17 Geo. J. Legal Ethics 619

Georgetown Journal of Legal Ethics
Summer, 2004

Current Development 2003-2004

PROFESSIONAL MISCONDUCT BY MENTALLY IMPAIRED ATTORNEYS: IS THERE A BETTER WAY TO TREAT AN OLD PROBLEM?

Kristy N. Bernard[a1] Matthew L. Gibson[aa1]

INTRODUCTION

The *Model Rules of Professional Conduct* ("*Model Rules*") exist to ensure that attorneys abide by specific standards of conduct and provide a minimum quality of service to the public. Violations of the *Model Rules* hamper these goals and threaten the already suspect legal profession. The American Bar Association Standards for Imposing Sanctions ("ABA Standards") provide guidelines for disciplining lawyers who violate the *Model Rules*. These guidelines anticipate different scenarios of professional misconduct, including the unique situation when a lawyer violates the rules, not due to malicious intent, but due to mental impairment whether caused by illness or substance abuse.[1] The ABA Standards deem mental impairment a mitigating factor in the discipline process, a factor that neither justifies unethical actions nor shields the attorney from discipline; rather, it may allow for a lesser sanction.

This Note will first outline the scope of mental impairment and describe the professional misconduct usually committed by mentally impaired attorneys. Sections II and III will then discuss the sanctions traditionally imposed upon such attorneys and examine the purpose of attorney discipline. Sections IV and V will analyze the growing trend of disciplinary diversion, a different method for dealing with professional misconduct by mentally impaired lawyers, based on calls for change in the disciplinary process.[2] Finally, Section VI will argue that ***620** diversion programs present a more effective and purposeful method for achieving the goals of sanctioning and serving public policy.

I. MENTAL IMPAIRMENT

In ethics opinions and disciplinary cases, attorney mental impairment is usually seen as having several causes: "emotional problems," illness, and substance abuse.[3] These causes may work concurrently or independently, depending on the individual. Mental impairment manifests itself in a variety of ways, and may be temporary or permanent.[4] As such, the category of mental impairment in the context of disciplinary action is quite broad.

Specifically, definitions of mental impairment range from emotional problems to severe psychosis.[5] Gregory Sarno provides a comprehensive view of the breadth of this category. In his writings on the subject, Sarno outlines the category of mental impairment as containing psychoses, neuroses, alcoholism, drug dependency, emotional instability, or some combination thereof.[6] A 2003 American Bar Association formal ethics opinion cites alcoholism, substance abuse, and Alzheimer's disease as examples of mental impairment conditions.[7] In addition, the EEOC broadly defines mental impairment with regard to the Americans with Disabilities Act as "[a]ny mental, emotional, or psychological disorder; [m]ajor depression; [b]ipolar disorders; [a]nxiety disorders (e.g., obsessive compulsive disorders, panic disorders, and post-traumatic stress disorder); [s]chizophrenia; [p]ersonality disorders."[8]

Because no single definition of mental impairment is well established, courts consistently rely on Section 9.3 of the ABA

Standards and Rule 10 of the Model Rules for Lawyer Disciplinary Enforcement for guidance in disciplinary cases in which the attorney's mental status is in question.[9] These guidelines permit ***621** consideration of mental impairment as a mitigating factor when manifested as "personal or emotional problems, or mental disability or chemical dependency including alcoholism or drug abuse."[10] State courts used these guidelines to clearly establish each of the following as a form of mental impairment: depression, personality disorder, emotional distress, bipolar disease, attention deficit disorder, alcoholism, and drug abuse.[11] While these state court opinions evidence the breadth of the category for consideration, they also exemplify the common denominator: mental impairment is an illness or a substance dependency that diminishes the mental capacity required for an attorney to proficiently perform the duties he owes to his client, the public, the legal system, and the legal profession.[12]

II. SANCTIONING MENTALLY IMPAIRED ATTORNEYS

"Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct."[13] The American Bar Association asserts that "[i]mpaired lawyers have the same obligations under the *Model Rules* as other lawyers. Simply stated, mental impairment does not lessen a lawyer's obligation to provide clients with competent representation."[14] As a result, mentally impaired lawyers who violate ethics rules are subject to the same sanctions as their un-impaired counterparts. They are not absolved of the responsibility to act professionally and ethically despite the effect of their mental illness or substance abuse.

A. DETERMINING THE APPROPRIATE SANCTION

Self-regulation is both a right granted and a responsibility given to the legal profession. Imposing appropriate sanctions is an important component of acceptable self-governing. Ultimately, the goal of discipline is as follows:

> ***622** First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.[15]

To ensure that attorneys are appropriately disciplined for misconduct, the ABA published the Standards for Imposing Lawyer Sanctions.[16] Because courts and state bar associations use a case-by-case approach based on the facts,[17] these standards offer assistance with disciplinary proceedings.[18] The Standards attempt to generate consistency regarding sanctions imposed upon attorneys for professional misconduct. Four factors are listed as those to be considered when imposing sanctions: (1) the duty violated; (2) the lawyer's mental state; (3) the potential or actual injury caused by the misconduct; and (4) the existence of aggravating or mitigating factors.[19]

1. DUTY VIOLATED AND INJURY CAUSED

Attorneys owe duties to their client, the general public, the legal system, and the profession as a whole.[20] Because mental impairment may affect the mental acuity necessary to perform professionally and ethically, many attorneys suffering from mental illness or substance dependency face an increased likelihood of becoming subject to disciplinary action for violating the *Model Rules*. In general, the *Model Rules* violated by mentally impaired attorneys are those related to the client-lawyer relationship—competence, diligence, and confidence.[21] However, ethical misconduct is not limited to these rules. Disciplinary cases demonstrate that mentally impaired ***623** attorneys violate a variety of rules, depending on the type and extent of the incapacity.[22]

An ABA formal opinion discussing mental impairment cites Model Rules 1.3 and 1.4 as the most likely ethical violations committed by mentally impaired lawyers.[23] These rules specifically outline the competence and diligence standards owed to clients. In addition, mentally impaired attorneys often violate Rule 1.16, the rule that requires withdrawal due to diminished

mental capacity.[24] A violation of this rule usually results in disciplinary action because it exists in part to prevent misconduct by mentally impaired lawyers. Presumably, if an attorney withdraws at the onset of mental impairment, he will prevent a *Model Rules* violation caused by such impairment.

2. MENTAL STATE

The ABA Standards prescribe consideration of the lawyer's mental state when determining the appropriate sanction.[25] The examination of mental state, however, centers on the *intent* of the attorney when committing misconduct and not on whether the attorney suffers from some sort of impairment.[26] When considering this factor, courts question whether the attorney knowingly violated his duties.[27] They look for a conscious objective or purpose to accomplish a particular result, or evidence of acting with conscious awareness of the nature of the conduct. Intent for misconduct is an absent factor in most disciplinary actions involving mentally impaired attorneys.[28] Because mental impairment causes diminished mental capacity, attorneys can be placed in a position where they are unable to comprehend the wrongfulness of their actions or to prevent the misconduct.[29]

*624 3. MENTAL IMPAIRMENT AS A MITIGATING FACTOR

In accordance with the guidance provided in the ABA Standards, courts and bar associations usually consider mitigation when dealing with mental impairment in the lawyer disciplinary process.[30] ABA Standard 9.3 lists personal or emotional problems, mental disability, and chemical dependency including alcoholism or drug abuse as mitigating factors.[31] However, conditions apply to the use of these mitigating factors, and mitigation can be rendered moot by aggravating circumstances, such as prior misconduct.[32]

In order to use mental impairment as a mitigating factor, the attorney must establish a causal nexus between the impairment and the misconduct.[33] This connection is important because it addresses the question of the lawyer's mental state. The causal link demonstrates the misconduct was due, at least in part, to impairment as opposed to malicious intent.[34] While cases fail to explicitly describe the elements of a causal connection in disciplinary matters, courts and bar associations tend to rely on medical testimony and conclusions drawn from the other evidence presented. Typically, testimony by doctors and the attorney himself is used to establish the illness or dependency, and then the court or predominant fact-finder judges whether the misconduct is tied to the mental impairment.[35]

The causal connection requirement has been described in guidelines and cases as either a "but, for" test, or a threshold of "clear and convincing evidence." For example, the ABA characterizes mental impairment in mitigation as the "assum[ption] that, but for his mental impairment, the lawyer would be able to comply with the requirements of all of the Model Rules."[36] Similarly, in the *Kersey* case, the Court introduced the "but, for" ***625** test as a precedent in presiding over sanctions cases involving mental impairment.[37] The "clear and convincing evidence" standard operates in much the same fashion, requiring the evidence presented to clearly establish a causal relationship to the mental impairment.[38]

The causal nexus requirement is not easily met. Some judicial opinions exemplify the rigorous nature of the requirement. For example, the *Dixon* court held that the causal connection between Dixon's mental illness (psychological issues including personality and interpersonal relationship difficulties) and her misappropriation of funds was not sufficiently compelling to require consideration of her illness as a mitigating factor: "Dixon's mental state did not cause and does not justify her dishonest conduct."[39] In comparable cases, attorneys face harsher punishment due to failure to establish the necessary causal relationship between the misconduct and the impairment.[40] The causal link is necessary to alleviate the intent of the ethical violation because if the causal nexus is not established, the court assumes intent as the mental state.[41]

ABA Standards recommend the following be present for mental illness or drug dependence to be considered in mitigation: medical evidence of effect, a causal link between impairment and misconduct, a meaningful and sustained period of successful rehabilitation, and arrest of the misconduct and unlikely recurrence.[42] All of these factors are not always present in the impairment disciplinary cases, but courts are usually willing to consider them anyway.[43]

B. TRADITIONAL SANCTIONS: PUBLIC CENSURE, SUSPENSION, AND DISBARMENT

The ABA Standards do not prescribe sanctions for specific types of *Model Rules* violations, but only set forth a range of suggestions based on the nature of the infraction.[44] Public censure, suspension, and disbarment are the sanctions traditionally imposed in disciplinary cases involving mentally impaired lawyers, ***626** but the Standards also allow for "private," i.e., non-public, discipline.[45] These three sanctions are used in variance depending on the four ABA criteria for appropriate sanctions: severity of misconduct, injury to client or public, lawyer's mental state, and aggravating or mitigating factors.[46]

Public censure, the leanest sanction of those traditionally imposed, is imposed less often than suspension and disbarment as a means of sanctioning mentally impaired attorneys.[47] Because mentally impaired attorneys usually violate rules related to the lawyer-client relationship, arguably the most important ethical duty, censure is deemed too lenient a punishment.[48] Censure only serves the goals of sanctioning if the attorney's mental impairment is significantly responsible for the misconduct, or if relatively minor misconduct was caused by the mental impairment.[49]

Suspension is imposed in the majority of mental impairment cases upon weighing all the factors.[50] Either the rules infractions themselves warrant suspension despite mental impairment, or the rules infractions warrant disbarment, and suspension is imposed as a lesser sanction due to the mitigating factor of mental impairment.[51] Suspension is a less severe sanction than disbarment in that the suspended lawyer does not permanently lose the ability to practice.

Disbarment, considered the most severe sanction, is only used in the most egregious misconduct cases.[52] Traditionally attorneys who mishandle funds or charge excessive fees face disbarment despite any showing of mental impairment.[53] While harsh, disbarment is seen as a necessary tool because "continuing public confidence in the judicial system and the bar require that the strictest ***627** discipline be imposed in misappropriation cases."[54] Disbarring an attorney serves to protect the public from additional misconduct by the offending attorney by removing him from the profession.[55]

III. PURPOSE OF SANCTIONS

Misconduct by attorneys elicits one of three types of sanctions: those that incapacitate (disbarment and suspension), those that express a message of disapproval (public censure and probation), and those that serve to rehabilitate the attorney (voluntary agreements for treatment).[56] These three types of sanctions share the same purpose, "to protect the public and the administration of justice."[57] Because of the obligation to self-govern, courts and bar associations take seriously the charge to protect the professional reputation and the public perception of it.[58] "In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct."[59] The goal in the disciplinary process is not necessarily to punish the attorney, but "to protect the public, maintain public confidence in the bar, preserve the integrity of the legal profession, and prevent similar conduct in the future."[60]

IV. A CALL FOR CHANGE: THE GROWING TREND TOWARDS NON-DISCIPLINARY SANCTIONS

In the case of a mentally impaired attorney, the profession and the attorney are not necessarily well served by traditional sanctions such as disbarment, suspension, or some other formal reprimand. Though not excusable, misconduct caused by special circumstances warrants special treatment. When an attorney's mental impairment is treatable and unlikely to recur, the public in general and the ***628** attorney's clients in particular are better served by helping the attorney, with strict oversight, to overcome or otherwise deal with the mental impairment.

Over the past decade, legal commentators, judges, bar associations, and individual attorneys have added their voices to the ever-increasing opposition to these traditional rules of attorney discipline. Legal ethics, coupled with a court's disciplinary system, can serve potentially conflicting goals: the punishment of the wayward attorney, the protection of the public and the protection of the "administration of justice."[61] In some limited instances, where an otherwise competent lawyer commits some form of misconduct attributable to a mental or physical condition[62] or a substance abuse problem,[63] and where that attorney is

successfully treating the problem, neither the public nor the profession is well served by the temporary or permanent removal of the attorney from practice.

As early as 1965, courts recognized the need to craft sanctions that take into account mental illness or impairment of disciplined attorneys.[64] Subsequently, other judges,[65] legal commentators,[66] students,[67] and bar associations[68] have recognized the need for special sensitivity in cases involving attorney impairment,[69] ***629** the general need for reform,[70] the often limited options for sanctions provided by states' disciplinary rules,[71] and the relative inflexibility of the ABA Standards[72] in crafting an appropriate remedy for mentally impaired attorneys.

A recent case from West Virginia illustrates the inherent limitations of the ABA Standards with regard to misconduct by mentally impaired attorneys.[73] In *Lawyer Disciplinary Board v. Scott*, the attorney was suspended in light of his twenty-two instances of misconduct, ranging from practicing with a suspended license to failing to diligently represent a client to dishonesty.[74] Instead of disbarring Scott, as was recommended by the Office of Disciplinary Counsel,[75] the court decided to suspend Scott's license for three years.[76] One of the mitigating factors that the majority relied upon was medical testimony establishing that Scott suffered from "Bipolar II disorder."[77]

It may seem strange either to argue against a long-term suspension or to argue for a reduction in the duration of Scott's suspension. After all, Scott stipulated to twenty-two counts of professional misconduct[78] and was sanctioned, in part, for lying to his clients.[79] Because West Virginia generally follows the ABA Standards,[80] the court only had a few available options for sanction. ***630** [81] One justice, however, recognized the need for a sanction that was more tailored to Mr. Scott's condition and suggested "where illness is the basis for limiting an attorney's practice, the period of limitation should be determined by the duration of the illness, rather than by some arbitrary standard."[82] Justice McGraw did not go so far as to suggest that *no* suspension was necessary, but his dissent does demonstrate a call for something more appropriate.[83]

Another scenario that challenges inflexible disciplinary rules is presented in *State ex. Rel. Oklahoma Bar Association v. Busch*.[84] The scenario is as follows: an attorney commits several minor infractions while suffering from an undiagnosed mental disability; upon diagnosis, the attorney undergoes treatment and ceases committing these minor violations; after receiving treatment, the affected client files a complaint based on the pre-diagnosis misconduct.[85] In such an instance, any suspension would be visibly unfair and could conceivably harm the attorney's clients by forcing them to obtain new counsel.

Numerous "unseen" mental illnesses and neurological conditions could affect an attorney's competence yet would not continue to present a problem once the attorney receives treatment.[86] What makes a reform of the current system even more pressing is the potentially lengthy duration of time between clinical onset of an impairment and its (eventual) diagnosis.[87] Why suspend an otherwise competent attorney for infractions that are unlikely to recur?[88]

It is well established that attorneys, as a group, suffer from mental illness and substance abuse at a rate higher than the general population.[89] Consequently, ***631** many local bar associations have established Lawyer Assistance Programs ("LAPs") to help lawyers get the counseling or medical attention they need.[90] A key component of many of the LAPs is a grant of civil immunity to the attorneys involved in running the programs.[91] While most would agree that the attorney's mental condition should not remove culpability for major transgressions,[92] the growing presence of local LAPs and the plethora of Continuing Legal Education classes[93] on the topic of substance abuse suggest an urge to educate and rehabilitate impaired attorneys.

V. DIVERSION: THE EMERGENCE OF A STANDARD

Diversion programs offer a potential solution to the problem inherent in sanctioning the misconduct of mentally impaired attorneys. These programs assist attorneys while preserving the public's trust, and thereby conform to the goals of attorney discipline. In 1991, Arizona became one of the first states to incorporate such a device into its disciplinary rules. As first enacted, Arizona's diversion program was broadly constructed: there could be "little likelihood" of harm to the public during the diversion period and the attorney's performance under the diversion agreement must be able to be supervised adequately.[94] Upon ***632** satisfaction of the agreement, the disciplinary action was to be dismissed.[95] Little guidance was given regarding an attorney's eligibility for diversion.

Several years after the Arizona rules were modified to include the diversion agreement, Colorado adopted a more narrowly tailored version of the diversion agreement.[96] Unlike Arizona's initial attempt at diversion, Colorado placed nine explicit restrictions on the application of its Rule 251.13.[97] In addition to providing "little likelihood" of danger to the public, the alleged misconduct could not have involved fraud, theft, dishonesty, family violence, a crime, or generally anything that would warrant a sanction more severe than a public censure.[98] In other words, the Colorado program was generally only applicable to ethics violations falling within Model Rules 1.3 and 1.4 (diligence and communication).

Although Colorado's program is more limiting than Arizona's initial attempt, it appears to have made a more lasting impression. First, Colorado's rules expressly affirm that "[d]iversion shall not constitute a form of discipline,"[99] and that upon successful fulfillment of the attorney's obligations under the diversion agreement, the disciplinary matter was to be "dismissed and expunged."[100]

In 2000, Alabama followed Colorado's lead and created its own "Prediscipline Diversion Program," but added a twist.[101] As part of the diversion agreement, Alabama requires that the attorney provide an "unqualified guilty plea to the ***633** violations,"[102] which has the obvious purpose of providing a strong incentive to abide by the agreement. In the event of a breach of an Alabama diversion agreement, the disciplinary action resumes, but at the sanctioning phase.[103] While Alabama's Diversion Program requires that successful diversions remain "private and confidential,"[104] it also allows the "dismissal as diverted" to be considered as a prior offense in any subsequent disciplinary proceeding.[105]

Other states have added to the Colorado-style diversion program, and a general standard appears to be developing for structured, non-disciplinary sanctions.[106] Generally, "diversion" states do not allow participation in a diversion program where the misconduct is severe, or involves theft of client funds, dishonesty, fraud, or deceit, or where the attorney has been previously disciplined (or has previously entered into a diversion program).[107] States have imposed additional eligibility requirements or limitations to a greater or lesser degree, sometimes even prohibiting diversion where the "misconduct involves sexual relations" otherwise prohibited[108] or limiting the program to attorneys with specific types of impairments.[109] States may[110] or may not[111] allow either the existence or the contents of a diversion agreement to be admitted in subsequent disciplinary actions.

VI. DIVERSION AS GOOD PUBLIC POLICY

Because the primary purpose of attorney discipline is to protect the public and to ensure the proper administration of justice,[112] it is easy to fashion cogent public policy arguments against diversion programs. The public at large holds a cynical view of lawyers,[113] and diversion programs (established by lawyers and ***634** run by lawyers) could be seen as a self-serving mechanism for avoiding sanctions. There is a justifiably pervasive attitude that attorneys should be held to the highest standard of conduct, both in order to safeguard the public and to preserve the reputation of the profession.[114] Accordingly, it could be argued that allowing *any* attorney a "free ride" on a disciplinary matter would encourage irresponsible behavior and serve to further diminish the public's view of the profession. Finally, the confidentiality and opacity of diversion from the public's point of view can be seen as significantly undermining the "consumer protective" aspect of attorney discipline.[115] While such criticisms appear facially valid, they ignore the strict limitations placed on attorneys participating in diversion programs and long-term analyses that are beginning to emerge from "diversion" states.[116]

It is indisputable that certain diversion programs do allow an attorney to have a "free ride" for some types of misconduct: diversion is inherently non-disciplinary.[117] This criticism, however, is overly simplistic. As a review of the relevant rules shows, diversion is generally only applicable where the infraction is minor, where it is caused by a recognizable impairment, and where there is a significant likelihood for full recovery.[118] Furthermore, in many states, participation in diversion programs is admissible as an "aggravating factor" in subsequent disciplinary matters, which, if observed, would mitigate the "free ride" problem.[119]

In order for diversion programs to be effective, they must be available to a significant number of attorneys and must prevent future harm. After all, one of the reasons for the existence of attorney discipline is the protection of the public.[120] While there is

a dearth of current data on the types of disciplinary actions brought and the severity of the sanctions, the 2001 Survey of Lawyer ***635** Disciplinary Systems ("SOLD") provides a good starting point.[121] This survey, which is compiled from the voluntary responses to questionnaires distributed to fifty-five disciplinary agencies, provides statistics on the types of sanctions imposed.[122] In addition, the Maryland Bar Journal has reported statistics from neighboring states over roughly the same period.[123] From these two sources, one can infer that a significant number of disciplinary cases may be suitable for diversion.[124]

One of the problems with states not having diversion programs is that the admonition or "private" sanction may be sending the wrong message to attorneys.[125] Where an attorney faces nothing more than admonition or other "private" sanctions, there is little incentive to modify the behavior leading to misconduct. By compelling attorneys to undergo treatment for substance abuse, a mental illness, or other condition, states provide the attorney an opportunity to cure the problem underlying the misconduct.[126] This opportunity for rehabilitation not only protects the public by reducing the probability of future similar offenses but also provides a real service to the attorney as a person.

There are enough infractions to warrant diversion programs, there is a good argument for providing them, and there is a strong recommendation to do so. But are diversion programs truly effective in reducing recidivism? According to Ellis' ten-year study, diversion appears to be working in Arizona.[127] In addition to "[s]ubjective consensus and anecdotal evidence,"[128] Ellis has compiled various statistics on the recidivism rates of Arizona attorneys participating in diversion and those not choosing to participate and has found a "statistically significant difference in the number and severity of subsequent disciplinary charges between lawyers who have completed a ... diversion program and those who have not."[129] In light of the emphasis that diversion programs place on rehabilitation, education, and treatment versus punishment, Ellis' results are not surprising.

*636 CONCLUSION

Unfortunately, attorney misconduct is a fact of life. While the profession should not condone misconduct, in the limited circumstance of misconduct by mentally impaired attorneys, traditional methods of sanction do not serve the goals of protection of the public and the administration of justice. The growing trend towards the codification of diversion programs suggests a new way of treating this issue, and early statistical analysis of the Arizona program suggests that these programs may be effective. The diversion programs satisfy the aims of disciplinary programs through non-disciplinary actions while allowing attorneys to remain in practice and serve their clients and the public.

Discussions of mental acuity should strike a nerve with most attorneys. The legal profession, after all, is a thinking profession, and an allegation of a cognitive dysfunction, whether protracted or temporary, strikes at the heart of what enables attorneys to function. An admission of such a dysfunction ultimately gives rise to both professional and emotional problems. For these reasons, an ongoing dialogue on the treatment of mentally impaired attorneys is vital, both to ensure the health of the profession and of the person.

Footnotes

a1 J.D., Georgetown University Law Center (expected May 2006). Kristy N. Bernard would like to thank her fiancé Theodore, her sister Kerri, and the rest of her family and friends for their unwavering support and constant inspiration.

aa1 J.D., Georgetown University Law Center (expected May 2006). Matthew L. Gibson would like to thank his wife Christina and his family and friends for all of their encouragement and support.

1 For the limited purpose of this Note, the term "mental impairment" is used to refer collectively to mental illness, mental disorders, substance abuse, and neurological disorders or diseases, and the like, all of which hamper an attorney's competency as a legal practitioner. In grouping the foregoing causes of "mental impairment" together, the authors have chosen to adopt the increasingly accepted view articulated in the American Bar Association Standing Committee on Ethics and Professional Responsibility's Formal Opinion 03-429 that certain types of substance abuse, especially alcoholism, are best categorized with other diseases.

[2] Disciplinary diversion programs offer alternative methods for sanctioning lawyers who violate the *Model Rules of Professional Conduct*. The programs involve non-disciplinary "private" sanctions like mediation and rehabilitation instead of traditional "public" sanctions like suspension or disbarment.

[3] ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS (hereinafter ABA STANDARDS); ABA Comm. on Ethics and Professional Responsibility, Formal Op. 03-429 (2003).

[4] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 03-429 (2003).

[5] *See, e.g.*, The Florida Bar v. Patarini, 548 So. 2d 1110 (1989) (citing emotional problems as a mitigating factor in attorney discipline case); Duggan v. The State Bar of California, 551 P.2d 19 (1976) (citing psychosis as a mitigating factor in attorney discipline case).

[6] Len Klingen, Note and Comment, *The Mentally Ill Attorney*, 27 NOVA L. REV. 157 (2002); Gregory G. Sarno, Annotation, *Mental or Emotional Disturbance as Defense to or Mitigation of Charges Against Attorney in Disciplinary Proceeding*, 26 A.L.R. 4th 995 (1983).

[7] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 03-429 (2003).

[8] The ADA and Mental Impairment *Texas Trial Lawyer, June 30, 1997 (source: EEOC Notice No. 915.002)*, available http://www.forensic-psych.com/pubs/pubADAment.html (On March 27, 1997, the EEOC issued guidelines concerning mental and psychiatric disabilities under the ADA. The guidelines list what is and is not considered an impairment.).

[9] ABA STANDARDS, *supra* note 3; MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT (hereinafter "MRLDE") Rule 10; *see, e.g.*, *In re* Neal, 20 P.3d 121 (N.M. 2001); *In re* Davis, 2000 Ariz. LEXIS 20; People v. Lavenhar, 934 P.2d 1355 (Colo. 1997); Statewide Grievance Comm. v. Glass, 699 A.2d 1058 (Conn. App. Ct. 1997) (citing section 9.3 in opinion as having been considered by the court).

[10] ABA STANDARDS, *supra* note 3.

[11] *See, e.g.*, Maryland v. Olver, 831 A.2d 66 (2003) (citing depression and personality disorder as mental impairment); State of Oklahoma *ex rel*. Oklahoma Bar Ass'n v. Busch, 919 P.2d 1114 (1996) (citing Attention Deficit Disorder as impairment in disciplinary action); Louisiana State Bar Ass'n v. Guidry, 571 So.2d 161 (La. 1990) (citing depression and marijuana use as mental impairment).

[12] ABA STANDARDS, *supra* note 3.

[13] MODEL RULES OF PROFESSIONAL CONDUCT [hereinafter MODEL RULES] Rule 8.4.

[14] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 03-429; *see also* MODEL RULES pmbl. ("Every lawyer is responsible for observance of the Rules of Professional Conduct."); State of Oklahoma *ex rel*. Oklahoma Bar Ass'n v. Southern, 15 P.3d 1, 7-8 (Okla. 2000) ("This does not mean an attorney's disability will shield him from professional responsibility.... It is important that all members of the bar understand that while a disabling medical condition may in some instances mitigate misconduct, the illness may not excuse the attorney's failure to terminate his services or seek assistance when his legal performance

falls below the required standard of competent representation.").

15 The Florida Bar v. Wolfe, 759 So. 2d 639, 644 (Fla. 2000).

16 ABA STANDARDS, *supra* note 3.

17 John D. Fabian and Brian Reinthaler, *An Examination of the Uniformity (Or Lack Thereof) of Attorney Sanctions*, 14 GEO. J. LEGAL ETHICS 1059, 1080 (2001) ("No matter how much a state may desire uniformity of sanctions, each state judiciary recognizes the need for a case-by-case evaluation of lawyer misconduct.").

18 Louisiana State Bar Ass'n v. Guidry, 571 So.2d 161, 163 (La. 1990) ("The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances.").

19 MRLDE Rule 10 Sanctions; ABA STANDARDS, supra note 3; *see also* Cuyhoga County Bar Ass'n v. McClain, 791 N.E.2d. 411, 414 (Ohio 2003) ("To determine the appropriate sanction, we consider 'the duties violated, the actual injury caused, the lawyer's mental state, the existence of aggravating or mitigating circumstances, and sanctions imposed in similar cases.'" (quoting Disciplinary Counsel v. Connors, 780 N.E.2d 567 (Ohio 2002)).

20 ABA STANDARDS, *supra* note 3; MODEL RULES.

21 Maryland v. Olver, 831 A.2d 66 (2003) (citing violation of rules regarding competence, diligence, communication, and misconduct); *see* MODEL RULES.

22 *See* Attorney Grievance Comm'n of Maryland v. Garfield, 797 A.2d 757 (Md. 2002) (citing sanctions imposed in attorney neglect cases ranging from disbarment to censure based in part on mitigating circumstances like mental impairment); Sarno, *supra* note 6 (citing different types of mental impairment and the ethical violations committed by the impaired attorney).

23 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 03-429; MODEL RULES Rule 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); MODEL RULES Rule 1.4 (requiring a lawyer to reasonably consult with the client to keep the client reasonably informed about the status of the matter).

24 MODEL RULES Rule 1.16 ("A lawyer shall not represent a client or, where representation has commenced shall withdraw from the representation of a client if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client.").

25 ABA STANDARDS, *supra* note 3.

26 *See, e.g., In re* Triem, 929 P.2d 634 (Alaska 1996); *In re* Shearin, 721 A.2d 157 (1998).

27 *See In re* Arnett, 52 P.3d 892 (Kan. 2002).

28 *See, e.g., In re* Hall, 2002 Ariz. LEXIS 152 (2002).

[29] *Compare* State of Oklahoma *ex rel*. Oklahoma Bar Ass'n v. Southern, 15 P.3d 1 (Okla. 2000) (finding no willfulness in action of attorney with vitamin deficiency to commit misconduct), *with* The Florida Bar v. Clement, 662 So. 2d 690 (Fla. 1995) (stating that the lawyer was able to distinguish between right and wrong, and therefore had intent when acting).

[30] ABA STANDARDS, *supra* note 3; *see, e.g.*, Sarno *supra* note 6 (citing instances of attorney mental impairment acting as a mitigating factor in disciplinary proceedings).

[31] MRLDE Rule 10 Sanction.

[32] ABA STANDARDS, *supra* note 3.

[33] Klingen, *supra* note 6, at 174 ("[A]ny mitigation of discipline for misconduct will be contingent upon a showing of causation."); *In re* Kurtz, 174 A.D.2d 207, 211 (N.Y. App. 1992) (stating that attorney failed to "establish any causal link between his health problems and his pattern of serious professional misconduct," and therefore produced no defense for his misconduct).

[34] *In re* Wolf, 298 A.D.2d 39, 40-41 (N.Y. App. Div. 2002) (finding a lawyer's ethics misbehavior involuntary and a product of his "tragic medical condition": "The medical testimony of respondent's physicians demonstrate that he had no culpability for the failure to cooperate in the Committee's investigation and that his conduct was neither intentional nor willful.").

[35] Maryland v. Olver, 831 A.2d 66 (2003) (using as mitigation in a disciplinary case, the fact that a lawyer suffering from debilitating mental illness (depression) during the events at issue continued to be treated for the illness); *In re* Guidry, 849 So. 2d 525, 529 (La. 2003) ("As mitigating factors, the committee recognized personal or emotional problems stemming from respondent's history of substance abuse concerns."); Attorney Grievance Comm. v. Duvall, 819 A.2d 343, 346 (Md. 2003) (Bar Counsel relied on doctor's opinion that lawyer "'had little or no control over her impaired judgment and that it was a product of her brain disease."').

[36] ABA Comm. on Ethics and Professional Responsibility, Formal Op. 03-429.

[37] *In re* Kersey, 520 A.2d 321 (1987) (using "but, for" standard in a sanction case).

[38] Colorado v. Sullivan, 802 P.2d 1091 (Colo. 1990) (using the "clear and convincing evidence" standard to determine that a lawyer's excessive fee charging was related to his emotional problems).

[39] Cleveland Bar Ass'n v. Dixon, 769 N.E.2d 816, 820 (Ohio 2002).

[40] The Florida Bar v. Clement, 662 So. 2d 690 (Fla. 1995) (disbarring lawyer because he failed to demonstrate that the bipolar disorder was the cause of his misconduct and that he lacked intent and could not distinguish between right and wrong); *In re* Sheridan, 813 A.2d 449 (N.H. 2001) (finding that the mental disorder of lawyer did not justify a lenient sanction because the disorder did not account for much of the misconduct underlying the ethical violations).

[41] Attorney Grievance Comm'n of Maryland v. Garfield, 797 A.2d 757 (Md. 2002) (finding the attorney's cocaine addiction so completely responsible for actions as to constitute a mitigating factor).

[42] ABA STANDARDS, *supra* note 3.

[43] *See In re* Temple, 596 A.2d 585 (D.C. 1991) (willing to accept "substantial affect" as opposed to but for causal link to allow drug use as a mitigating factor in an attorney disciplinary case).

[44] ABA STANDARDS, *supra* note 3.

[45] *Id*. Admonition is a form of "private" sanction that disciplines the lawyer without public comment and without affecting his or her ability to practice law.

[46] *Id*.

[47] Sarno, *supra* note 6.

[48] ABA STANDARDS, *supra* note 3.

[49] State of Oklahoma *ex rel*. Oklahoma Bar Ass'n v. Southern, 15 P.3d 1 (Okla. 2000) (The court offered public censure to a lawyer for failing to a handle case with competence and diligence. The lawyer suffered from a vitamin B-12 deficiency that exacerbated an already depressed state. The court found no voluntary conduct, and no intent to commit wrong. Mitigation was used to give a lesser sentence than suspension.).

[50] *See* Klingen, *supra* note 6, at 157.

[51] Cuyhoga County Bar Ass'n v. McClain, 791 N.E.2d. 411, 414 (Ohio 2003) ("[A]n indefinite suspension may be an appropriate sanction for repeated neglect caused, at least in part, by mental or emotional illness."); Erie-Huron Counties Joint Certified Grievance Comm'n v. Meyerhoefer, 788 N.E.2d 1073 (Ohio 2003) (The court suspended attorney for misappropriation of funds. Such a violation normally results in disbarment, but mental illness served as mitigating factor to downgrade the sanction to suspension.).

[52] The Florida Bar v. Clement, 662 So. 2d 690, 699 (Fla. 1995) ("Disbarment is the most severe sanction because it terminates a lawyer's ability to practice law. Disbarment enforces the purpose of sanctions by protecting the public from further practice by the lawyer and by protecting the reputation of the legal profession.").

[53] *Id*. ("The misuse of client funds is one of the most serious offenses a lawyer can commit, and disbarment is presumed to be the appropriate punishment.").

[54] Cleveland Bar Ass'n v. Dixon, 769 N.E.2d 816, 822 (Ohio 2002) (quoting Cleveland Bar Assn. v. Belock, 694 N.E.2d 897 (Ohio 1998)); *see also* Meyerhoefer, 788 N.E.2d at 1075 ("As we have consistently held, the normal sanction for misappropriation of client funds coupled with neglect of client matters is disbarment.").

[55] Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Disciplinary Sanctions*, 48 AM. U. L. REV. 1 (1998).

[56] *Id*.

[57] ABA STANDARDS, *supra* note 3. *In re* Fuller, 621 N.W.2d 460, 469 (2001) (stating the purposes of attorney discipline: "to protect

the public, to protect the legal profession, and to guard the administration of justice").

58 The Florida Bar v. Clement, 662 So. 2d 690, 690 (Fla. 1995).

59 Louisiana State Bar Ass'n v. Guidry, 571 So.2d 161 (La. 1990).

60 *In re* Sheridan, 813 A.2d 449, 451-52 (N.H. 2001); *In re* Arnett, 52 P.3d 892, 897 (Kan. 2002) ("The primary aim of the disciplinary process is to protect the client public of this state from abuses related to violations of the Kansas Rules of Professional Conduct by attorneys. In the instant case the Respondent admits to mental illness which has rendered her unable to serve her clients and to respect and honor rules of the Kansas Supreme Court pertaining to the discipline of attorneys.").

61 *See* Lawyer Disciplinary Bd. v. Swisher, 509 S.E.2d 884, 887 (W.Va. 1988); ABA STANDARDS, *supra* note 3.

62 Some jurisdictions have also adopted some form of "Disability Inactive" status for impaired attorneys. *See, e.g.*, Al. Rule Disc. Proc. Rule 27; Idaho R. Ct. Bar Comm. R. 516. As this Note's primary focus is on the rise of alternatives to formal discipline, this type of rule will not be discussed.

63 *In re* Rentel, 729 P.2d 615 (Wash. 1986) (Goodloe, J. dissenting) (arguing that the majority "ignore[d] a significant aspect of this case— Rentel's rehabilitation" and recommending a reduced sanction); *see* Jeffrey J. Fleury, *Kicking the Habit: Diversion in Michigan—the Sensible Approach*, 73 U. DET. MERCY L. REV. 11, 15-16 (1995) (citing studies asserting that the rate of substance abuse among attorneys is roughly twice that of the general population).

64 *In re* Sherman, 404 P.2d 978 (Wash. 1965) (finding that misconduct arising from attorney's "paranoid personality" disorder, for which attorney was receiving treatment, did not warrant suspension or disbarment).

65 *See, e.g.*, Cuyhoga County Bar Ass'n v. McClain, 791 N.E.2d. 411, 414 (Ohio 2003) (Lundberg Stratton, J. dissenting) (dissenting and recommending, in a jurisdiction following the ABA Standards, that the case be remanded for a more detailed analysis of the attorney's mental illness); *In re* Greenberg, 714 A.2d 243, 256 (N.J. 1998) (Stein, O'Hern, JJ, dissenting) (stating, in a case involving an attorney with a "major depressive disorder," a fundamental disagreement with the "rigid" rule for automatic disbarment and proposing that "[t]he discipline for other misconduct not involving client funds or implicating dishonesty that directly subverts the administration of justice ... should be individualized"); *In re* McLendon, 845 P.2d 1006, 1011-12 (Wash. 1993) (reversing the state disciplinary board's recommendation of disbarment of an attorney with a bipolar disorder).

66 *See generally* American Bar Association Commission on Evaluation of Disciplinary Enforcement, Lawyer Regulation for a New Century: Report of the Commission on Evaluation of Disciplinary Enforcement (1992) [hereinafter McKay Commission].

67 Bruce M. Familant, Comment, *The Essential Functions of Being a Lawyer with a Non-Visible Disability: On the Wings of a Kiwi Bird*, 15 T.M. COOLEY L. REV. 517 (1998).

68 Dick Honaker, *An Update From the New Select Committee to Review Disciplinary Functions*, 24-DEC WYO. LAW. 34, 36 (2001) (discussing the newly formed Select Committee to Review Disciplinary Functions' review of Colorado's newly established attorney disciplinary system); *see, e.g.*, Alabama State Bar, Alabama Lawyer Assistance Program.

69 Familant, *supra* note 67, at 542, *et seq*.

[70] Honaker, *supra* note 68, at 34. In some states, as in pre-reform Colorado, disciplinary cases can last for *years*. American Bar Association, Survey on Lawyer Discipline Systems 2002, available at http:// www.abanet.org/cpr/discipline/sold/toc_2002.html. During this time, the attorney could remain in practice (with the obvious result of potentially engaging in additional misconduct), while the public, depending on the openness of the disciplinary process, remains relatively unaware of the pending disciplinary proceedings. McKay Commission, *supra*, note 66 at "Introduction." This broader issue, while substantial and important, is regrettably beyond the scope of this Note.

[71] Justice Stein has suggested that the New Jersey Supreme Court's rule of automatic disbarment in the case of the misappropriation of client funds should not be extended to a case involving misappropriation of law firm funds where the attorney suffered from serious, diagnosed mental disorders. Justice Stein also faults the majority for failing to consider evidence of depression in client funds cases except in the limited circumstance of where the depression causes "respondant's comprehension and will were overborne." *In re* Greenberg, 714 A.2d 243, 268 (N.J. 1998) (Stein, J. dissenting).

[72] ABA STANDARDS, *supra* note 3.

[73] To be fair, the ABA and many states have recognized the need for a mechanism to attend to significantly impaired attorneys. The present systems typically involve changing the attorney's status to "Disability Inactive" for a set term, sometimes on the order of years and/or until the court reinstates the attorney (who bears the burden of proving that the disability will no longer impair the ability to practice). *See, e.g.*, R. Sup. Ct. Az. R. 59, 63.

[74] Lawyer Disciplinary Board v. Scott, 579 S.E.2d 550, 551 (W. Va. 2003) (McGraw, J. dissenting).

[75] *Id*.

[76] *Id*.

[77] *Id*. at 555-56. "Bipolar II Disorder" is a mood disorder "classified under major depression" and has symptoms such as hypomania. *Id*. at n.34. While the Office of Disciplinary Counsel and the court disagreed as to whether Scott's mental illness led to infractions such as the lack of diligence, both agreed that the illness did not contribute to infractions involving dishonesty.

[78] *Id*. at 556.

[79] Dishonesty generally makes a person ineligible for an alternative disciplinary program. *See* Col. Rules Civil Proc. Rule 251.13(b).

[80] *Scott*, 597 S.E.2d at 555.

[81] The ABA Standards do not provide much guidance to courts taking into account mitigating factors: "[a]fter misconduct has been established ... mitigating circumstances may be considered in deciding what sanction to impose." ABA STANDARDS, *supra* note 3, at § 9.1.

[82] *Scott*, 597 S.E.2d at 559. Even in states with the option of placing an attorney on Disability Inactive Status, the minimum length of suspension is set without regard to the nature of the illness or the speed of the treatment. *See, e.g.*, Alaska Bar Rules, R. 30(g) (requiring that an attorney remain inactive for one year and mandating that an inactive attorney may only apply for conversion to active status once per year).

[83] *Id*..

[84] State of Oklahoma *ex rel*. Oklahoma Bar Ass'n v. Busch, 919 P.2d 1114 (1996); Stephen M. Hines, *Attorneys: The Hypocrisy of the Anointed-The Refusal of the Oklahoma Supreme Court to Extend Antidiscrimination Laws to Attorneys in Bar Disciplinary Hearings*, 49 OKLA. L. REV. 731 (1996).

[85] *Id*.

[86] "Unseen" mental impairments are those impairments that are not easily detectable by lay people, as evidenced by what one commentator refers to as the typical response of "you look fine to me." Familant, *supra* note 67, at 519. A discussion of the Americans with Disabilities Act ("ADA") gives rise to an inquiry of how mental illnesses and neurological disorders would be classified as "impairments," thus falling within the Act.

[87] At the very least, courts should review statistics on the average onset/diagnosis period for a disease or condition at issue. Many conditions or diseases may go undiagnosed for years if not decades, potentially leading to a pattern of misconduct that, while disturbing on paper, could be easily remedied.

[88] McKay Commission, *supra* note 66. This situation could arguably fit within the McKay Commission's recommendation for an alternative procedure in lieu of formal discipline.

[89] Fleury, *supra* note 63 at 15; Joseph W. Caldwell, *Lawyers, Alcohol, Drugs, and the ADA*, 9-JUL W.VA. LAW. 20.

[90] *See, e.g.*, New York State Bar Assoc. Lawyer Assistance Program, available at http://www.nysba.org/Content/NavigationMenu/Attorney_ Resources/Lawyer_Assistance_Program_(LAP)/Lawyer_Assistance_Program_(LAP).htm (last visited July 20, 2004); Idaho Lawyer Assistance Program, available at http://www2.state.id.us/isb/gen/lap.htm (last visited July 20, 2004).

[91] Otherwise, these attorneys could face liability for a breach of the duty to report impaired attorney. MODEL RULES Rule 8.3. *See, e.g.*, Va. R. Prof. Conduct Rule 8.3(d).

[92] Major transgressions could be actions such as appropriation or mishandling of a client's funds or property, fraud on the court, etc. *See, e.g.*, MO Bar Rule R. 5.105(c); *see generally* ABA STANDARDS, *supra* note 3, at §§ 4.1 (client funds), 6.11 (fraud on the court)..

[93] *See, e.g.*, West LegalEd Center Program Guide on Substance Abuse, *at* http://westlegaledcenter.com/program_guide/search_results.jsp? page=prgmgd&creditTypeId=9 (last visited July 20, 2004).

[94] The initial Arizona Rule is as follows:
11. Diversion by the court, the commission, a hearing officer, or by a panel.
A. Diversion is an alternative to a disciplinary sanction that may be imposed for a specified period not in excess of two years, but may be renewed for an additional two-year period.
B. Diversion may be imposed in cases where there is little likelihood that the respondent will harm the public during the period of diversion, and the conditions of diversion can be adequately supervised. The terms of diversion shall be stated in writing, and may include restitution and assessment of costs and expenses.
C. Bar counsel shall be responsible for monitoring and supervising the respondent during the diversionary term. Bar counsel shall report material violations of the terms of diversion to the imposing entity. At the end of the diversionary term, bar counsel shall

prepare and forward a report to the imposing entity. This report shall provide information regarding the respondent's completion or non-completion of the imposed terms.
D. Upon request of a respondent after successful completion of diversion under these rules, the matter shall be dismissed by order of the panel, a hearing officer, the commission, or the court.
AZ S CT Rule 52(a)(11) (effective until December 1, 2003).

95 *Id*.

96 Col. Rules of Civil Proc. Rule 251.13.

97 The eligibility restrictions that Colorado enacted are as follows:
(b) Participation in the Program. As an alternative to a form of discipline, an attorney may participate in an approved diversion program in cases where there is little likelihood that the attorney will harm the public during the period of participation, where the Regulation Counsel can adequately supervise the conditions of diversion, and where participation in the program is likely to benefit the attorney and accomplish the goals of the program. A matter generally will not be diverted under this Rule when:
(1) The presumptive form of discipline in the matter is likely to be greater than public censure;
(2) The misconduct involves misappropriation of funds or property of a client or a third party;
(3) The misconduct involves a serious crime as defined by C.R.C.P. 251.201(e);
(4) The misconduct involves family violence;
(5) The misconduct resulted in or is likely to result in actual injury (loss of money, legal rights, or valuable property rights) to a client or other person, unless restitution is made a condition of diversion;
(6) The attorney has been publicly disciplined in the last three years;
(7) The matter is of the same nature as misconduct for which the attorney has been disciplined in the last five years;
(8) The misconduct involves dishonesty, deceit, fraud, or misrepresentation; or
(9) The misconduct is part of a pattern of similar misconduct.
Col. Rules Civil Proc. Rule 251.13(b).

98 *Id*.

99 *Id*. at 251.13(e).

100 *Id*. at 251.13(f).

101 *See generally* Al. R. Disc. P. Rule 8.1.

102 *Id*. at 8.1(d).

103 *Id*. at 8.1(*l*).

104 *Id*. at 8.1(i).

105 *Id*. at 8.1(k).

106 As of this writing, at least 18 states have adopted non-disciplinary diversion programs similar to the ones discussed thus far:

Alabama, Ala. R. Disc. P. R 8.1 (2004); Arizona, Ariz. S. Ct. R. 54(b)(1)(c) (2004); California, Cal. Bus. & Prof'l Code § 6230 (2004); Colorado, Colo. Rules Civil Proc. Rule 251.13(b); Florida, Fla. Bar Reg. R. 3-5.3 (2004); Georgia, Ga. R. & Regs. St. Bar R. 4-205 (2003); Hawaii, HRSC R. 2.3 (2004); Kansas, Kan. Sup. Ct. R. 203(d) (2003); Louisiana, La. Sup. Ct. Rule XIX (2003); Maryland, Md. Rule 16-712(a)(4) (2004); Missouri, Sup. Ct. Rule 5.105 (2003); Nevada, Nev. S.C.R. 105.5 (2004); New Hampshire, N.H. Sup. Ct. R 37; New Jersey, N.J. Court Rules, 1969 R. 1:20-10 (2004); Oregon, ORS § 9.568 (2003); Wisconsin, Wis. S.C.R. 22.10 (2004); Wyoming, Wyo. Bar. Discip. R. 14 (2003); and the District of Columbia, D.C. Bar R. 11, § 8.1 (2004). *But see, e.g.*, Mich. Ct. R. 9.114(B)(4).

107 *See, e.g.*, Ks. R. Disc. Rule 203(d)(1)(ii).

108 WISCR Rule 22.10(3)(i).

109 Md. Rules of Court Rule 16-736(a)(3).

110 Al. R. Disc. P. Rule 8.1(k).

111 Col. R. of Civ. Proc. Rule 251.13(f).

112 McKay Commission, *supra* note 66.

113 *See, e.g.*, John Sullivan, *In New Jersey, Rogue Lawyers are on the Rise*, N.Y. TIMES, October 19, 2003 at 14NJ, p. 5 (claiming that "[t]o many, the words legal and ethics fit together like an elephant in a bikini"); Lena H. Sun, *Cases Against Accused Attorneys Drag On; Discipline System Accused of Being Too Slow and Padded with Protections*, WASHINGTON POST, June 16, 2003 at A12. ("The system is created by lawyers for lawyers.").

114 State v. Ledvina, 237 N.W.2d 683, 687 (Wis. 1976) ("A lawyer is a professional person twenty-four hours a day, and not just 8 hours a day, five days a week. The court has also pointed out that a lawyer should demean himself in a proper manner and refrain from practices which bring disrepute upon himself and his profession.").

115 Most programs do not allow for the disclosure of any information regarding an attorney's participation in diversion. *See, e.g.*, Wis. S. Ct. R. 22.10(8). The disciplinary action is simply placed in abeyance until the successful fulfillment of the diversion agreement or an event of default under the agreement. *See, e.g.*, Al. R. Disc. Proc. Rule 8.1(1). Even after successful completion, the mere fact that an attorney participated in a diversion program can be withheld from public knowledge. *See* Ks. R. Disc. Rule 203(d)(2)(vi). *But see* Maryland Rules Rule 16-723(b)(6) (allowing for the disclosure of the fact that the attorney entered into a diversion agreement). Many states, however, still allow for "private" reprimand, which ultimately has the same effect and does not have the same strict eligibility requirements that have developed in the "diversion" states.

116 *See infra* text accompanying note 124.

117 *See infra* text accompanying note 115. *But see* WI SCR Rule 22.10(3)(i).

118 *See* Col. Rules Civil Proc. Rule 251.13(b).

[119] ALR. 8.1(k).

[120] McKay Commission, *supra* note 66.

[121] Available at http://www.abanet.org/cpr/discipline/sold/toc_ 2001.html (last visited July 20, 2004).

[122] *Id*. at Chart II. Because of the differences among the states' disciplinary procedures, the statistics on sanctions are not inherently meaningful. These statistics, however, do serve to rebut the "opacity" argument against diversion programs: there is a statistically significant number of "private" sanctions or simple admonishments, which, depending on the state, could remain confidential.

[123] Melvin Hirshman, *A Review of Other States*, 35-FEB MD. B.J. 58 (2002).

[124] One of the main categories of misconduct that is generally eligible for diversion is communication/diligence. In 1999-2000, Indiana reported that 56% of its grievances fell within this category. *Id*. at 59. In 1999, New Jersey reported 16.6% for "neglect" and 11.6 for "communication." *Id*. at 58.

[125] Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1224 (2003) (citing American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement (1970)).

[126] *Id*. at 1228-29.

[127] *Id*. at 1230.

[128] *Id*.

[129] *Id*. at 1255.