreme Court, effective June 1, 2000), which focuses on the return of lawyers to “competent, ethical professional practice . . .”).

116. STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i) (1991). This approach appears to be the most widely applied. See, e.g., *In re Belz*, 258 S.W.3d 38, 44 (Mo. 2008); *Lawyer Disciplinary Bd. v. Albers*, 639 S.E.2d 796, 801 (W. Va. 2006) (applying STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32(i)(1) (1991)); see also *Toledo Bar Ass’n*, 907 N.E.2d at 1177 (requiring proof of “a diagnosis of mental disability by a qualified health-care professional”); RULES GOVERNING THE MISSOURI BAR AND THE JUDICIARY R. 5.285 (2010) (mitigation applied to a “mental disorder”, which is a “condition, found in the current Diagnostic and Statistical Manual, that more than minimally impairs judgment, cognitive ability, or volitional or emotional functioning in relation to performance of professional duties and commitments . . .”), available at <http://www.courts.mo.gov/page.jsp?id=708>.

of properly focusing on the lawyer's condition.

B. Causation

At the time the formal mitigation criteria were initially adopted, the court made two important observations: mitigation is not a defense to misconduct and proving causation is critical.¹¹⁷ Nonetheless, subsequent cases, including *In re Mayne*, appear to require something almost akin to the *M'Naghten* criminal liability defense¹¹⁸ in psychological disability cases to prove causation.¹¹⁹ Although the court has recently clarified that "knowing right from wrong" is not a test of causation, it is unclear whether "impairment of cognitive functions and ability to direct one's actions"¹²⁰ remain tests for causation or are considered in determining the nature of the misconduct.

The court's recent clarification of "direct" causation¹²¹ provides some guidance for defining causation. However, the context in which it appears is troubling¹²² and underscores the need to

117. *In re Johnson*, 322 N.W.2d 616, 618 (Minn. 1982); see *In re Samborski*, 644 N.W.2d 402, 408 (Minn. 2002); *In re Anderley*, 481 N.W.2d 366, 370 (Minn. 1992); *In re Isaacs*, 406 N.W.2d 526, 529 (Minn. 1987).

118. See *State v. McLaughlin*, 725 N.W.2d 703, 708 n.3 (Minn. 2007) ("[A] defendant seeking to establish a mental illness defense must meet the M'Naghten standard" by "prov[ing] that at the time he committed the charged offense, he 'was laboring under such a defect of reason, from a mental illness or deficiency, as not to know the nature of the act, or that it was wrong.'" (quoting *Bruestle v. State*, 719 N.W.2d 698, 704 (Minn. 2006))).

119. See *In re Jellinger*, 655 N.W.2d 312, 315 (Minn. 2002) (rejecting a causal relationship between depression and active misconduct because Jellinger's conduct demonstrated his depression had not impaired Jellinger's "ability to direct his actions" and "he continued to recognize that his actions were wrong"); *In re Pyles*, 421 N.W.2d 321, 325 (Minn. 1988) (internal quotation marks omitted) (affirming that the lawyer's mental illness "did not result in impairment of respondent's cognitive functions, his ability to direct his actions, or to know right from wrong").

120. *In re Farley*, 771 N.W.2d 857, 861–62 (Minn. 2009); see *In re Pyles*, 421 N.W.2d at 325.

121. *In re Mayne*, 783 N.W.2d 153, 160 (Minn. 2010); *In re Farley*, 771 N.W.2d at 862 ("Indirect causation . . . is not sufficient to justify a finding of causation . . ."); see *In re Shoemaker*, 518 N.W.2d 552, 554 (Minn. 1994) ("[R]espondent has not proved that his psychological problems . . . caused or significantly contributed to his misconduct . . .").

122. Such a standard would be troubling since, although common features of substance addictions and other psychological illnesses can be identified, their impact on a particular person is unique. See, e.g., *In re Verra*, 932 A.2d 503, 504–05 (D.C. 2007) (placing lawyer on probation because of causal relationship between depression and misappropriation, despite strict approach that misappropriation

articulate a standard or definition of causation, because it seems to suggest that certain illnesses can be considered the cause of misconduct by omission but not intentional misconduct and that the illness must be the sole cause of the misconduct.¹²³ Without an articulated causation standard, it is left to the director, defense counsel, and the referee to attempt to define and determine causation in the first instance and for the Minnesota Supreme Court to ultimately determine on review whether causation exists. At best, this is an inefficient use of resources.¹²⁴

The language of the mitigation criteria suggests mitigation applies to psychological problems that “caused or contributed” to the misconduct.¹²⁵ Accordingly, the court has found causation when the psychological disorder played a “significant role” in causing misconduct¹²⁶ and when misconduct “stems” from alcoholism.¹²⁷ This is consistent with the “substantial factor” test¹²⁸

results in disbarment); *In re Belz*, 258 S.W.3d 38, 44–45 (Mo. 2008) (allowing mitigation in the case of a lawyer who misappropriated funds from a trust while he suffered from bipolar disorder); *In re Crescenzi*, 51 A.D.3d 230, 234 (N.Y. App. Div. 2008) (presumption that intentional conversion of client funds makes lawyer unfit to practice “can be rebutted by showing that the misappropriation caused by drug addiction or mental illness”); *Toledo Bar Ass’n v. Baker*, 907 N.E.2d 1172, 1178 (Ohio 2009) (allowing mitigation for lawyer who suffered from depression and post-traumatic stress disorder who engaged in deception and misappropriation); *Lawyer Disciplinary Bd. v. Albers*, 639 S.E.2d 796, 801 (W. Va. 2006) (allowing mitigation for criminal convictions when behavior was “affected by depressive disorder”).

123. See, e.g., *In re Shoemaker*, 518 N.W.2d at 554 (first alteration in original) (finding that Shoemaker’s depression “vaguely contributed to his behavior,” when Shoemaker’s expert had testified that his psychological disorder “would have been a part of his motivation to [steal],” although it did not “account[] entirely for the behavior”).

124. For example, a significant portion of the cross-examination in *In re Mayne* was devoted to repeated questioning of Mayne’s expert regarding Mayne’s ability to know right from wrong, which, as the expert explained, is a forensic determination that is not relevant to diagnosis and treatment of a psychological disorder. See Transcript of Record at 73, 75, 80, 82, 83, *In re Mayne*, 783 N.W.2d 153 (Minn. 2010) (No. A08-1522).

125. See *In re Weyhrich*, 339 N.W.2d 274, 279 (Minn. 1983) (“[H]e must prove . . . that the psychological problem was the cause of the misconduct . . . and [he] is making progress to recover from the psychological problem which caused or contributed to the misconduct . . .”).

126. *In re Bergstrom*, 562 N.W.2d 674, 678 (Minn. 1997) (“Bergstrom’s severe depression, for which he is being treated, played a significant role in causing his misconduct.”).

127. *In re Fallon*, 389 N.W.2d 509, 511 (Minn. 1986).

128. See RESTATEMENT (SECOND) TORTS § 431 cmt. a (1965) (explaining “substantial factor”); see, e.g., *Flom v. Flom*, 291 N.W.2d 914, 917 (Minn. 1980); *Lestic v. Kuehner*, 204 Minn. 125, 133, 283 N.W. 122, 127 (1938); *Peterson v.*

followed in tort cases in Minnesota, which recognizes that conduct is a “direct cause” if it plays a “substantial part” or is a “substantial factor” in bringing about the result.¹²⁹ “But for” causation is also required to meet substantial factor causation, since conduct cannot be a substantial factor in bringing about the result if it would have occurred even without the conduct.¹³⁰

Substantial factor causation is also consistent with the Standards for Imposing Lawyer Sanctions, which provide the following guidance in the commentary to Rule 9.32 of the Standards as to how the causation criteria should be applied in the mitigation context:

Issues of physical and mental disability or chemical dependency offered as mitigating factors in disciplinary proceedings require careful analysis. Direct causation between the disability or chemical dependency and the offense must be established. If the offense is proven to be attributable *solely* to a disability or chemical dependency, it should be given the greatest weight. If it is *principally* responsible for the offense, it should be given very great weight; and if it is a *substantial contributing* cause of the offense, it should be given great weight. In all other cases in which the disability or chemical dependency is considered as mitigating, it should be given little weight.¹³¹

Fulton, 192 Minn. 360, 364, 256 N.W. 901, 903 (1934).

129. See 4 MICHAEL K. STEENSON & PETER B. KNAPP, MINNESOTA PRACTICE SERIES: JURY INSTRUCTION GUIDES—CIVIL § 27.10 (5th ed. 2006 Supp. 2010–2011); see also *Kronzer v. First Nat'l Bank of Minneapolis*, 305 Minn. 415, 426, 235 N.W.2d 187, 194 (1975) (internal quotation marks omitted) (articulating a “direct consequences test,” which includes “[c]onsequences which follow in unbroken sequence, without an intervening efficient cause”); *Mickelson v. Kernkamp*, 230 Minn. 448, 458, 42 N.W.2d 18, 24 (1950) (referring to the “substantial factor rule”).

130. STEENSON & KNAPP, *supra* note 129 (quoting *George v. Estate of Baker*, 724 N.W.2d 1, 10–11 (Minn. 2006)).

131. STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.32 cmt. (1991) (emphasis added). Some jurisdictions have modified the second factor to incorporate similar standards. See *In re Zakroff*, 934 A.2d 409, 423 (D.C. 2007) (quoting *In re Verra*, 932 A.2d 503, 504 (D.C. 2007) (stating that the second factor requires showing that the lawyer’s disability “substantially affected” the lawyer’s misconduct)); *Toledo Bar Ass’n v. Baker*, 907 N.E.2d 1172, 1177 (Ohio 2009) (applying the aggravating and mitigating factors listed in Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline, including the second factor which requires “a determination that mental disability contributed to cause the misconduct”). For

The ABA commentary reflects an approach, consistent with Minnesota's definition of causation in the tort context¹³² that would guide the director, defense counsel, and the referees. Such an approach would also promote consistency and ensure that a lawyer who engages in misconduct as a result of impairment but undergoes appropriate treatment to prevent the misconduct from recurring receives the benefit of mitigation.

As applied to whether a psychological illness caused the misconduct at issue, the questions in each case are to *what extent* the lawyer's impairment played a part in his or her misconduct and the likelihood the lawyer's conduct would have occurred in the absence of the illness.¹³³ The focus in this determination would be on the opinion of a qualified mental health or chemical dependency professional, the testimony of the lawyer, or others.¹³⁴ These opinions give some insight into the reputation, practices, and ethical behavior of the lawyer who was not impaired, the impact the impairment had on the lawyer's behavior, the consistency of that behavior with the particular illness, and other relevant considerations.

If the impairment played no role in the misconduct, and thus the misconduct would have happened regardless of the impairment, it is not a mitigating factor unless the court wishes to consider it mitigating as a personal or emotional problem.¹³⁵ If a

The Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline, see Appendix II of SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO, *available at* <http://www.supremecourt.ohio.gov/LegalResources/rules/govbar/govbar.pdf#App2>.

132. The ABA also supports use of a "but for" approach. See ABA Compendium of Prof'l Responsibility Rules and Standards, Formal Op. 03-429, n.9 (2003); see also *In re Zakroff*, 934 A.2d at 423 (stating that "substantially affected" test is met by showing that "but for" disabling condition, misconduct would not have occurred (quoting *In re Kersey*, 520 A.2d 321, 327 (D.C. 1987))).

133. See, e.g., *In re Isaacs*, 406 N.W.2d 526 (Minn. 1987).

134. See *id.* at 529 ("Isaacs' estranged wife testified that his whole life seemed to revolve around alcohol, that Isaacs had blackouts from drinking, and that from 1980 to 1983 he drank himself into oblivion almost every night. Isaacs' daughter also testified that before he had quit drinking Isaacs was always drunk when out of the office and that since he had quit drinking he was more aware of things. It was during this period, 1980 to spring 1984, that all the misconduct other than the Rahn incident occurred. The medical expert also stated that the criteria he used for evaluation showed clearly how severely Isaacs' dependency affected his life.").

135. See *In re Rooney*, 709 N.W.2d 263, 272-73 (Minn. 2006) (holding that extreme stress as a mitigating factor did not outweigh the seriousness of misappropriation); *In re Heffernan*, 351 N.W.2d 13, 15 (Minn. 1984) ("[T]urmoil in respondent's personal and professional life neither excuses, justifies, nor even

causative relationship has been established, the issue is how much weight the impairment should be given as a mitigating factor in considering what sanction will protect the public and serve the purposes of lawyer discipline.

C. *Partial Mitigation*

The decision in *In re Mayne* exposes a peculiar approach to the mitigation criteria, differing standards of mitigation for “passive” and “active” misconduct.¹³⁶ The referee’s recommendation to suspend Mayne was based in part on the court’s previous consideration of psychological disorders when some, but not all, of the factors had been met.¹³⁷ The court, in rejecting the referee’s recommendation, distinguished these cases as mitigation only for unintentional or passive misconduct.¹³⁸ The referee’s confusion is understandable. *In re Berg*,¹³⁹ upon which the referee relied, and *In re Jellinger*,¹⁴⁰ cited therein, permitted psychological mitigation of the discipline in cases involving conduct that would otherwise have resulted in disbarment even though not all of the mitigation criteria had been met.¹⁴¹

Berg had misappropriated funds from six different clients, actively concealed the misappropriation, forged a client’s signature, and made misrepresentations to clients.¹⁴² The court indicated that Berg’s depression and anxiety could mitigate his unintentional misconduct, but not his intentional misconduct.¹⁴³ Berg also had made restitution, had no prior discipline, and had been suffering from a terminal heart condition at the time of the misconduct.¹⁴⁴ Although the director acknowledged that Berg only met the first factor for psychological mitigation, the court nonetheless accepted the stipulated discipline of an indefinite suspension of no less than five years, reasoning that it had previously considered depression in mitigation when the psychological condition did not completely

explains his misconduct . . .”).

136. See *In re Mayne*, 783 N.W.2d 153, 161 (Minn. 2010) (citing *In re Berg*, 741 N.W.2d 600, 605 (Minn. 2007)).

137. *Id.* (quoting *In re Berg*, 741 N.W.2d at 605).

138. *Id.*

139. 741 N.W.2d at 605.

140. 655 N.W.2d 312, 316 (Minn. 2002).

141. *In re Berg*, 741 N.W.2d at 605–06.

142. *Id.* at 602–03.

143. *Id.* at 605.

144. *Id.*

satisfy all of the mitigation factors.¹⁴⁵ While the court's opinion stated that mitigation was being applied only to the unintentional misconduct, since the intentional misappropriation and misrepresentations would have justified disbarment,¹⁴⁶ the mitigation resulted in imposition of a lesser sanction of suspension.¹⁴⁷

The basis for the court's application of mitigation was not based on the facts of *In re Berg*¹⁴⁸ but instead appeared to be based on the general proposition that depression does not mitigate intentional misconduct, for which the court cited *In re Jellinger*.¹⁴⁹ In *In re Jellinger*, the court rejected the referee's determination that Jellinger had proved the mitigation factors.¹⁵⁰ Jellinger's expert had testified that Jellinger's misconduct (misrepresentations, lack of diligence, communication, cooperation with the disciplinary investigation, and misappropriation of approximately \$19,000 while acting as a personal representative for an estate) "was in large part a result of his depressive disorder."¹⁵¹

Because the court was not convinced that a causal relationship existed between the depression and the affirmative acts of misconduct, causation was not met.¹⁵² This conclusion, that Jellinger's active misconduct was not caused by his illness, became the basis for the distinction in *In re Berg* between active and passive misconduct.¹⁵³ In addition to failing to meet the causation criterion, Jellinger also failed to meet the last two criteria.¹⁵⁴ Nonetheless, Jellinger's misappropriation and misrepresentation did not result in disbarment; he received a "stayed" disbarment with conditions, including an indefinite suspension for a minimum of two years.¹⁵⁵

145. *Id.* at 605–06.

146. *Id.* at 604.

147. *Id.* at 606.

148. The matter came before the court on the parties' stipulation, which was accompanied by a memorandum describing Berg's physical and psychological condition and other mitigating factors. *Id.* at 604.

149. *Id.* at 605 (citing *In re Jellinger*, 655 N.W.2d 312, 316 (Minn. 2002)).

150. *In re Jellinger*, 655 N.W.2d at 315.

151. *Id.* at 314.

152. *Id.* at 315.

153. *In re Berg*, 741 N.W.2d at 605.

154. *In re Jellinger*, 655 N.W.2d at 315.

155. *Id.* at 316.

The principle that has now apparently emerged as black letter law in *In re Mayne*, that all of the psychological factors must be met to mitigate intentional misconduct, was applied to prevent any mitigation for Mayne, even though it clearly ameliorated the disbarment sanction in both *In re Berg* and *In re Jellinger*.¹⁵⁶ The distinction that mitigation ameliorates passive but not active misconduct is not borne out by the prior cases.

The court could conceivably allow a psychological problem to be treated as a personal or emotional problem, therefore mitigating without a showing of causation¹⁵⁷ to ameliorate a sanction that appears harsh or unnecessary in light of the circumstances of a particular case. Nonetheless, denying mitigation altogether for intentional misconduct is inconsistent with the court's prior decisions, which reject attempts to limit the availability of mitigation in misappropriation and criminal cases,¹⁵⁸ and places one more obstacle to mitigation for impairment.

V. THE BALANCE: DISBARRING IMPAIRED LAWYERS

A. *Protecting the Public by Disbarring Lawyers*

The difficulty with the opinions in *In re Mayne* and *In re Rodriguez* is not necessarily that the lawyers who took money that did not belong to them should not have been disbarred. Our disciplinary jurisprudence certainly supports disbarment of attorneys who engage in dishonest conduct prohibited by Rule 8.4(c), whether it results in a criminal conviction and thereby violates Rule 8.4(b) or is prejudicial to the administration of justice and thereby violates Rule 8.4(d). Misappropriation and other dishonest conduct threaten public trust and client protection. The court has the difficult job of weighing the factors in light of precedent and the unique circumstances of each case in order to carry out its duty to protect the public, the profession, and the

156. *In re Mayne*, 783 N.W.2d 153, 163 (Minn. 2010); *see cf. In re Berg*, 741 N.W.2d at 604 (“A factor that mitigates Berg’s unintentional misconduct is his depression.”); *In re Jellinger*, 655 N.W.2d at 316 (“We also recognize that Jellinger’s depression was shown to have some causative relationship to his passive misconduct.”).

157. *See* STANDARDS FOR IMPOSING LAWYER SANCTIONS 9.31 (1991).

158. *In re Rooney*, 709 N.W.2d 263, 270–71 (Minn. 2006) (ruling, based on the Standards, that mitigation is available in misappropriation cases); *In re Olkon*, 324 N.W.2d 192, 195 (Minn. 1982) (refusing to adopt per se disbarment for criminal conduct).

system of justice. Ultimately, the court has to determine what sanction “best serves the purposes of attorney discipline”¹⁵⁹

Mitigating factors make all the difference in the sanction a lawyer receives for dishonest conduct. Therefore, while a felony conviction generally warrants disbarment, mitigating factors can and frequently do warrant a sanction less than disbarment.¹⁶⁰ Similarly, while misappropriation of client funds generally warrants disbarment,¹⁶¹ the court has not always disbarred attorneys who have misappropriated funds.¹⁶² Mitigating factors are considered, regardless of the severity of the misconduct, to determine whether a less severe sanction is appropriate.¹⁶³

Disbarment is an “extreme penalty”¹⁶⁴ that “exists primarily as a necessary adjunct to criminal prosecution penalties, to protect the public and to deter lawyers who may otherwise be tempted to perform illegal acts.”¹⁶⁵ Disbarment, although not technically permanent, usually is.¹⁶⁶

159. *In re Andrade*, 736 N.W.2d 603, 609 (Minn. 2007) (Page, J., dissenting).

160. *In re Andrade*, 736 N.W.2d at 605. As the dissent indicates in *In re Andrade*, the court’s prior cases reflect discipline short of disbarment for felony convictions, often without mention of mitigating factors. *See id.* at 608–09 (Page, J., dissenting) (summarizing nine cases involving felony conduct ranging from misappropriation charged as a felony theft to securities fraud and three million felony theft imposing suspension or lesser discipline); *see also In re Olkon*, 324 N.W.2d at 196 (lawyer convicted of two felonies suspended in light of pro bono work, good character, as well as contrition, remorse, and counseling for character flaws that gave a strong indication that the lawyer would not engage in unethical or illegal conduct in the future).

161. *In re Rooney*, 709 N.W.2d at 268 (citing *In re Olson*, 577 N.W.2d 218, 220–21 (Minn. 1998)).

162. *Id.* (citing *In re Hanvik*, 609 N.W.2d 235, 242 (Minn. 2000); *In re Pyles*, 421 N.W.2d 321, 327 (Minn. 1988)); *see In re Isaacs*, 451 N.W.2d 209, 211 (Minn. 1990) (citing *In re Wareham*, 413 N.W.2d 820, 821 (Minn. 1987)); *In re Simonson*, 365 N.W.2d 259, 261 (Minn. 1985) (holding that misappropriation warrants serious sanctions, unless substantial mitigating circumstances exist).

163. *In re Rooney*, 709 N.W.2d at 270–71 (considering lack of disciplinary history, restitution, remorse, cooperation with director, good character, significant contributions to the community, extraordinary stress, and counseling as factors that mitigated lawyer’s misappropriation of \$27,700 of client’s funds); *see, e.g., In re Hanvik*, 609 N.W.2d at 241–42 (considering lack of prior disciplinary history and restitution); *In re Pyles*, 421 N.W.2d at 326–27 (considering pro bono service and exemplary life); *In re Bernstein*, 404 N.W.2d 804, 805 (Minn. 1987) (considering amount of funds, restitution, contrition, and good character); *In re Heffernan*, 351 N.W.2d 13, 14–15 (Minn. 1984) (considering pro bono services, personal turmoil, and restitution).

164. *In re O’Hara*, 330 N.W.2d 863, 865 (Minn. 1983).

165. *In re Olkon*, 324 N.W.2d at 195.

166. *See Betty M. Shaw, Disbarment—Not Necessarily Forever in Minnesota*, MINN.

Few disbarred attorneys have been reinstated, excluding early cases that explicitly contemplated reinstatement after relatively brief periods of disbarment.¹⁶⁷ Imposing the most serious sanction that can be given sends a clear message to the public and other lawyers that the conduct is so inconsistent with the standards of the profession that the lawyer may no longer be a member. This sanction should not be imposed on lawyers whose misconduct arises from their impairments and who are receiving treatment that makes future misconduct unlikely.

B. Rehabilitation, Compassion, and Mitigation

Compassion and rehabilitation are not foreign to lawyer discipline. An early case denied that “enlistment of a natural human sympathy for respondent’s unrelated misfortune” could deter the court from its paramount duty to protect the public.¹⁶⁸ However, the court has since recognized that disbarment has consequences not only on the lawyer, but on the community,¹⁶⁹ and has exercised its discretion to make such other dispositions as it deems appropriate.¹⁷⁰ It has also shown compassion for impaired lawyers.¹⁷¹

LAWYER, Aug. 1, 2005 (discussing the disbarment and reinstatement of David Anderley and three other Minnesota attorneys).

167. *Id.*; see William J. Wernz, *Character, Fitness & Redemption: Measuring Fitness to Practice*, BENCH & B. MINN., Oct. 2007, at 18, 19; see *Shamed Lawyer Wins Rare Reprieve*, ST. PAUL PIONEER PRESS (Minn.), Aug. 28, 2006, available at www.dorsey.com/resources/detail.aspx?pub=2351.

168. *In re Hanson*, 258 Minn. 231, 233, 103 N.W.2d 863, 864 (1960) (denial of request by respondent who had quit practicing law three years earlier and who had suffered a serious impairment of his eyesight for consideration of hardship).

169. See *In re Olkon*, 324 N.W.2d at 196.

170. *In re Hansen*, 318 N.W.2d 856, 858 (Minn. 1982) (quoting *In re Hanson*, 103 N.W.2d at 864). While acknowledging that “natural human sympathy” cannot deter the court from protecting the public, the court nonetheless placed an eighty-eight year old lawyer whose improper litigation conduct and failure to cooperate were “obviously . . . a result of the lawyer’s advanced age rather than moral shortcomings,” on inactive status rather than indefinitely suspending him since the discipline was not appropriate or necessary to protect the public. *Id.*

171. See *In re Peters*, 332 N.W.2d 10, 18 (Minn. 1983) (suspending rather than disbaring lawyer to permit him to seek reinstatement after receiving psychological or psychiatric treatment and seek to rehabilitate himself to “once again be restored as a worthy and contributing member of the Minnesota bar”); *In re O’Hara*, 330 N.W.2d 863, 865 (Minn. 1983) (suspending rather than disbaring lawyer in order to give him an opportunity to rehabilitate himself. “If his alcoholism can be arrested, we are convinced he can be restored as a contributing and worthy member of the Minnesota bar.”).

Minnesota's disciplinary history recognizes impairment as a mitigating factor that allows rehabilitation:

Although alcoholism in and of itself is not a defense to professional misconduct, it can be a mitigating factor in determining the appropriate disciplinary sanction. Here, there are grounds for the immediate disbarment of Fallon. That extreme discipline, however, is not imposed. Fallon's misconduct apparently stems from chronic alcoholism and he should be given an opportunity to rehabilitate himself. If Fallon's illness can be arrested, he will likely be, as he once was, a contributing and worthy member of the bar. Until he is rehabilitated, however, he is not fit to practice law and the public must be protected.¹⁷²

Whether or not rehabilitation and empathy are officially accepted in our disciplinary jurisprudence, the court has paused before imposing the extreme consequence of the disbarment on a lawyer who, for one reason or another, should not be ousted from the profession. The reasons have been many, or sometimes not even stated, but there are many lawyers who engaged in misappropriation or conduct that resulted in felony convictions who were not ousted from the profession.¹⁷³ On the other hand, there are plenty of lawyers who engaged in similar conduct and have been found undeserving of a less extreme sanction.¹⁷⁴ Of

172. *In re Fallon*, 389 N.W.2d 509, 511 (Minn. 1986).

173. See, e.g., *In re Lahlum*, 719 N.W.2d 707, 707–08 (Minn. 2006) (felony theft); *In re Post*, 686 N.W.2d 529, 529 (Minn. 2004) (felony DWI); *In re Singer*, 630 N.W.2d 404, 404 (Minn. 2001) (felony theft for misappropriating funds from trust account); *In re Barta*, 461 N.W.2d 382, 385 (Minn. 1990) (tax fraud and evasion); *In re Serstock*, 432 N.W.2d 179, 179–80 (Minn. 1988) (dismissing traffic tickets for favors and failing to file income tax returns); *In re Kimmel*, 322 N.W.2d 224, 226–27 (Minn. 1982) (felony criminal sexual conduct); *In re Scholle*, 274 N.W.2d 112, 113 (Minn. 1978) (conspiracy to import and distribute cocaine); *In re Scallen*, 269 N.W.2d 834, 835, 837 (Minn. 1978) (securities fraud and felony theft); *In re Swagler*, 239 Minn. 566, 566, 58 N.W.2d 272, 272 (1953) (criminal negligence).

174. See *In re Rothstein*, 777 N.W.2d 31, 31 (Minn. 2010) (lawyer misappropriating funds from his law firm convicted of felony theft by swindle); *In re Foster*, 771 N.W.2d 512, 512 (Minn. 2009) (felony involving dishonesty); *In re Andrade*, 736 N.W.2d 603, 603–04 (Minn. 2007) (lawyer convicted of attempted theft by swindle of money from client); *In re Giberson*, 735 N.W.2d 683, 683 (Minn. 2007) (willful failure to pay child support); *In re Pugh*, 710 N.W.2d 285, 286–87 (Minn. 2006) (lawyer convicted of thirty-three felony counts, including mail fraud, wire fraud, and money laundering); *In re Perez*, 688 N.W.2d 562, 565, 569 (Minn. 2004) (mail fraud); *In re Oberhauser*, 679 N.W.2d 153, 154 (Minn.

these, none had engaged in misconduct while they were impaired, as Rodriguez and Mayne undoubtedly did; and none of them took money to satisfy their addictions or compulsions,¹⁷⁵ as Rodriguez and Mayne appear to have done.¹⁷⁶

Recognizing that chemical dependency and mental illness inordinately affect the legal profession and cause lawyers to engage in behaviors that violate the Rules of Professional Conduct is one reason to pause. Recognizing that the public is protected when a lawyer seeks appropriate treatment to effectively address the illness and prevent future misconduct is another. Empathy for those who suffer from these illnesses and encouragement of rehabilitation are merely additional benefits. Had the court suspended Mayne and Rodriguez indefinitely, the sanction would have been a serious one that would have protected the public and sent the message to the public and the profession that the conduct is not tolerated; it would have also sent the message that the legal profession encourages rehabilitation.¹⁷⁷

C. *The Balance*

The role of the Minnesota Supreme Court is to discipline lawyers in the interests of the public and the profession, not to show empathy for lawyers who engage in misconduct while they are impaired. However, Minnesota's discipline jurisprudence demonstrates the court's ability to protect the interests of the public and the profession while allowing impaired lawyers to rehabilitate themselves. Mitigation for lawyer impairment serves

2004) (money laundering); *In re Klane*, 659 N.W.2d 701, 701 (Minn. 2003) (felony mail fraud); *In re Amundson*, 643 N.W.2d 280, 280–81 (Minn. 2002) (five counts of felony theft by swindle and misappropriation of client funds).

175. See *In re Rothstein*, 777 N.W.2d at 31; *In re Giberson*, 735 N.W.2d at 683; *In re Andrade*, 736 N.W.2d at 604; *In re Pugh*, 710 N.W.2d at 286; *In re Perez*, 688 N.W.2d at 563–64; *In re Oberhauser*, 679 N.W.2d at 154–55; *In re Klane*, 659 N.W.2d at 701; *In re Amundson*, 643 N.W.2d at 280.

176. See *In re Mayne*, 783 N.W.2d 153 (Minn. 2010); *In re Rodriguez*, 783 N.W.2d 170 (Minn. 2010).

177. See *In re Rodriguez*, 783 N.W.2d at 170 (Anderson, J., dissenting) (“If we disbar Rodriguez, there will be one less reason for him to work toward recovery. If we suspend him indefinitely, he will have an extremely steep hill to climb in order to be reinstated, but foreclosing that possibility does not further any of our stated goals in lawyer discipline cases. Here, disbarment does not protect the public more than indefinite suspension would; nor does it do more to safeguard the administration of justice. Further, disbarment will not likely deter similar conduct by other lawyers.”).

these interests. When viewed from that perspective, the disbarments of Mayne and Rodriguez are neither just nor right.

Establishing and defining a direct causation standard, removing other obstacles, and separating concepts of excuse and defense from mitigation would result in the mitigation for lawyer impairment functioning as it was meant to function. Nothing in the history of either Minnesota's or the ABA's adoption of mitigating factors suggests that mitigation for psychological or other disabilities should be treated with any more suspicion than any of the other mitigating factors. The ABA's specific identification of impairments as mitigating factors and articulation of the criteria were intended to promote consistency in recognizing that impairments that cause misconduct that are successfully treated and give assurances that misconduct will not recur serve to protect the public and the profession and should mitigate discipline.¹⁷⁸

Our abhorrence of misappropriation or crimes of dishonesty by our colleagues, skepticism, or our lack of familiarity with psychological disorders should not blind us to the fact that psychological impairments may cause lawyers who are otherwise honest to behave in ways inconsistent with their character.¹⁷⁹ Recognizing impairment as a mitigating factor does not mean the court or the profession condones, accepts, defends, or excuses the behavior. It allows imposition of a sanction that takes into account that the impairment has been effectively treated and misconduct is not likely to recur. It also sends the message that the legal profession, including its disciplinary system, supports the recovery and rehabilitation of impaired lawyers.

Education is also necessary to dispel misunderstanding and misconceptions of impairments to ensure proper respect for the role of mental health professionals and the complex nature of diagnosis and the variability of psychological illnesses. For example, understanding the following may avoid a misconception that a lawyer can or must prove that he or she was under the influence of alcohol or in a particular mental state on a particular day when he or she engaged in misconduct:

178. See STANDARDS FOR IMPOSING LAWYER SANCTIONS 1.3, 9.3 cmt. (1991).

179. See *In re Johnson*, 322 N.W.2d 616, 617 (Minn. 1982) (recognizing the "numerous members of the legal profession whose conduct due to alcoholism had seriously affected their ability to maintain the standards of the profession . . .").

An impaired lawyer's mental condition may fluctuate over time. Certain dementias or psychoses may impair a lawyer's performance on "bad days," but not on "good days" during which the lawyer behaves normally. Substance abusers may be able to provide competent and diligent representation during sober or clean interludes, but may be unable to do so during short or extended periods in which the abuse occurs.¹⁸⁰

Common understanding of behaviors typically associated with alcoholism, such as denial and impaired judgment, have resulted in recognition of its impact within the disciplinary system,¹⁸¹ just as certain types of misconduct have come to be associated with depression.¹⁸² The mitigation criteria should be applied in a manner that avoids creating obstacles to understanding our growing knowledge of impairments that affect lawyers and result in discipline.

VI. CONCLUSION

In re Mayne and *In re Rodriguez* demonstrate that our mitigation standard has become an obstacle to recognizing lawyer impairment as a mitigating factor. These decisions represent the culmination of a jurisprudence that has come to treat impairment mitigation as an excuse or a defense. As such, it is subjected to a higher level of proof than other mitigating factors. Its threshold criterion has been defined piecemeal in litigation and frequently without regard to the science of mental and chemical dependency and the testimony of its professionals. Its undefined and shifting causation standard is nearly impossible to meet.

The decisions also appear to mark a turn from jurisprudence that allowed the court to mitigate the sanction of disbarment when disbarment was not necessary to protect the public and—when appropriate—to ameliorate the impact of the rigid mitigation criteria for those lawyers whose impairment leads to active misconduct. Concepts of compassion and rehabilitation are

180. ABA Compendium of Prof'l Responsibility Rules and Standards, Formal Op. 03-429 (2003).

181. See, e.g., *In re Johnson*, 322 N.W.2d at 617.

182. See, e.g., *In re Mayne*, 783 N.W.2d 153, 160 (Minn. 2010). Although mental impairments are most likely to cause violations of Rule 1.1, 1.3, and 1.4, they may result in the violation of other rules. ABA Compendium of Prof'l Responsibility Rules and Standards, Formal Op. 03-429 (2003).

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consistent with protection of the public and the profession and can be accomplished by removing the obstacles that have been placed in the way of treating impairment as a mitigating factor.