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In the Matter of Mitigation: The Necessity of a Less Discretionary Standard for Sanctioning Lawyers Found Guilty of Intentionally Misappropriating Client Property

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NOTE

IN THE MATTER OF MITIGATION: THE NECESSITY OF A LESS DISCRETIONARY STANDARD FOR SANCTIONING LAWYERS FOUND GUILTY OF INTENTIONALLY MISAPPROPRIATING CLIENT PROPERTY

I. INTRODUCTION

On July 31, 2002, the Supreme Court of Ohio decided the case of one Caesar M. Harris, an attorney found guilty of intentionally misappropriating over $29,000 of alimony payment intended to go to his client. The question before the court was related to sanctioning, and whether Mr. Harris should be permanently disbarred from practice for such a reprehensible offense, or instead suspended for some length of time. The court chose the lighter sentence of indefinite suspension over disbarment, in spite of a number of factors leaning heavily towards disbarment. Harris's client was helpless for reasons beyond mere ignorance of the workings of the legal system; she was mentally unstable to a degree that required a series of involuntary hospitalizations. In addition, Harris's dishonest conduct had been going on with this client for a period of nine years. This factual deck was certainly stacked against Harris in Ohio, where the precedent is to begin with a presumption of permanent disbarment in cases of intentional misappropriation.

1. See Cleveland Bar Assoc. v. Harris, 772 N.E.2d 621, 623 (Ohio 2002) (finding that, in addition to the misappropriation, the respondent lawyer had also charged his client an excessive fee and had neglected her interests).
2. See id.
3. See id. at 624.
4. See id. at 623.
5. See id.
6. See id.
How, then, did this court get from a presumption of disbarment to a conclusion of suspension, in light of the circumstances? It did so through its application of the amorphous, potentially all-encompassing lawyer-friendly tool of mitigating circumstances. In this case, the court felt it was enough that Harris had a spotless twenty-seven year career (even though he spent nine of those years stealing from this client), that he was an honorably discharged veteran, and that he was a regular churchgoer.

It is difficult to imagine very many smell tests that such a result could pass, and this particular case is merely one tree in a forest of similar sanctioning decisions.

A baby must crawl before it can walk, and perhaps that same progression of movement is appropriate for the sanctioning of unethical attorneys within a system that has been loudly criticized for its rampant inconsistency. While those unhappy voices grow in number and continue to demand a much-needed uniform sanctioning scheme, such a Herculean task remains unperformed as countless sanctioning injustices continue to mount. In the meantime, before a set of uniform standards is constructed that can somehow account for the inordinate number of fact situations that arise even in the specific area of intentional conversion of client funds, it might be worthwhile for courts to consider imposing a bright-line standard for at least the most egregious examples of that particular violation.

In 1986, the American Bar Association Joint Committee on Professional Standards developed the Standards for Imposing Lawyer Sanctions. The main objective of these standards was to assist the courts in furthering the objectives of lawyer discipline, which include the goals of maintaining the public’s confidence in the legal system and protecting the public from unethical lawyers by properly deterring lawyer misconduct, but without making the sanctions so punitive that they halt lawyers from reporting the ethical violations of other lawyers. The ABA Joint Committee intended for these standards to be used as a non-binding model that would give courts direction while at the same time leaving room for “flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct.” As it turns out, creativity is

7. See id.
8. See id.
10. STANDARDS FOR IMPOSING LAWYER SANCTIONS (1991) [hereinafter ABA STANDARDS].
11. See id. at 1.
12. Id.
exactly what these standards permitted, to such a great degree that the Standards have been rendered virtually meaningless.

The interpretation and enforcement of the standards for sanctioning lawyers guilty of ethical violations remain woefully inconsistent between jurisdictions and even within individual jurisdictions. The ABA Standards themselves further such confusion. With such inconsistency, the ABA’s goals for lawyer discipline remain at least partly unsatisfied. Moreover, with public confidence in the sanctity of fiduciary duty related to money handling at such a low in the wake of the Enron, WorldCom, and Tyco disasters, it is time for jurisdictions to consider a sanctioning standard for lawyers guilty of conversion from clients that can be more consistently, and more justly, applied.

Such a standard would serve the courts when faced with the choice between disbarment and suspension, the only two choices available when the wrongdoer lawyer has mishandled client property in any knowing way. Technically and practically, the difference between the two sanctions is relatively small. Disbarment is permanent in only a minority of jurisdictions, with generally a five-year minimum before the lawyer can apply for readmission. The sanction of suspension commonly imposes an incapacitation of the lawyer of anywhere from a few months to three years. Therefore, the actual achievement of such a bright line standard would be a modest one, especially since disbarred lawyers are readmitted at a relatively frequent rate. Even though the difference between disbarment and suspension could be as small as two years of work for the lawyer, however, the difference becomes significantly larger when viewed in light of the primary goals of lawyer sanctioning: the deterrence of lawyer misconduct in order to protect the public from such harm, and the preservation of public confidence in the legal system. Disbarment makes it more difficult for the lawyer to get

14. See, e.g., Levin, supra note 9, at 40 (noting that the commentary to Standard 4.12 confounds analysis by citing to a case contradicting the commentary’s previously stated recommendation regarding the circumstances when suspension is a more appropriate sanction than disbarment).
15. See ABA STANDARDS, supra note 10, at Standard 4.1.
16. See id. at Standard 2.2 Commentary.
17. See id.
18. See id. at Standard 2.3.
his or her career back than would a suspension,\textsuperscript{20} and there is a stigma attached to the sanction of disbarment that simply does not exist with a mere suspension, even an indefinite one.\textsuperscript{21} For the most egregious offenses committed by lawyers, the public deserves to see the most severe sanctions imposed, and nothing short of that will preserve that public confidence while providing lawyers with the appropriate degree of deterrence.

There is another component to this difference between disbarment and suspension that connects to the public's capacity to maintain confidence in its legal system. While the complex disciplinary procedural systems that exist in various forms among the states are not the subject of this Note, there are two wrinkles in such procedures that put the preservation of that public confidence in particular danger. The first is that lawyer disciplinary proceedings are often conducted confidentially before they get to the stage of approval by the courts, with the purpose of protecting the lawyer's reputation but with the unfortunate by-product of engendering suspicion of such a secretive system, an effect to which the ABA was particularly sensitive in its 1992 Commission on Evaluation of Disciplinary Enforcement.\textsuperscript{22}

The second wrinkle is that such proceedings are conducted almost primarily by lawyers, where even the inclusion of non-lawyers on the hearing committees is not enough to overcome the stench of professional partisanship, not when those lay members fail to ever represent a majority of the vote, not when they are chosen by members of the legal profession, and not when they generally refrain from pushing for more stringent sanctions than the lawyers on the board.\textsuperscript{23} Even by the time disciplinary proceedings get to a final review by the courts, lawyers are being judged by judges who were once practicing lawyers, and so there is a natural tendency to suspect that lenient sanctions might be more the product of professional solidarity than actual justice.\textsuperscript{24}

\bibliography{notes}

\textsuperscript{20} See \textit{Model Rules for Lawyer Disciplinary Enforcement}, R. 24 and R. 25 Commentary (1996) (noting that there should be a presumption against readmission after disbarment and that it should not be even considered until at least five years have passed, while for suspension, if six months or less, reinstatement is automatic if the proper papers are filed).

\textsuperscript{21} See \textit{ABA Standards}, supra note 10, at Standard 2.2 Commentary.

\textsuperscript{22} See \textit{The Legal Profession: Responsibility and Regulation} 558-59 (Geoffrey C. Hazard, Jr. \& Deborah L. Rhode eds., 1994).


\textsuperscript{24} See Levin, supra note 9, at 13.
public feel that the legal system is operating in an objective, justice-
minded fashion.

Part II of this Note will outline the ABA sanctioning standard for
lawyer misappropriation of client funds, and will then examine the basic
jurisdictional approaches to sanctioning guilty lawyers for such an
ethical violation. This part of the Note will look at the two outer
extremes of such enforcement, the case-by-case application favored by
states like Colorado and Ohio,25 and the bright line standards favored by
New Jersey and the District of Columbia.26

Part III will explore the strengths and weaknesses of each approach,
and will argue for a bright line test that gives the courts less opportunity
to allow lawyers guilty of conversion to escape disbarment.

Finally, Part IV will begin to consider what such a bright line test
might be, examining the strengths and weaknesses of the mitigating
factor analysis that the courts use to grant the lighter sentence of
suspension rather than disbarment.

II. BACKGROUND

A. Standard 4.1

Most jurisdictions either rely heavily on the ABA Standards, or
have applied their own standards modeled after those proposed by the
ABA.27 For those jurisdictions, conversion of client funds can be found
as the first ethical violation on the list, covered by Standard 4.1. That
standard is broken down into four subsections covering different degrees
of severity.28 Standard 4.11 speaks to the most severe, recommending
disbarment when the lawyer "knowingly converts client property and
disposes of it in a manner inconsistent with the interests of the owner or
causes injury or potential injury to a client." Moving one step down in
severity, Standard 4.12 recommends suspension when the lawyer
"knows or should know that he is dealing improperly with client
property and causes injury or potential injury to a client."29

It is between these two sanctioning standards that the courts face
confusion. Before the courts get to that point, Standard 3.0 lays some

25. See generally People v. Tidwell, 35 P.3d 624 (Colo. 2001); Cleveland Bar Assoc. v. Harris, 772 N.E.2d 621 (Ohio 2002).
27. See Levin, supra note 9, at 33-35.
28. See ABA STANDARDS, supra note 10, at Standard 4.1.
29. Id. at Standard 4.11.
30. Id. at Standard 4.12.
groundwork to help clarify the decision. This Standard gives the court four factors to consider before imposing a sanction: "(a) the duty violated; (b) the lawyer's mental state; and (c) the actual or potential injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." This Note will be concerned with the intentional conversion of client funds. Therefore, for the purpose of this Note, assume that the duty violated, conversion, has already been proven. Also, assume that the lawyers' mental state, which the ABA Standards classify as either intent, knowledge, or negligence, is intent, and the injury is significant.

The only variable existing in the cases that will be covered within is factor (d), the consideration of aggravating and mitigating circumstances. Standards 9.2 and 9.3 provide a list of such possible factors. Standard 9.21 defines aggravation as those circumstances or factors "that may justify an increase in the degree of discipline to be imposed." 9.22 lists nine factors that may be considered in such a way:

(a) prior disciplinary offenses; (b) dishonest or selfish motive; (c) a pattern of misconduct; (d) multiple offenses; (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process; (g) refusal to acknowledge wrongful nature of conduct; (h) vulnerability of victim; (i) substantial experience in the practice of law; (j) indifference to making restitution.

As this Note will examine and as the Harris case has already exhibited, such factors fail to get nearly the amount of court time that the mitigating factors do.

Mitigating factors are the opposite of aggravating factors. They are those considerations that give the court justification for reducing the degree of the sanction imposed upon the guilty lawyer. There are thirteen factors listed:

(a) absence of a prior disciplinary record; (b) absence of a dishonest or selfish motive; (c) personal or emotional problems; (d) timely good

31. Id. at Standard 3.0.
32. See id. at Standard 3.0 Commentary.
33. See id. at Standards 9.2 and 9.3
34. Id. at Standard 9.21
35. Id. at Standard 9.22
36. See Cleveland Bar Assoc. v. Harris, 772 N.E.2d 621, 624 (Ohio 2002) (dismissing summarily the vulnerability of the wronged client after paying it lip service).
37. See ABA STANDARDS, supra note 10, at Standard 9.31.
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faith effort to make restitution or to rectify consequences of misconduct; (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (f) inexperience in the practice of law; (g) character or reputation; (h) physical or mental disability or impairment; (i) delay in disciplinary proceedings; (j) interim rehabilitation; (k) imposition of other penalties or sanctions; (l) remorse; (m) remoteness of prior offenses.  

Although the commentary to the mitigating factors list does some work to clarify the application of mitigating factor (d), restitution, the commentaries to these lists provide very little guidance into how they should be weighed, except to note that cases concerning physical and mental impairment of the lawyer are particularly difficult to treat. The commentaries also list one illustrating case for each aggravating or mitigating circumstance. Such a means of clarification is not all that helpful when a single case cannot possibly provide much insight into how such factors should be applied in a variety of factual situations. Because room for manipulation exists, a handful of jurisdictions have all but discarded the usage of aggravating and mitigating factors in their decisions on how to sanction lawyers guilty of intentionally converting client funds, preferring to approach such decisions with a presumption towards disbarment while not quite adopting a per se rule of disbarment.

B. The (Almost) Bright Line Tests

Two jurisdictions in particular, New Jersey and the District of Columbia, have taken a good deal of heat for adopting a notably draconian stance on lawyers guilty of intentional misappropriation. However, these jurisdictions have kept an intensely focused eye on the policy goals underlying lawyer discipline, and have refused to provide the wiggle room for courts to use mitigating factor considerations as a rationale for more lenient sanctioning.

38. Id., at Standard 9.32.  
39. See id. at Commentary.  
40. See id., at Standard 9.22 Commentary; Standard 9.32 Commentary.  
41. See generally In re Wilson, 409 A.2d 1153 (N.J. 1979); In re Addams, 579 A.2d 190 (D.C. 1990).  
1. *In re Wilson*

In 1978, the Supreme Court of New Jersey delivered a short five-page decision that had the landmark effect of implementing great change in sanctioning standards in New Jersey, to a degree that no other state had then seen.43

Attorney Wendell Wilson was caught intentionally and wrongfully possessing over $27,000 of his clients' money.44 Wilson was also found guilty of lying to clients, wantonly disregarding their interests, and advising them to commit fraud.45 None of those additional violations mattered to the court; it was working on the belief that intentional misappropriation alone was sufficient to warrant disbarment.46 Chief Justice Wilentz, the author of the opinion, minced no words regarding the seriousness of such an action, proclaiming that "[n]o clearer wrong suffered by a client at the hands of one he had every reason to trust can be imagined."47 The preservation of the public's confidence in the bar and the legal system was first and foremost on this court's mind, and such was its moral foundation for determining that mitigating factors will rarely provide a lawyer an escape from disbarment.48

The *Wilson* court condemned three of the mitigating factors other courts in New Jersey had previously utilized in their sanctioning determinations for intentional conversion, all three of which eventually appeared in the ABA Standards' list of mitigating factors.49 Restitution was the factor most often relied upon by the courts up until that point, and so the court directed most of its attention towards restitution as a mitigating factor.50 Relying on the reasoning of a very old case, the court forcefully dismissed such a factor as having no relevance to a lawyer's intentional conversion:

"We do not attach very much importance, as a rule, to the matter of restitution, because that may depend more upon financial ability or other favoring circumstances than repentance or reformation. A

44. See id. at 1154.
45. See id.
46. See id.
47. Id. at 1155.
48. See id. at 1157-58.
49. See id. at 1156-57. Even though this opinion was delivered eight years before the Standards for Imposing Lawyer Sanctions was devised, the New Jersey courts, like most courts in other states, did consider particular factors as mitigation, such as "the economic and emotional pressures on the attorney which caused and explained his misdeed; his subsequent compliance with client trust account requirements; his candor and cooperation with the ethics committee; his contrition; and, most of all, restitution." Id. at 1155.
50. See id. at 1156.
thoroughly bad man may make restitution, if he is able, in order to rehabilitate himself and regain his position in the community; and a thoroughly good man may be unable to make any restitution at all."\footnote{1007}

The court went on to attack the usefulness of a prior outstanding career and the inexperience of the wrongdoing lawyer as mitigating factors.\footnote{1107} Chief Justice Wilentz proclaimed that "[t]his offense against common honesty should be clear even to the youngest; and to distinguished practitioners, its grievousness should be even clearer."\footnote{1207}

The \textit{Wilson} court was not entirely unsympathetic to the risk of injustice inherent in the creation of such a strict, bright-line standard, noting that stress and financial pressures could, for instance, force a perfectly moral lawyer, capable of reformation, into feeling the necessity to steal for the benefit of his family.\footnote{1307} The continued confidence of the public in the legal system trumped even that tragic a possibility, according to the court.\footnote{1407}

Critics of the \textit{Wilson} rule find such reasoning too harsh, especially since New Jersey is one of the few jurisdictions where disbarment is almost exclusively permanent.\footnote{1507} Of particular concern is the shifting of that reasoning by New Jersey courts in the wake of \textit{Wilson} to cases where the lawyer guilty of intentional conversion did so while afflicted with some form of physical or mental conditions or addictions, such as alcoholism, drug addictions, or compulsive gambling.\footnote{1607} Where such lawyers committed their violations when going through such an illness, and later rehabilitated themselves, the push for allowing such a factor to be considered as mitigation is based on the fact that such a lawyer is no longer the same person he or she was when committing the offense, therefore eroding the deterrent effect of disbarment in such cases while providing the public with enough reasoned information that this lawyer is no longer a threat, thus preserving the public's confidence in the system.

In any event, the \textit{Wilson} court did not create a per se rule for disbarment, only a rule for a strong presumption of disbarment in intentional conversion cases. In the conclusion of his opinion, Chief
Justice Wilentz declared that "mitigating factors will rarely override the requirement of disbarment." The word "rarely" left the door slightly ajar, but the court was relatively silent as to when that opening could be exploited. The District of Columbia was not as tight-lipped about its presumption towards disbarment rule.

2. *In re Addams*

In 1990, after a series of cases leading to the development of this result, the District of Columbia Court of Appeals created its own presumption of disbarment in *In re Addams*. The *Addams* decision created a standard that was both more lenient than *Wilson* and, on its face, more strict. While *Wilson* all but eradicated the usage of any mitigating factors as a means of avoiding disbarment, the *Addams* court advocated the consideration of such factors, but only when they persuasively outweighed the existence of any aggravating factors.

Where the *Addams* decision appeared to endorse a result even stricter than *Wilson* was in the application of the facts of the case. In *Addams*, the wrongdoing lawyer returned money he had improperly taken out of his client's escrow account, and his client, who was perfectly content with her lawyer's performance, never complained about such action. In actuality, Addams had been doing this client the favor of working for her despite the fact that she was continually tardy in paying for his services, and he had taken the money out of the escrow account as a means of paying for services the client had not yet paid for directly. The lawyer contributed somewhat towards his own disbarment, however, by adding an aggravating factor to the mix: he presented dishonest and conflicting explanations for his misconduct to the disciplinary board.

The extraordinary nature of the facts of the case is represented by the disciplinary board's original recommendation: four votes for disbarment, and four votes for suspension for a year and one day. Faced with such a split, the DC Court of Appeals tackled the facts head on, and determined that corrupt intent was irrelevant; as long as the lawyer intentionally, knowingly misappropriated funds, even if not

60. *See id.* at 191.
61. *See id.* at 199.
62. *See id.*
63. *See id.*
64. *See id.*
65. *See id.* at 191.
specifically for his own benefit or for the purpose of injuring the client, disbarment would be presumed. Thus, in effect, this court eliminated from consideration entirely mitigating factor (b), the “absence of a dishonest or selfish motive.” Boiled down to its essence, this resulted in the court’s adoption of the rule that disbarment was always presumed in all misappropriation cases except those resulting from the presence of simple negligence.

As in Wilson, the Addams court was most concerned about the protection of the public and the preservation of the public’s confidence in the integrity of the bar and the legal system, but was not without reservations regarding the potential harshness of its presumptive rule. The majority opinion did concede that unfair results were possible and should be avoided, noting specifically the circumstance of a violating lawyer’s rehabilitation from a physical impairment such as alcoholism. This reasoning led the court to adopt a test approaching the balancing test between aggravating factors and mitigating factors envisioned by the ABA Standards for Imposing Lawyer Sanctions, except that this court required that the mitigating factors outweigh the aggravating factors to a substantial degree.

According to the concurrence by Associate Judge Ferren, this espoused balancing test was so stringent that it barely existed as a balancing test at all, that for all of the majority’s insistence that it was avoiding a per se rule of disbarment, that is precisely what it adopted when it made the presumption of disbarment so unusually difficult to rebut. Judge Ferren noted the danger of completely eliminating the lack of venal intent as a mitigating factor when he brought up the hypothetical case of a lawyer who, with no intent to harm the client, replaces misappropriated funds after a negligibly short period of time. Judge Ferren went on to note that, “[a]lthough predictability may be fostered by per se rules, this benefit is offset by a real risk of injustice when the individual circumstances of a case cannot be taken into account in imposing sanctions.”

66. See id. at 199.
67. ABA STANDARDS, supra note 10, at Standard 9.32.
68. See Addams, 579 A.2d at 191.
69. See id. at 194.
70. See id. at 194-95.
71. See id. at 191.
72. See id. at 201.
73. See id.
74. Id. at 202 (emphasis in original).
On the other hand, Judge Ferren did agree with the majority that the offense of intentional conversion does warrant a more stringent standard than other ethical offenses, and that opinion is supported by his agreement with the result of the balancing test in this particular case. Even though the wrongdoing lawyer had on his side a previously spotless twenty-two year record, full satisfaction from his client even considering the violation, and the client’s owing of fees substantially in excess of the funds the lawyer misappropriated, Judge Ferren held that the lawyer’s false accountings to the client and to the disciplinary board were enough to overwhelm such mitigating factors. Judge Ferren reminded the court of the possible injustices that can come from too heavy a lean towards disbarment, but by the same token he seemed to endorse a significantly more weighted balancing test than the even-handed balancing suggested by the ABA Standards.

Both the Wilson and Addams courts struggled with the question of how to handle the balance between a potentially meaningless sanctioning standard that could result from a too ill-defined system of mitigation and aggravation and a standard that was too suffocating to allow for unusual fact patterns. They tried to achieve this by examining the legitimacy of individual mitigating circumstances, and poking enough holes in them to justify their exclusion from consideration. Wilson ruled for the practical abandonment of such factors, while Addams ruled only that such factors be given significantly less weight than they had been given previously. Addams does the better job of addressing the possibility of inequitable results, but even that decision, without giving much guidance for future courts to handle such thorny issues as lawyer alcoholism, opens the door to unjust outcomes. Do the jurisdictions that give their courts free reign to decide between disbarment and suspension in cases of intentional conversion of client funds achieve more fully the balance between the public-minded policy goals underlying the standards of lawyer discipline and protection of lawyers from draconian sanctions?

C. The Case by Case Jurisdictions

Some states employ presumptions of disbarment similar to those used by New Jersey and the District of Columbia, although with some

75. See id. at 203.
76. See id.
77. See id.
added room for consideration of mitigation. Other states employ no bright lines of any kind in their lawyer sanctioning, even for intentional conversion of client funds, either following the ABA Standards for Imposing Lawyer Sanctions directly as a non-binding guide, or developing their own disciplinary standards modeled after the ABA Standards. Under either system, the process for the determination of disciplinary sanctions consists of multiple steps. A court will first use as a guideline the recommendation of that particular jurisdiction's disciplinary review department, as well as its own precedents applied in cases with similar fact patterns, in addition to conducting its own application of the jurisdiction's disciplinary standards. In applying those standards, the courts generally conduct a two-step process: determining the presumptive sanction based on the ethical duty violated, the lawyer's mental state, and the extent of the actual or potential harm caused by the violation, and then balancing out the relevant aggravating and mitigating factors to determine whether that presumptive sanction should be reduced.

Such consideration of what mitigates is not an exact science, as noted in In re Buckalew, one of the first cases to utilize the ABA Standards: "There is no 'magic formula' to determine which or how many mitigating circumstances justify the reduction of an otherwise appropriate sanction. Each case presents different circumstances which must be weighed against the nature and gravity of the lawyer's misconduct." As noted earlier, there are ten aggravating factors and thirteen mitigating factors listed in the ABA Standards. However, many of these factors are simply mirror opposites of factors on the other side.

78. See, e.g., In re Carey, 809 A.2d 563, 564 (Del. 2002) (“In every prior Delaware disciplinary matter in which an attorney has intentionally misappropriated client funds, the attorney has been disbarred.”); Fla. Bar v. Korones, 752 So. 2d 586, 589 (Fla. 2000) (“This Court has also held that disbarment is presumed to be the appropriate discipline for misuse of client funds; however, this presumption can be rebutted by mitigating circumstances.”).
81. See, e.g., In re Huddleston, 974 P.2d 325, 332 (Wash. 1999); In re Brown, 906 P.2d 1184, 1191 (Cal. 1995).
82. See, e.g., Brown, 906 P.2d at 1191.
83. See In re Huddleston, 974 P.2d at 331-32.
85. See ABA STANDARDS, supra note 10, at Standards 9.2-9.3.
concerning either the presence or the absence of that particular factor, making the total number of factors closer to eleven or twelve rather than twenty-three.\(^6\) The remainder of the background section to this Note will examine the ways in which these case-by-case jurisdictions evaluate each of these factors.

1. Prior Offenses, or Lack Thereof

There is one ABA aggravating factor and two mitigating factors that concern those offenses of the lawyer which took place prior to the current disciplinary proceeding, and they are often considered together in the same case.\(^6\) On the side of aggravation, there is Standard 9.22(a) (the presence of prior offenses).\(^8\) Alternative mitigating factors are Standards 9.32(a) (the absence of prior offenses), and 9.32(m) (the remoteness of prior offenses). With deterrence of the offender as one of the main goals of lawyer discipline,\(^9\) the presence of a past record, in the light of the lawyer’s current wrongdoing, will naturally lead courts to assume that the lawyer requires a more severe sanction in order to be properly deterred from acting out yet again.

Courts will take into consideration the nature and severity of the prior offenses, however.\(^9\) Oregon, in particular, has laid out an explicit, multi-prong balancing test for the consideration of prior offenses as aggravation:

1. The relative seriousness of the prior offense and resulting sanction;
2. The similarity of the prior offense to the offense in the case at bar;
3. The number of prior offenses; and
4. The timing of the current offense in relation to the prior offense and resulting sanction, specifically, whether the accused lawyer had been sanctioned for the prior offense before engaging in the offense in the case at bar.\(^9\)

This test is used to determine how much weight to give such offenses in the sanctioning determination.\(^9\) Offenses that get further away in time and similarity begin to drift away from aggravation and

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\(^6\) For example, ABA Standard 9.22(a) concerns the presence of prior disciplinary offenses, while Standard 9.32(a) concerns the absence of prior discipline.

\(^8\) See, e.g., In re Triem, 929 P.2d 634, 644-45 (Alaska 1996).

\(^9\) See ABA STANDARDS, supra note 10, at Standard 9.22.

\(^9\) See Cotton v. Miss. Bar, 809 So. 2d 582, 585 (Miss. 2000) (quoting Pitts v. Miss. State Bar Ass’n, 462 So. 2d 340, 343 (Miss. 1985)).

\(^9\) See, e.g., In re Jones, 951 P.2d 149, 152 (Or. 1997).

\(^9\) Id.

\(^9\) See, e.g., id.
move closer to the mitigation of remoteness. The timing of the prior offense is also taken into account by this test, in that the court will determine if such timing permitted the wrongdoing lawyer to ignore the deterring effect of a previous sanction.

When it comes to the intentional conversion of client funds, however, such a balancing test does not often enter into the picture. For instance, in the Colorado case People v. Lavenhar, there was no indication by the court that two prior offenses resulting only in letters of admonition were given any less weight as aggravation because of their small severity or dissimilarity to conversion. Particular aggravation weight is given to prior offenses when they combine to form a discernible pattern.

While the absence of prior offenses will sometimes be taken as meaningful mitigation, especially since it is often entwined with determinations of character, this is not always the case. Some courts fail to consider the absence of prior offenses as any mitigation, finding that because there are directly alternating factors under the mitigation and aggravation ABA Standards, that the absence of prior offenses "is not particularly strong since it consists in the mere absence of a certain aggravating factor."

2. Dishonest of Selfish Motive, or Lack Thereof

While the Wilson and Addams courts rejected any need to show that an attorney guilty of intentionally converting client funds acted with a dishonest or selfish motive, other jurisdictions following the ABA standards have been more willing to consider the lack of such motivation as mitigation. In the alternative, those courts following the ABA do

93. See, e.g., In re Kimmell, 31 P.3d 414, 419 (Or. 2001) (holding that the prior offenses, which resulted only in public reprimand, were sufficiently different than the misconduct at issue so as to lessen their significance).
94. See, e.g., In re Starr, 952 P.2d 1017, 1028 (Or. 1998) (holding that only a moderate amount of weight should be given to particular prior offense, because it "occurred at roughly the same time as the events giving rise to the present proceeding, so the accused's acts herein do not reflect a disregard of an earlier adverse ethical determination").
95. See People v. Lavenhar, 934 P.2d 1355, 1360 (Colo. 1997).
96. See, e.g., In re Nassif, 547 N.W.2d 541, 544 (N.D. 1996).
97. See, e.g., Cleveland Bar Assoc. v. Harris, 772 N.E.2d 621, 623 (Ohio 2002).
99. See In re Addams, 579 A.2d 190, 194 n.9 (D.C. 1990) (defining misappropriation as "any unauthorized use of a client's funds entrusted to him [or her], including not only stealing but also unauthorized temporary use for the lawyer's own purpose, whether or not he [or she] derives any personal gain or benefit therefrom," quoting In re Wilson 409 A.2d 1153, 1155 n.1 (1979)).
100. See ABA STANDARDS, supra note 10, at Standard 9.32(b).
consider the presence of such a motive as aggravation. The ABA Standards do not support disbarment or suspension for a technical conversion resulting from negligence, but when it comes to the intentional taking of client funds, the wrongdoing lawyer will have a difficult time getting the benefit of Standard 9.22(b). Jurisdictions have disagreed over whether an attorney who practices self-help has taken client funds with a dishonest or selfish motive. For the purposes of this Note, which will concern itself with lawyers who have clearly converted client money with the knowledge that they had no right to do so, such disputes will remain irrelevant. Dishonest intent is established by the very act of intentional conversion itself.

3. Cooperation with the Disciplinary Proceedings, or Lack Thereof

ABA Standards 9.22(e) and 9.22(f) present as aggravating factors the bad faith obstruction of the disciplinary proceeding and the practice of deception during such proceedings, respectively. An attitude of full cooperation in the disciplinary proceedings, however, will count towards the mitigation of sanctioning pursuant to Standard 9.32(e). The courts have been quite clear as to when these issues apply. If a lawyer fails to comply with a hearing panel's discovery order, he has fallen under Standard 9.22(e). If a lawyer submits false statements during the disciplinary process, he has fallen under Standard 9.32(f). In contrast to prior offenses, it is possible for a lawyer to gain neither the benefit of the mitigating factor nor the drawback of the aggravating factor. In Cotton v. The Mississippi Bar, the court held that "the mere absence of an attempt by the attorney to mislead the Bar or the Court as to what was done, particularly where there is a default judgment, is a neutral

101. See id. at Standard 9.22(b).
102. See id. at 4.13.
103. See, e.g., People v. Tidwell, 35 P.3d 624, 628 (Colo. 2001) (holding that once it is determined that the misappropriation was knowing, there can be no mitigation for motive, citing People v. Varallo, 913 P.2d 1, 11 (Colo. 1996)).
104. Compare Att'y Grievance Comm'n Of Md. v. Sheridan, 741 A.2d 1143, 1161 (Md. 1999) with In re Young, 488 N.E.2d 1014 (Ill. 1986) (concerning similar situations of lawyers having valid beliefs that the property was rightfully theirs and not the clients, with two different results concerning whether this had an affect on the determination of the lawyer's motive.)
106. See ABA STANDARDS, supra note 10, at Standards 9.22(e), 9.22(f).
107. See id. at Standard 9.32(e).
factor,"110 and that even candid admissions of guilt do not equate to full and free cooperation in the absence of other participation in the process.111 Finally, even if a lawyer fully and freely cooperates with the disciplinary proceedings, courts will not give such cooperation the credit of mitigation if it deems that such cooperation was coerced by the authorities involved in the case.112

4. Personal/Emotional Problems, Physical/Mental Impairments, and Interim Rehabilitation

These are the first standards on either list (mitigating in this case) that do not have a corresponding standard on the other side.113 There is no aggravating black mark given to an attorney who intentionally converts client funds while entirely within his or her right mind. While each of these mitigating factors deals with influences affecting the clarity of the wrongdoer’s judgment, they are not treated equally by the courts. Personal or emotional problems are not given much weight, since such problems are generally more commonplace and manageable than physical or mental impairments.114

Physical and mental impairments are not so commonplace and manageable. They are treated more seriously and are more likely to be considered as strong mitigating factors at times.115 However, the 1992 version of the ABA Standards for Imposing Lawyer Sanctions proposed a multi-prong test for the determination of whether a particular example of physical or mental impairment sufficed as mitigation.116 As articulated by the courts, this test allowed for such an impairment to be considered as mitigation only when:

(1) there is medical evidence that the Respondent is affected by a chemical dependency or mental disability; (2) the chemical dependency or mental disability caused the misconduct; (3) the Respondent’s recovery from the chemical dependency or mental

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111. See id. at 589.
113. See ABA STANDARDS, supra note 10, at Standards 9.32(c), 9.32(h), 9.32(j).
114. See, e.g., Fla. Bar v. Korones, 752 So. 2d 586, 591 (Fla. 2000) (holding that such personal problems as marital and economic issues “are visited upon a great number of lawyers. Clearly, we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems,” quoting Fla. Bar v. Shanzer, 572 So. 2d 1382, 1384 (Fla. 1991)).
115. See, e.g., Miami County Bar Assoc. v. Hallows, 676 N.E.2d 517 (Ohio 1997) (handing down suspension rather than disbarment for a lawyer who intentionally converted over fifty thousand dollars, due to the lawyer’s alcoholism and no other mitigating factor.)
disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and (4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.117

Proof of all four factors, medical evidence that the impairment exists, causation, rehabilitation, and the rehabilitation’s probable halting of any future misconduct, must be present under this test in order to qualify as mitigation.118 Courts have discarded the entire issue as mitigation due to the failure of a single element. Even before the creation of the ABA Standards for Imposing Lawyer Sanctions, courts were approaching such impairments in this way. In *Office of Disciplinary Counsel v. Silva*, a Hawaii case, the lawyer’s alcoholism was thrown out as a mitigating factor because he had displayed no progress in controlling his drinking, despite going through some rehab.119 In the Colorado case, *People v. Post*, the court explicitly referred to this test and rejected the lawyer’s medical depression and post-concussive syndrome because no evidence was submitted to show that such conditions caused the misconduct, nor had the lawyer submitted to any meaningful period of rehabilitation.120 In *People v. Lavenhar*, another Colorado case, the court discounted even the possibility of adequate recovery and the halting of the misconduct as a result of recovery, due to persuasive evidence that the impairment, a personality disorder with anti-social aspects, was generally not subject to effective treatment.121 Finally, there are some courts that, while willing to consider impairments such as alcoholism as some measure of mitigation, will not allow it alone to constitute full mitigation from disbarment down to suspension,122 noting that “[t]he attorney’s impaired judgment diminishes the responsibility he must bear, but does not eliminate it. Not all alcoholics appropriate the money of their clients; the slide from drink to dishonor may be smooth, but it is neither automatic nor uncontrollable.”123

Some courts have paid particularly close attention to the character of the interim rehabilitation, and have discounted it when it fails to meet

118. See, e.g., id.
121. See *People v. Lavenhar*, 934 P.2d 1355, 1360 (Colo. 1997).
123. See id. at *16 (quoting *In re Driscoll*, 423 N.E.2d 873 (Ill., 1981)).
certain standards of thoroughness.124 These courts require a sufficiently lengthy period of attendance in rehabilitation programs, holding that enrollment alone is never enough.125

5. Restitution, or Lack Thereof

The Commentary to the ABA Standards isolates restitution, along with personal problems and physical impairments, as a mitigating factor that receives particularly diverse treatment by the courts.126 The Commentary endorses a good faith effort by the wrongdoing lawyer to make restitution as a mitigating factor, while discarding as mitigation those instances where the lawyer is coerced into paying back the misappropriated money.127 The ABA Standards propose the timeliness of the restitution as a measuring stick for the sincerity behind it: the longer into the proceedings that restitution is made, the less weight given to it as a mitigating factor.128 Courts have followed this guidance, negating as a 9.32(d) mitigating factor any restitution paid after the start of the disciplinary proceedings, but not necessarily turning such late payment into a 9.22(j) aggravating factor.129 Some courts will refuse to give any mitigating credit for restitution to lawyers guilty of intentionally misappropriating client funds, especially when such restitution was made under pressure.130

6. Vulnerability

ABA Standard 9.22(h) recognizes the helplessness of certain clients to wrongdoing attorneys as an aggravating factor.131 There is no corresponding mitigating credit for a lawyer who steals from a generally capable client. There are various forms of vulnerability that different jurisdictions recognize, while sometimes a court will basically ignore the concept altogether.132 Those courts that do recognize it as a factor in

125. See e.g., McGough, 793 P.2d at 437.
126. See ABA STANDARDS, supra note 10, at Standard 9.32 Commentary.
127. See id.
128. See id.
130. See, e.g., Cotton v. Miss. Bar, 809 So. 2d 582, 587 (Miss. 2000).
131. See ABA STANDARDS, supra note 10, at Standard 9.22(h).
132. See, e.g., Cleveland Bar Assoc. v. Harris, 772 N.E.2d 621, 624 (Ohio 2002).
aggravation consider both medical/physical limitations, as well as emotional incapacity.

One local court in Connecticut took a particularly novel approach to the consideration of vulnerability. In a case where the wrongdoing lawyer had instituted a federal lawsuit against the judge as an apparent stall tactic in her own disciplinary proceedings, the court found the aggravating factor of vulnerability not because any of the lawyer’s clients were especially vulnerable, but because the lawyer had made the public at large vulnerable by attacking the civil justice system, using the vulnerability of judges who have limited means to protect themselves from such unsubstantiated attacks.

7. Remorse, or Lack Thereof

ABA Standard 9.32(l) gives credit to the lawyer who shows remorse, while 9.22(g) penalizes the lawyer who exhibits none. As with restitution, when there is a gesture of remorse, the sincerity of such a gesture is measured by its timeliness, by the nature of its expression, and in light of the surrounding circumstances. In one case, the court refused to consider as remorse, for purposes of mitigation, the wrongdoing lawyer’s submitting to a stipulation whereby he implicitly acknowledged his misconduct, especially since there was no concurrent explicit acknowledgement of the misconduct. Another court entirely disregarded the lawyer’s expression of remorse, because this particular lawyer had made similar expressions during the many prior disciplinary actions in which he was involved, thus giving the court much reason to doubt the sincerity of such expression.

8. A Pattern of Misconduct and Multiple Offenses

These two ABA-devised aggravating factors, 9.22(c) (pattern of misconduct) and 9.22(d) (multiple offenses), relate to the nature and

133. See, e.g., In re Rotman, 556 N.E.2d 243, 253 (Ill. 1990) (including the mental incompetence of the client as aggravation).
134. See, e.g., In re Starr, 952 P.2d 1017, 1028 (Or. 1998) (including the fact that the client was vulnerable, due to the threat of losing her child, as aggravation).
136. See id.
137. See ABA STANDARDS, supra note 10, at Standards 9.22(g), 9.32(l).
139. See Post, 2000 Colo. Discipl. LEXIS 80.
140. See Lau, 941 P.2d at 300.
141. See ABA STANDARDS, supra note 10, at Standards 9.22(c), 9.22(d).
extent of the wrongdoing, and are generally used interchangeably by the courts.\textsuperscript{142} There is no corresponding ABA mitigating factor that gives credit to the lawyer whose violation consists of a single act, although the lack of multiple offenses will sometimes be treated as mitigation.\textsuperscript{143}

Courts generally interpret these two aggravating factors in a straightforward fashion, treating more harshly those wrongdoing lawyers whose misconduct consisted of a number of bad acts, rather than just one.\textsuperscript{144} On the other hand, what appears on its face to be a solitary act will sometimes be broken down into a multiplicity of misconduct.\textsuperscript{145} In one case, the court noted that “although (the lawyer’s wrongdoing) may be viewed as a single, isolated incident, it involved intentionally lying to both respondent’s clients and to the court, in order to carry out the conversion of funds which should have been turned over to the clients.”\textsuperscript{146} One court found no meaningful distinction between multiple offenses and isolated offenses.\textsuperscript{147}

9. Character or Reputation

Except for the presence of prior offenses, there is no ABA aggravating factor for bad character outside of the misconduct at issue, and it is difficult to find cases that deliver more severe sanctioning for wrongdoing lawyers who are shown to be less than high-quality human beings outside of the misconduct for which they are currently being punished. When there is the presence of prior offenses committed by the lawyer, any additional proof of good character is generally considered to be irrelevant.\textsuperscript{148} Proof of good character for the purposes of mitigation comes in two forms: testimony from witnesses that the wrongdoing lawyer is a good person, and evidence that the lawyer has served the community well over a significant period of time or through numerous honorable acts.\textsuperscript{149}

\begin{itemize}
  \item \textsuperscript{142} Compare Fla. Bar v. Mavrides, 442 So. 2d 220 ( Fla. 1983) with State ex. rel. Okla. Bar Assoc. v. Warzyn, 624 P.2d 1068 (Okla. 1981) (these two cases, listed in the ABA commentary as illustrative examples of ABA Standard 9.22(c) and 9.22(d), respectively, create no distinction between a pattern of misconduct and multiple offenses).
  \item \textsuperscript{144} See, e.g., \textit{In re Cohen}, 456 N.E.2d 105, 110 (Ill. 1983).
  \item \textsuperscript{146} \textit{Id.}
  \item \textsuperscript{147} See \textit{People v. Torpy}, 966 P.2d 1040, 1044 (Colo. 1998) (holding that it did not matter for disciplinary purposes whether the wrongdoing lawyer withdrew nine thousand dollars of his clients funds all at once or if he, as had a disbarred lawyer in a prior case, withdrew the money over a longer time frame using a number of checks).
  \item \textsuperscript{148} See, e.g., \textit{In re Hunter}, 769 A.2d 1286, 1290 (Vt. 2000).
  \item \textsuperscript{149} See, e.g., \textit{In re Young}, 488 N.E.2d 1014, 1017 (Ill. 1986).
\end{itemize}
These types of character evidence are not necessarily given the same weight. For good acts within the community, such evidence is sometimes discarded even when the lawyer spent a significant amount of time performing such civic-minded acts.\textsuperscript{150}

When it comes to letters or testimony from individuals vouching for the character of the wrongdoing lawyer, such testimony is given weight only if it is clear that the testimonials have come from people who are fully aware of the lawyer’s misconduct, and still consider him or her to be trustworthy despite such misconduct.\textsuperscript{151} The status of the witnesses vouching for the wrongdoing lawyer matters as well; members of the legal community are held in particularly high esteem in these proceedings, and when the lawyer cannot get a member of the legal community to vouch for his or her integrity, such an absence is sometimes considered to partially deflate whatever character evidence does exist.\textsuperscript{152} However, some jurisdictions, such as California, do not want judges to voluntarily testify on the behalf of a lawyer in a disciplinary proceeding, fearing that introducing the prestige of their position into such a proceeding would give their testimony an undue amount of weight.\textsuperscript{153}

The amount of weight given to character evidence; in general, varies greatly among courts. When it comes to intentional conversion, a court will occasionally find no place for character-based mitigation.\textsuperscript{154} Other courts, such as the one that ruled in the aforementioned \textit{Cleveland Bar Association v. Harris}, have allowed character evidence alone, absent any other mitigating factors, to mitigate a sanction from disbarment down to suspension for intentional conversion.\textsuperscript{155} A jurisdiction like California has been more careful than the ABA Standards to ensure that if such evidence is going to be used as mitigation, it had better be powerful, requiring “[a]n extraordinary demonstration of good character attested to by a wide range of references in the general and legal

\textsuperscript{150} See, e.g., \textit{In re Rotman}, 556 N.E.2d 243, 249-50 (Ill. 1990) (ordering disbarment despite the fact that at varying points in his career, the lawyer worked at a homeless person emergency hotline four hours a week, helped at a local soup kitchen, spent ten to fifteen hours per month as a board member for a New York theater company, two or three hours a month as a board member for a not-for-profit dance company, and held membership in a lawyers’ group that raised money for Meals on Wheels).

\textsuperscript{151} See, e.g., \textit{In re Parks}, 396 N.W.2d 560, 563 (Minn. 1986).


\textsuperscript{153} See \textit{Aronin v. State Bar}, 801 P.2d 403, 410 n.4 (Cal. 1990) (referring to a California judicial conduct rule and commentary).


\textsuperscript{155} See \textit{Cleveland Bar Ass’n v. Harris}, 772 N.E.2d 621, 623-24 (Ohio 2002).
communities who are aware of the full extent of the member’s misconduct.”


These two mitigating factors, ABA Standards 9.32(i) (delay in disciplinary proceedings) and 9.32(k) (imposition of other penalties or sanctions) serve to take into account the amount of hardship already inflicted upon the lawyer for his or her misconduct.

Standard 9.32(k) has been occasionally interpreted in a manner different from that intended by the ABA Standards. The ABA Commentary to Standard 9.32(k) lists a number of cases meant to illustrate the purpose of the standard, all of which consist of wrongdoing lawyers given a break in their sanctioning due to having already received some measure of sanctioning for the same misconduct. By contrast, some courts will occasionally give a lawyer a similar kind of break due to sanctioning they received from wholly unrelated misconduct. More often, courts will apply this standard in accordance with the ABA’s intent, such as the holding in Louisiana State Bar Ass’n v. Chatelain, that “[w]hen a second disciplinary proceeding against an attorney involves misconduct which occurred during the same time period as the first proceeding, the overall discipline to be imposed should be determined as if both proceedings were before the court simultaneously.”

When it comes to a delay between the time of the misconduct and the time of the disciplinary proceedings, the concern of the courts is whether the lawyer was prejudiced by such a delay. Such prejudice must come in the form of a diminished ability to collect evidence, much like the type of prejudice intended to be avoided by statutes of limitation. A diminished capacity to practice law due to the imposition

156. Blair v. State Bar, 781 P.2d at 942-43 (holding that reliance of testimony from one client, a former law clerk, and a minister failed to qualify either as an “extraordinary demonstration” or a “wide range of references”).
157. See ABA STANDARDS, supra note 10, at Standards 9.32(i), 9.32(k).
158. See, e.g., In re Lamberis, 443 N.E.2d 549, 553 (Ill. 1982); In re Garrett, 399 N.E.2d 369, 370 (Ind. 1980).
159. See, e.g., In re Loosemore, 771 N.E. 2d 1154, 1155-56 (Ind. 2002) (holding that suspension for failure to pay attorney registration fees and failure to comply with legal education requirements served to mitigate the lawyer’s sanctioning for intentionally converting thousands of dollars from clients.)
161. See, e.g., Blair, 781 P.2d at 939-40.
162. See, e.g., id. at 940.
of an interim suspension during a delay does not qualify as prejudice in this context, since such a diminished capacity exists in every instance of interim suspension.\textsuperscript{163} In addition, delay as a mitigating factor will be given less weight if the court perceives that the lawyer had a part in causing the delay.\textsuperscript{164}

11. Experience, or Lack Thereof

ABA Standard 9.22(i) (substantial experience in the practice of law) is an aggravating factor.\textsuperscript{165} Standard 9.32(f) (inexperience in the practice of law) is a mitigating factor.\textsuperscript{166} Perhaps the most intuitive way to reason these standards out is to say that the experienced lawyer should have known better, while the inexperienced lawyer did not know any better. However, for purposes of an examination of intentional conversion, the lawyer’s experience is mostly irrelevant to the question of whether a lawyer should be disbarred. When it comes to dishonest acts, whether a lawyer is experienced or not experienced has no real bearing on the matter, since one should not need training in the practice of law to know that dishonesty is wrong.\textsuperscript{167} This has not stopped courts, however, from holding the existence of many years of experience against a lawyer.\textsuperscript{168}

12. Factors not Considered by the ABA

There are some factors considered in mitigation by a few courts that are not among those listed in the ABA Standards for Imposing Lawyer Sanctions. One such factor is financial problems, which might be lumped in with the personal and emotional problems listed above. As with personal and emotional problems, some courts dismiss financial problems out of hand,\textsuperscript{169} while it has also been held that such a factor only serves as mitigation if the financial difficulties “are extreme and result from circumstances that are not reasonably foreseeable or that are

\textsuperscript{163} See, e.g., In re Ford, 749 P.2d 1331, 1335-36 (Cal. 1988).
\textsuperscript{164} See, e.g., In re Juarez, 24 P.3d 1040, 1062 (Wash. 2001).
\textsuperscript{165} See ABA STANDARDS, supra note 10, at Standard 9.22(i).
\textsuperscript{166} See id. at 9.32(f).
\textsuperscript{167} See, e.g., In re Thompson, 991 P.2d 820, 823 (Colo. 1999).
\textsuperscript{169} See, e.g., Juarez, 24 P.3d at 1061.
beyond the attorney’s control.'\textsuperscript{170} Little weight is given to the difficulties if they were caused by the lawyer’s own unwise spending practices.\textsuperscript{171}

Another rarely cited mitigating factor is the motive behind the complaint filed against the lawyer who has intentionally converted client funds.\textsuperscript{172} In the New York case of \textit{In re Albanese}, the court held that the appearance of a possible malevolent intent behind the filing of the complaint was, while not dispositive, a factor in considering whether the lawyer deserved to be disbarred or suspended.\textsuperscript{173}

\section*{III. PROBLEMS}

What are the purposes of lawyer discipline? Part of the answer to that question depends on how disciplinary sanctions are characterized: as sentences akin to criminal sanctions,\textsuperscript{174} or as sanctions with their own identity and individual purposes.\textsuperscript{175} For those courts that view such sanctions as analogous to criminal sanctions, there are generally three purposes.\textsuperscript{176} For starters, the sanctions are intended to punish the wrongdoer to a degree that is appropriate to the offense committed.\textsuperscript{177} Secondly, they are intended to protect the public, as both a specific deterrent and a general deterrent.\textsuperscript{178} Lastly, disciplinary sanctions are meant to reinforce the public’s confidence in the legal system and its ability to govern itself.\textsuperscript{179} Those courts that do not view disciplinary sanctions as criminal deny any punitive purpose behind lawyer sanctions, while agreeing that deterrence and preservation of the public’s confidence are crucial, and that sometimes rehabilitation comes into play as a purpose when it comes to a case of a lawyer under the influence of a physical or mental impairment.\textsuperscript{180} All of these purposes can be folded within the all-encompassing purpose of either protecting the public or protecting the integrity of the legal system, where the ultimate goal of

\begin{itemize}
\item \textsuperscript{170} \textit{In re Brown}, 906 P.2d 1184, 1195 (Cal. 1995) (quoting \textit{In re Naney}, 793 P.2d 54, 60 (Cal. 1990)).
\item \textsuperscript{171} \textit{See, e.g.}, \textit{id.} (giving no weight to financial difficulties as mitigation where it was unclear whether the lawyer’s problems arose from changes in law that affected his law practice or from his own fixation with his construction of a dream house).
\item \textsuperscript{172} \textit{See In re Albanese}, 710 N.Y.S.2d 594, 596 (N.Y. App. Div. 2000).
\item \textsuperscript{173} \textit{See id.}
\item \textsuperscript{174} \textit{See, e.g.}, Cotton v. Miss. Bar, 809 So. 2d 582, 585 (Miss. 2000).
\item \textsuperscript{175} \textit{See, e.g.}, \textit{Ex parte Thompson}, 152 So. 229, 232 ( Ala. 1933).
\item \textsuperscript{176} \textit{See, e.g.}, Cotton, 809 So. 2d at 585.
\item \textsuperscript{177} \textit{See, e.g.}, \textit{id.}
\item \textsuperscript{178} \textit{See, e.g.}, \textit{id.}
\item \textsuperscript{179} \textit{See, e.g.}, \textit{id.}
\item \textsuperscript{180} \textit{See, e.g., In re Kersey}, 520 A.2d 321, 326 (D.C. 1987).
\end{itemize}
both is to purge the legal system of those lawyers who have done harm to the system, and who might continue to do harm.\textsuperscript{181}

So with these purposes in mind, the key concern is whether the system of lawyer sanctioning is properly constructed so as to ensure that the public is adequately protected and that their confidence in the legal system is maintained. The countervailing concern is that if the system goes too far to ensure that every sanctioning body metes out a severe enough sanction so as to definitively protect the public, the door could be opened to the possibility that overly harsh sanctions are sometimes handed down, which in and of itself diminishes the ability of the public to maintain confidence in the system. The goal must be to find the correct balance between those two concerns, while protection of the public and the integrity of the legal system are achieved without inflicting sanctions that are unfair and extreme.

A. Too Discretionary

The ability to weigh mitigating factors in any trial determination gives judges the discretion to hand down the decision they feel is most appropriate, but is it possible to give judges too much discretion? When examined in the context of satisfying particular sanctioning goals, it is entirely possible. Various courts have either failed to come up with the sanction that logically follows from their own reasoning,\textsuperscript{182} or they have interpreted individual mitigating factors in a way that is inconsistent with the stated sanctioning goals.\textsuperscript{183}

In the New York case \textit{In re Glazer}, an attorney was found guilty of intentionally misappropriating over $86,000, in order to help his own law practice and his marriage.\textsuperscript{184} The attorney claimed the existence of two mitigating factors: that he lacked a selfish motive because he intended to pay the money back once his own problems were solved, and that he did eventually pay the money back, thus making restitution.\textsuperscript{185} The court rightly dismissed both mitigating factor claims.\textsuperscript{186} The motive to convert came from the attorney’s original, intentional taking of the money, and was not purged by any honorable future plans for that

\begin{itemize}
\item \textsuperscript{181} See, e.g., \textit{Ex parte Thompson}, 152 So. 229, 232 (Ala. 1933); \textit{In re Hand}, 787 So. 2d 294, 297 (La. 2001).
\item \textsuperscript{183} See generally Miami County Bar Ass’n v. Hallows, 676 N.E.2d 517 (Ohio 1997).
\item \textsuperscript{184} See \textit{Glazer}, 641 N.Y.S.2d at 6.
\item \textsuperscript{185} See id. at 7.
\item \textsuperscript{186} See id.
\end{itemize}
The court allowed for a lessening of the sanction from disbarment to suspension if the attorney was careless or mistaken about his right to the money, but noted that this was not such a case.\(^\text{188}\) In response to the restitution claim, the court held that the ultimate repayment of the money did not serve to excuse the wrongful conduct.\(^\text{189}\) This was especially true in this case, where the attorney paid back the money only after the complaint against him had been filed.\(^\text{190}\)

How is it, then, that this court, after shooting down all of the attorney’s mitigating factor claims, recommended suspension rather than disbarment, pending any future disciplinary findings?\(^\text{191}\) There are two plausible explanations. First is the possibility that there is more to this case than is present in the published opinion, a distinct possibility considering the fact that many disciplinary hearings are held confidentially.\(^\text{192}\) Such confidentiality can sometimes serve to protect lawyers from personal, embarrassing information being made public. However, it also serves to completely undermine the sanctioning goal of preserving the public’s confidence in the legal system. The second possibility is that this was a case of lawyers helping lawyers, where professional empathy took precedence over a rightful sanction.\(^\text{193}\) If this was the case here, then the court has virtually ignored the goals of lawyer sanctioning in favor of maintaining a level of camaraderie within the profession.

Those courts that have misapplied and misinterpreted mitigating factors have subverted the goals of lawyer sanctioning in subtler fashion. In *Miami County Bar Association v. Hallows*, an Ohio case, a lawyer guilty of intentionally converting client funds was relieved of the sanction of disbarment almost entirely because of his alcoholism.\(^\text{194}\) The problem with the court’s reasoning was that it deemed the alcoholism a mitigating factor simply by virtue of the fact that the lawyer was an alcoholic, and that he had made a sincere attempt to overcome the affliction.\(^\text{195}\)

A sincere attempt to overcome alcoholism does not by itself serve to satisfy the two goals of lawyer discipline. Unless the lawyer has

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\(^{187}\) See id.

\(^{188}\) See id.

\(^{189}\) See id.

\(^{190}\) See id. at 6-7.

\(^{191}\) See id. at 7-8.

\(^{192}\) See supra note 22.

\(^{193}\) See supra note 24.

\(^{194}\) See Miami County Bar Ass’n v. Hallows, 676 N.E.2d 517, 519 (Ohio 1997).

\(^{195}\) See id.
actually succeeded in overcoming the disease to some degree that can assure the public that he will not lose control in such a way again, the public has not been properly protected by the sanction. Besides the fact that disbarment keeps a wrongdoing lawyer away from the practice of law for at least two years longer than a standard suspension, \(^{196}\) it is more difficult to become reinstated after disbarment than it is from suspension, and the larger stigma of disbarment does a far more effective job of communicating to the public that the legal system can police itself. \(^{197}\) It makes little sense for the court to give such a break to a lawyer guilty of intentional conversion when the lawyer has done so little to show that he has overcome the disease that ostensibly caused him to commit the violation in the first place.

Similar misapplications and misinterpretations of mitigating factors have occurred in other courtrooms. In the Georgia case, In re Freeman, a lawyer intentionally misappropriated nearly $6,000, and was suspended for ninety days rather than disbarred. \(^{198}\) One claim that influenced this court to go from a disbarment down to the short suspension was the court’s conclusion that the wrongdoing lawyer lacked a selfish motive, because he gave the money he took from his client to his brother, who was suffering financial problems. \(^{199}\) Such a holding fails to further the goal of protecting the public. The public is not protected if a lawyer gets a break simply because he or she has put stolen client funds to honorable use. The client is harmed regardless of what the lawyer ultimately does with the taken money. Unlike an alcoholic who has recovered, there is no assurance that the lawyer would not do the same thing all over again once his ninety-day suspension expired, since he has proven himself to be someone who would go to such lengths if the situation required it.

**B. Too Draconian**

Are the brighter line standards adopted by the Wilson and Addams courts, \(^{200}\) with their near-rejection of most every possible mitigating factor in intentional misappropriation cases, too harsh? With the existence of an infinite number of possible fact situations, it is important that judges be provided some discretion in order to allow the breathing

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197. See ABA STANDARDS, supra note 10, at Standard 2.2 Commentary.
198. See In re Freeman, 506 S.E.2d 872, 874 (Ga. 1998).
199. See id. at 873.
200. See generally In re Wilson, 409 A.2d 1153 (N.J. 1979); In re Addams, 579 A.2d 190 (D.C. 1990).
room for those situations where a lawyer guilty of intentional misappropriation is indeed more deserving of suspension rather than disbarment. Having said that, there are precious few areas where the intentionally misappropriating lawyer is not given every possible benefit of the doubt.

One of those areas where lawyers are sometimes given a raw deal is that circumstance where the lawyer is mentally or physically impaired, specifically when it comes to alcohol or drug addiction. The New Jersey case *In re Hein*, a progeny of *Wilson*, goes to great lengths to explain why alcoholism should not be considered a mitigating factor even when the afflicted lawyer has shown a course of rehabilitation and recovery.\(^1\) The court in that case addressed the situation of a lawyer who fully recovers from alcoholism and thus will most certainly not intentionally misappropriate client funds again, and noted that even though it was troubling to disbar such a lawyer, disbarment was necessary to achieve the two overriding goals of lawyer discipline.\(^2\) However, if one accepts the proposition that an alcoholic who misappropriates was acting under the influence of a temporary affliction, and that this lawyer has removed that affliction from his or her life, then the sanction of disbarment does not serve to protect the public any more than a suspension would. There is no specific deterrence value to the disbarment if the wrongdoing lawyer has eliminated the only factor that led to the commission of the violation. Such a lawyer would not repeat the offense regardless of the sanction. It has also been argued, forcefully, that there is no general deterrence value to such a sanction.\(^3\)

The *Hein* court’s means of discounting the probability that the protection of the public will not be served by disbarring a fully recovered alcoholic, is to conclude that any lawyer sanctioned for intentional misappropriation will likely never misappropriate again and yet courts disbar them anyway, removing any reason to give recovered alcoholics special treatment.\(^4\) That is an oddly hollow argument, especially since there is data that speaks directly against it, indicating a significant percentage of recidivism.\(^5\) Regardless, this court put all of

\(^1\) See *In re Hein*, 516 A.2d 1105, 1107-08 (N.J. 1986).
\(^2\) See id. at 1108.
\(^3\) See, e.g., *In re Kersey*, 520 A.2d 321, 327 (D.C. 1987) (noting that “[o]ther alcoholic attorneys likely will fail to make the connection between the sanctioned attorney’s alcoholic condition and their own drinking problem, and between their own drinking and their professional behavior”).
\(^4\) See *Hein*, 516 A.2d at 1108.
\(^5\) See *Levin*, supra note 9, at 5 n.20 (stating that “27% of New Jersey lawyers who were disciplined but not disbarred for stealing client money were found to have stolen again”).
its focus on the goal of preservation of public's confidence in the integrity of the justice system, without being able to justify the sanction through the more earthbound goal of protecting the public. That is a dangerous road to travel. If the only goal of lawyer sanctioning was the preservation of the public's confidence in a legal system that can police itself, such a goal could justify the imposition of a great many overly severe sanctions without the justification of protecting the public required as well. Such a concern is all the more reason to search for a balanced standard, where every sanctioning decision serves to further both goals.

IV. TOWARDS A LESS DISCRETIONARY STANDARD

While the Wilson court may have justified some severe and unfair sanctioning by focusing entirely on the disciplinary goal of preserving the public's confidence in the system, ignoring the goal of protecting the public,206 it is difficult to argue with its basic premise that there is nothing worse than the theft of a client's money.207 Therefore, it is important that judges have a more clearly defined standard to use when determining the proper sanction for such an offense, one that allows them room to avoid inappropriate harshness while at the same time depriving them of the discretionary space that allows them to lighten the sanction in just about any possible misappropriation case.

Before analyzing each of the mitigating factors within the context of the two chief sanctioning goals, it is important to address the issue of client injury. If the act of intentionally misappropriating client funds is by itself the cardinal sin for a lawyer, then, according to the logic used by the Wilson court, it should not matter how much money was taken. Such an idea is rightfully unattractive to many, because the potential for harshness becomes so large.208 The problem with so severe a rule is that, besides the fact that from a punishment standpoint the sanction would clearly not be in proportion to the violation, the goal of protecting the public through deterrence by disbarring a lawyer who stole fifty dollars instead of suspending him is an example of overkill in the extreme. A suspension of up to three years should be plenty of deterrence for a lawyer thinking of stealing so small an amount of money. Nor is the

206. See In re Wilson, 409 A.2d 1153, 1155 (N.J. 1979) (holding that “the principal reason for discipline is to preserve the confidence of the public in the integrity and trustworthiness of lawyers in general,” and that such a goal was controlling in misappropriation cases).
207. See id. at 457.
208. See Levin, supra note 9, at 30 (noting that “a rule requiring disbarment of all lawyers who convert client funds would encompass the lawyer who took $50,000 or $50”).
public so bloodthirsty that it needs to see such a lawyer disbarred in order to maintain its confidence in the system. Therefore, the courts must have some discretion when it comes to this factor of the analysis. If the court determines that the amount taken is sufficiently large that it inflicted a significant injury on the client, then the degree of that injury should be considered as aggravation, and if the degree of the injury is small enough, it should be viewed as mitigation. The ABA Standards for Imposing Lawyer Sanctions have accounted for this by making the analysis of the injury as well as the potential for injury a determination apart from the consideration of mitigating and aggravating circumstances.\(^\text{209}\)

In a Note calling for more disbarment, it is also important to address the issue of temporary disbarment versus permanent disbarment. According to a court in Nebraska, one of the few states where disbarment is permanent,

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\text{[a] judgment of permanent disbarment is a most severe penalty, as anyone who is dependent upon some special skill or knowledge for his own livelihood will quickly recognize if he contemplates for a moment the impact of being deprived by judicial fiat of the use of that skill and knowledge. Disbarment ought not to be imposed for an isolated act unless the act is of such a nature that it is indicative of permanent unfitness to practice law.}^{210}
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With such a consideration in mind, it would be more equitable if those few states where disbarment is automatically permanent utilized a test similar to that proposed in California in 1997, a test that would at least give such courts the space to temporarily disbar the attorney if such a sanction was more appropriate.\(^\text{211}\)

\subsection{A. Analyzing the Factors}

Determining how effective the ABA’s mitigating and aggravating circumstances fit into the goals of lawyer sanctioning for intentional misappropriation is the next step towards a less discretionary standard. Since every sanction, by virtue of it being a sanction, serves to increase the public’s confidence in the system, the true test of a mitigating or

\begin{footnotesize}
\begin{enumerate}
\item \textit{See} ABA STANDARDS, \textit{supra} note 10, at Standard 3.0 Commentary.
\item State \textit{ex rel.} Neb. State Bar Ass’n v. Cook, 232 N.W.2d 120, 132 (Neb. 1975).
\item \textit{See} Tracy Genesen, \textit{Permanent Disbarment Sanction: The New Rule}, LITIGATION (Los Angeles County Bar Assoc., Los Angeles, CA), Summer 1997, at 2 (proposing a system where six factors similar to those listed in the ABA Standards are weighed to consider the appropriateness of temporary or permanent disbarment).
\end{enumerate}
\end{footnotesize}
aggravating factor's worthiness is whether it considers an issue that relates to the protection of the public.

1. Prior record: Aggravating, But Not Mitigating

In order to advance the goal of protecting the public, a lawyer's prior record should be considered as aggravating to a degree dependent upon the factors listed in the Oregon test, but the lack of any prior record should not be viewed as mitigating in an intentional misappropriation case. The presence of a sufficiently relevant prior record makes sense as aggravation because a lawyer who was not deterred by past sanctions has displayed a greater need for more severe punishment in order to be properly deterred from committing the act again. By the same token, a lawyer with a previously spotless record who has intentionally misappropriated has illustrated, by virtue of committing the egregious act itself, that he or she has not been deterred by the threat of sanctioning. As has been noted by certain courts, the absence of a prior record serves more as the cancellation of an aggravating factor, rather than as a mitigating factor all on its own, and should be treated neutrally, not as mitigation.

2. Selfish Motive: Aggravating, But Not Mitigating

A dishonest intent is established by the very act of conversion itself, and so this factor generally does not come into play in intentional misappropriation cases, except for the lawyer who has taken the money as self-help. Courts have ruled that a lawyer with a bona fide claim to money has the right to appropriate it before the law has actually given him that right, but those courts that have refused to consider such a circumstance as mitigation are more in tune with the concern of protecting the public. While a client who has no actual right to certain funds is not injured by such conversion, there is a potential danger in allowing a lawyer to make that determination on his or her own, the potential of the lawyer being wrong, that is rightfully considered by the ABA Standards as equal to actual harm. What exactly is the lack of selfish motive, in the context of an intentional

212. See In re Jones, 951 P.2d 149, 152 (Or. 1997).
213. See, e.g., Cotton v. Miss. Bar, 809 So. 2d 582, 587 (Miss. 2000).
215. See, e.g., Attorney Grievance Comm'n of Md. v. Sheridan, 741 A.2d 1143, 1161 (Md. 1999); In re Young, 488 N.E.2d 1014, 1017 (Ill. 1986); see also supra text accompanying note 104.
216. See, e.g., Sheridan, 741 A.2d at 1161.
217. See, e.g., Young, 488 N.E.2d at 1017.
218. See ABA STANDARDS, supra note 10, at Standard 3.0(c).
misappropriation? Should the lawyer who steals in order to donate to charity be given a lighter sentence than the lawyer who steals in order to buy a yacht? When it comes to protecting clients from lawyer theft, and even when it comes to preserving the public’s confidence in the system, there is no practical difference between the two. Theft, by definition, is selfish, and should always be considered as aggravation no matter the lawyer’s intent for the stolen property.

3. Cooperation: Aggravating and Mitigating

Cooperation with the authorities in disciplinary matters is one factor the ABA seems to have gotten right. Because the achievement of justice is important both towards protecting the public and preserving the public’s confidence in the system, it is entirely sensible to give a lawyer charged with intentional misappropriation credit for fully cooperating with the proceedings, and to hold it against the lawyer who obstructs those proceedings. While cooperation should never be enough on its own to mitigate a sanction down to suspension, it should be a consideration, in order to make sure that lawyers have every incentive to promote an accurate result, and every disincentive to obstruct the march towards that objective.

4. Physical and Mental Impairments: Mitigating

When it comes to physical or mental impairments, it is vital that the test laid out by the 1992 version of the ABA Standards for Imposing Lawyer Sanctions be followed, in order to ensure that if such a factor is treated as mitigation the public is still getting the full measure of protection. That means the lawyer must essentially show that he or she was a fundamentally different person while committing the misappropriation. Such a showing requires proof that the lawyer had the affliction, that the lawyer sought out treatment for the affliction, and that the lawyer has fully recovered from the affliction. Courts have been rightfully strict when it comes to making sure that the lawyer has truly recovered from the problem, sometimes even requiring that a period of probation be tacked onto the suspension. If the lawyer was under the influence of a problem that no longer exists, the public can be assured of protection when such a lawyer is allowed back into the profession.

This issue gets quite a bit more complicated when a lawyer claims to have been under the influence of personal, emotional, or financial

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problems while committing the conversion. While there is always the threat of relapse after a recovery from a physical or mental addiction or impairment, the lawyer who has stolen client funds while under more personal pressures will have a far harder time showing a full “recovery” from such pressure. Without such recovery, the chance of that lawyer committing the same violation for similar reasons remains. Such a lawyer has shown a propensity to steal from a client, and because personal and financial problems are more commonplace and should be more manageable in the daily lives of lawyers, in most cases nothing can be proven that will show a removal of that propensity.

5. Restitution: Aggravating But Not Mitigating

While the ABA endorses restitution as a mitigating factor when made in a timely fashion,\(^\text{221}\) the Wilson court’s complete dismissal of restitution as mitigation is more consistent with sanctioning goals.\(^\text{222}\) As that court noted, restitution is often used to contend that the lawyer intended to borrow the money rather than steal it, a contention that communicates the idea that borrowing client money is somehow appropriate.\(^\text{223}\) Giving restitution mitigating weight, even when the money is paid back before a complaint has been filed, communicates the message to lawyers that taking money from clients will get them the lighter sanction of suspension if they pay it back in the future (and get caught doing so). The problem, as noted in Wilson, is that lawyers often fail to receive the money they planned to pay back their “loan,” and so they end up robbing Peter to pay Paul, and potential injury turns into actual injury.\(^\text{224}\) Therefore, giving lawyers sanctioning breaks for paying back money they had no right to take in the first place gives lawyers, in certain situations, extra incentive to “borrow” a client’s money. While one could argue that removing restitution as a mitigating factor will remove the incentive of the lawyer to pay back the client, thus adding harm to the client, such a fear should be assuaged by preserving the failure to make restitution as an aggravating factor.

6. Vulnerability: Aggravating

The issue of client vulnerability, which exists only on the side of aggravation, should not just be maintained as an aggravating factor, but courts should give it more attention than they currently do. A public

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221. See ABA STANDARDS, supra note 10, at Standard 9.32 Commentary.
223. See id. at 458.
224. See id. at 458-59.
unschooled in the law is vulnerable enough already to lawyers with the 
predilection to steal from them, and those with added helplessness 
require added deterrent protection.

7. Remorse: Aggravating But Not Mitigating

Remorse is a tricky subject, because it is so difficult to measure its 
sincerity. Remorse could have legitimacy as a mitigating factor if truly 
sincere, since such sincerity would indicate that the lawyer would be less 
likely to repeat the violation, thus rewarding the lawyer who indicated a 
likelihood of being specifically deterred. Besides the impossibility of 
determining sincerity, it would be difficult to attribute very much weight 
to such a mitigating factor even if the expression was sincere, since the 
mere stress of getting caught could generate such sincere expressions of 
remorse. Far more telling is a lack of remorse as an aggravating factor, 
since such a lacking would clearly indicate the inability of the lawyer to 
accept that he or she had done wrong, thus increasing the likelihood of 
recidivism.

8. Single Act or Multiplicity of Acts: Aggravating But Not 
Mitigating

Because the violation of intentional misappropriation is as serious 
as it is, it is entirely unclear why a lawyer should get a break for 
misappropriating client funds through a single thieving act rather than 
through a multiplicity of acts. While a series of acts stretched over a 
period of time illustrates a more calculated intent on the part of the 
intentionally misappropriating lawyer and thus makes a lawyer more 
dangerous to the public, a single act does not necessarily illustrate the 
lack of calculation. This is another factor that makes much more sense as 
aggravation rather than as mitigation.

9. Character: Not Mitigating

Character evidence is the most open-ended mitigating factor on the 
list, a vaguely defined catch-all for disciplinary boards and judges who 
might want to help out a fellow lawyer. While some courts take the 
factor seriously, restricting that which constitutes credible character 
evidence, there are others that will use it as the court did in the 
aforementioned Cleveland Bar Assoc. v. Harris, where the lawyer who

225. See, e.g., In re Rotman, 556 N.E.2d 243, 251 (Ill. 1990) (giving little credence to the fact 
that the wrongdoing lawyer was hired by a respectable law firm and a prestigious family after the 
disciplinary proceeding began, because the lawyer never informed the law firm or the family of the 
pending discipline).
stole from an institutionalized client escaped disbarment by virtue of being a discharged veteran and a churchgoer.\textsuperscript{226} Even for those courts that strictly scrutinize the character evidence, it is difficult for such evidence to carry any relevance to the act of intentional misappropriation. Such an act requires secrecy and concealment by its very nature, and if the lawyer has already been shown to have committed the violation of intentional conversion once, it is basically impossible for any character evidence to indicate that the lawyer had not committed similar acts before, or to indicate that the lawyer will not commit such an act again in the future.

10. Other Penalties and Delay: Mitigating
The imposition of other penalties and a delay in the proceedings are far more viable as mitigating factors, because both are concerned with the lawyer getting as just and fair a proceeding as possible. If a delay in the proceeding hurt a lawyer’s opportunity to put on his or her best case, the public is not given any more protection by ignoring such prejudice, nor is confidence in the legal system increased, or even maintained. The public is also not entitled to nor legitimately protected by a lawyer receiving more penalty than is deserved, and so any previous sanctioning for the same misconduct should be considered.

11. Experience: Not Aggravating and Not Mitigating
While an abundance of experience is considered to be an aggravating factor, and a lack of experience is treated as a mitigating factor, neither one has any relevance to the goals of lawyer sanctioning in an intentional misappropriation case. A lawyer with little experience is no less likely to repeat the offense than a lawyer with much experience, because the violation of conversion is so clearly wrong that it is practically impossible to say that the lawyer with little experience did not know any better. As was noted in the Colorado case \textit{In re Thompson}, \textsuperscript{227} \textquotedblleft

\textsuperscript{226} See Cleveland Bar Ass’n v. Harris, 772 N.E.2d 621, 623 (Ohio 2002).
\textsuperscript{227} In re Thompson, 991 P.2d 820, 823 (Colo. 1999).
stealing from a client was wrong, and thus protection of the public is also not furthered by making such a circumstance an aggravating factor.

12. Factors Not Previously Considered

The test for any factor presented to the courts not listed in the ABA Standards for Imposing Lawyer Sanctions and not considered previously should be the same as that applied to the above factors. If the presence of the factor makes it less likely that the public's confidence in the system will be decreased, or that the wrongdoer lawyer will repeat similar misconduct, and thus the protection of the public is advanced, then such a factor should mitigate. If the presence of the factor makes it more likely that the public's confidence in the system will be decreased by slack sanctioning, if the factor represents an even greater attack on the public by the violation at issue, or if the presence of the factor would create a decrease in general deterrence should slack sanctioning result, then that factor should be treated as aggravation.

B. Weighing the Factors

It is worth repeating the concept articulated in In re Buckalew, that "[t]here is no 'magic formula' to determine which or how many mitigating circumstances justify the reduction of an otherwise appropriate sanction. Each case presents different circumstances which must be weighed against the nature and gravity of the lawyer's misconduct."228 When the violation is as serious as intentional conversion, such a weighing should become a little more clear cut. Mitigating and aggravating factors are discretionary tools by definition, and so it must be left up to the courts to utilize them, although the overall balancing test can be more strictly defined. Because intentional misappropriation is so serious an offense, because clients are so helpless to lawyers put in charge of their money, the protection of the public and preservation of the public's confidence in the system requires the adoption of the test formulated by the Addams court.229 Recognizing the potential for unfairness while at the same maintaining a strict view of the violation, that court held that in order to lessen the sanction from disbarment to suspension, the mitigating factors must outweigh the aggravating factors to a substantial degree.230 The concern expressed by

228. In re Buckalew, 731 P.2d 48, 54 (Alaska 1986); see also supra text accompanying note 84.
230. See id. at 195.
Judge Ferren in his concurrence in Addams that such a balancing test is no balancing test at all is unfounded. It is entirely possible for a mitigating factor such as recovery from alcoholism or even a negligible client injury to substantially outweigh an aggravating factor such as client vulnerability, since a strong case could be made by the wrongdoing lawyer that what motivated the violation was the alcoholism, now eliminated, and not the vulnerability of the client. What is important is that the courts in intentional misappropriation cases be given some limits as to how far they can stretch mitigating factor consideration in order to reach the result they want, so that the two overriding goals of lawyer sanctioning are maintained.

V. CONCLUSION

In these post-Enron days, where countless innocent people have been destroyed by violations of fiduciary duties related to the handling of money, it is all the more important that the legal system take the necessary steps to make sure the public is protected from such egregious breaches of fiduciary duties by lawyers, and to do everything within reason to give the public confidence that the legal system has the integrity to function properly. It is therefore of the utmost importance that the system furthers the deterrence of lawyers who might be inclined to commit acts of intentional misappropriation of client funds, while working towards the incapacitation of lawyers who have already done so. As it exists now, the national disciplinary system is generally ill-equipped to treat this violation with the stringency it deserves, producing woefully inconsistent results between the states and within individual jurisdictions. Too many courts have too many mitigating factor considerations at their fingertips that allow them the discretion to save virtually any lawyer from disbarment that they wish, regardless of the merits of the case.

A paring down of such factors is in order for intentional misappropriation cases, along with a reformulation of the balancing between mitigating and aggravating factors. Those mitigating factors that should be maintained in such a scheme are the consideration of any mental or physical impairments that influenced the lawyer at the time of the violation but have since been eliminated, along with those factors, such as delay in proceedings or a full cooperation in those proceedings, that relate to the court's ability to reach an accurate and just decision.

231. See id. at 201.
All those factors relating to the lawyer’s character or experience prior to the misconduct should be discarded, because conversion is so egregious that such factors say preciously little about the lawyer’s propensity to convert again in light of the fact that the lawyer converted already. Those mitigating factors that are maintained should substantially outweigh any aggravating factors, in order to make sure that if the court is going to merely suspend a lawyer who has intentionally taken money from a client, it is because there is every reason to believe, from the perspective of the court and the public, that such an act by that lawyer will never happen again.

David Luty*

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