moral character inconsistent with one "dedicated to the peaceful and reasoned settlement of disputes," *see* 401 U.S. at 166, but, rather, more consistent with someone who wishes to go outside the field of law and settle disputes by mounting personal attacks and portraying himself as the victim and his opponent as the aggressor. Such disruptive, hostile, intemperate, threatening, and turbulent conduct certainly reflects negatively upon those character traits the applicant must prove prior to being admitted to the Nebraska bar, such as honesty, integrity, reliability, and trustworthiness.

The result might have been different if Converse had exhibited only a "single incident of rudeness or lack of professional courtesy," *see* In re Snyder, 472 U.S. 634, 647 (1985), but such is simply not the case. The record clearly establishes that he seeks to resolve disputes not in a peaceful manner, but by personally attacking those who oppose him in any way and then resorting to arenas outside the field of law to publicly humiliate and intimidate those opponents. Such a pattern of behavior is incompatible with what we have required to be obligatory conduct for attorneys, as well as for applicants to the bar. . . .

We conclude that the Commission's determination to deny Converse's application was correct. . . .

B. Professional Discipline

Problems

2-2. Martyn discovers that a valuable and brilliant associate has been charging a client for phantom travel expenses, thereby generating money that he has used to fund a gambling addiction. To make matters worse, the client has filed a bar complaint against Associate. Martyn tells Fox not to worry because Associate has repaid the money and joined Gambler's Anonymous. May Fox accept Martyn's advice?

2-3. Fox told Associate, who was counsel of record in a matter, not to appear in court because he wanted to "take care of the matter," even though Fox was not admitted to practice in the state in question. When the judge questioned Associate's absence, Fox replied that Associate had a medical emergency that prevented her appearance. The next day, Fox told Associate: "The judge wants to verify your absence. Just send a letter to the court backing me up—nobody has to know."

2-4. Client hires Martyn & Fox to get back her $25,000 retainer from her former lawyer. Client explains: "That bum charged me $10,000 for incompetent work and won't refund the rest of my $15,000." Martyn writes a demand letter to client's former lawyer that includes the following:

> "My hope is to avoid an ethics investigation for you. If you do not return my client's $25,000 within 14 days, it is likely my client will file a disciplinary complaint."

Consider: Model Rules 5.1, 5.2, 8.3, 8.4
RLGL § 5

People v. Walker

2011 Colo. Discipl. LEXIS 32

William R. Lucero, Presiding Disciplinary Judge, Gail C. Harriss, Hearing Board Member, Dean S. Neuwirth, Hearing Board Member. . . .

I. SUMMARY

Respondent converted over $22,000.00 from twelve clients by failing to return their retainers after he neglected to perform agreed-upon work. His neglect of most of those matters was so pronounced as to amount to abandonment. Respondent's major depressive disorder, however, was principally responsible for his misconduct. In light of Respondent's demonstrated mental disability and other mitigating factors, the Hearing Board determines that a three-year suspension is warranted in this matter. . . .

On February 24, 2010, the People filed a complaint alleging that Respondent violated Colo. RPC 1.3, 1.4(a), 1.15(b), 1.16(a)(1), 1.16(d), and 8.4(c). . . .

III. FINDINGS OF FACT AND RULE VIOLATIONS . . .

This case involves extensive misconduct with respect to fourteen client matters. Because Respondent has stipulated to this misconduct, the facts of each matter are presented here in an abbreviated form. . . .

Shannon Boerger Matter . . . Shannon Boerger ("Boerger") hired Respondent in November 2008 to represent her in a contempt action against her ex-husband. She paid Respondent a $3,000.00 retainer. Respondent neglected her case by taking nearly three months to file the contempt motion. He failed to prepare and timely submit exhibits prior to the contempt hearing and then failed to appear for the hearing, resulting in the postponement of Boerger's trial. Boerger was subsequently unable to reach Respondent. Respondent abandoned Boerger and failed to return either her file or any portion of her retainer, thereby converting unearned legal fees. Through these actions, Respondent violated Colo. RPC 1.3 (requiring lawyers to act with reasonable diligence and promptness), 1.4(a) (requiring lawyers to communicate with clients about their matters), 1.16(a) (requiring lawyers to withdraw from representation if continued representation will result in violations of the Rules of Professional Conduct), and 8.4(c) (requiring lawyers to refrain from conduct involving dishonesty). . . .

The Colorado Attorneys' Fund for Client Protection paid a total of $22,707.00 to Respondent's clients to reimburse them for Respondent's conversions.

IV. SANCTIONS

The American Bar Association *Standards for Imposing Lawyer Sanctions* ("ABA *Standards*") . . . *Standard* 3.0 mandates that, in selecting the appropriate sanction, the Hearing Board consider the duty breached, the injury or potential

injury caused, Respondent's mental state; and the aggravating and mitigating evidence.

Duty: Respondent violated the duties he owed to fourteen clients. He failed to uphold some of the most fundamental obligations of a lawyer, including the obligations to act with loyalty and honesty towards clients. By failing to properly terminate his representation of clients, he also violated duties he owed as a professional.

Injury: Respondent caused serious injury or potential injury to his clients. His abandonment of his clients' cases caused delay in those matters and jeopardized the clients' interests. In some instances, Respondent's failure to attend hearings on his clients' behalf appears to have led to adverse judicial rulings. Moreover, Respondent converted over $22,000.00 in client funds, in some cases depriving clients of money they needed to hire another lawyer. By failing to appear at scheduled hearings, Respondent also caused harm to the court system by wasting judicial resources. Finally, Respondent's misconduct negatively influenced the public's perception of the legal profession.

Mental State: Respondent stipulated to the mental state required to support each rule violation alleged by the People in this matter. In doing so, Respondent admitted that the gravamen of his misconduct—his abandonment of clients and his conversion of client funds—was knowing.

ABA *Standard* 3.0–Aggravating Factors . . .

Dishonest or Selfish Motive—By converting funds from clients, Respondent benefitted at his clients' expense. Respondent's conversion permitted him to continue to pay his own bills while in some cases depriving his clients of the opportunity to hire an attorney to pursue or defend their interests.

Pattern of Misconduct—Respondent engaged in the same rule violations with respect to numerous clients.

Multiple Offenses—In the client matters underlying this proceeding, Respondent violated multiple rules of conduct.

ABA *Standard* 3.0–Mitigating Factors . . .

Absence of a Prior Disciplinary Record—Respondent has not previously been subject to discipline for violations of the Rules of Professional Conduct.

Personal and Emotional Problems—Respondent testified that prior to his misconduct he suffered from a variety of personal and emotional problems, such as his divorce, the death of a pet dog, and significant medical issues, including surgeries.

Timely Good Faith Effort to Make Restitution—As of the date of the sanctions hearing, Respondent had paid a total of $60.00 in restitution, made in six installments. This sum may represent a significant effort on Respondent's part in light of his now minimal income. But given the large amount of funds Respondent converted, the Hearing Board finds that this mitigating factor merits its minimal weight.

Full and Free Disclosure to Disciplinary Board or Cooperative Attitude toward Proceedings—Although Respondent initially did not respond to letters from

the People, Respondent became more cooperative as his mental and emotional status improved. The Hearing Board gives considerable weight to Respondent's decision to facilitate the resolution of this matter by admitting to the rule violations alleged by the People.

Remorse—Respondent testified that he regrets his misconduct. His psychotherapist also testified that Respondent has demonstrated remorse and has assumed responsibility for his actions. Accordingly, the Hearing Board finds Respondent to be genuinely remorseful for his misconduct.

Mental Disability—ABA *Standard* 9.3(i) provides that a mental disability or chemical dependency is a mitigating factor 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 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. . . .

The Hearing Board heard extensive testimony from three mental health experts, a friend of Respondent, and Respondent himself regarding Respondent's mental condition. The testimony shows that Respondent entered a state of depression starting in 2008, which significantly worsened during the spring and summer of 2009. During the summer and fall of 2009, he attempted to commit suicide twice and was committed to a mental hospital on three occasions. . . . Respondent continued to suffer from significant depression through the beginning of 2010, during the period when Respondent lived temporarily with his brother in Texas. Through therapy and the use of medications, Respondent's condition improved, and he returned to Colorado later that year. . . .

[Two other experts who treated respondent testified that] respondent has made significant strides in treating his depression and a relapse is unlikely as long as Respondent continues to "take care of himself," . . . [and] respondent is unlikely to engage in further misconduct if he continues to "learn" and to "grow."

The expert testimony that Respondent's misconduct would have been unlikely but for his severe depression demonstrates that Respondent suffered from a mental disability and that a direct causal connection exists between that disability and Respondent's misconduct. In addition, the expert testimony shows that Respondent has largely been rehabilitated through weekly therapy sessions since January 2010 and that recurrence of misconduct is unlikely. Even as of the summer of 2010, Dr. Wortzel found that the disabling aspects of Respondent's depressive episode no longer persisted and that he appeared to be "restored in terms of functional abilities." . . .

Sanctions Analysis Under ABA *Standards* and Case Law

Under the ABA *Standards*, the presumptive sanction for Respondent's misconduct is disbarment. ABA *Standard* 4.11 provides that disbarment is typically

warranted when a lawyer knowingly converts client property and thereby causes injury or potential injury. Similarly, ABA *Standard* 4.41 provides that disbarment is generally appropriate when a lawyer causes serious or potentially serious injury to a client by knowingly failing to perform services for a client, engaging in a pattern of neglect with respect to client matters, or abandoning the practice.

The Colorado Supreme Court likewise has held that, except where significant mitigating factors apply, disbarment is the appropriate sanction for knowing conversion of client funds in violation of Colo. RPC 8.4(c). Where a lawyer's conversion of client funds is coupled with abandonment of the client, it is all the more clear that disbarment is the presumptive sanction. The Colorado Supreme Court, however, has cautioned that mitigating factors merit close examination and may in some cases warrant a departure from the presumption of disbarment.

Here, Respondent's misconduct occurred during the time period when Respondent was suffering from a mental disability, and his most serious misconduct—conversion of client funds and abandonment of clients—occurred while Respondent was experiencing a severe mental disability. As a result, we find that Colorado Supreme Court case law supports Respondent's argument that his mental disability justifies a sanction less severe than disbarment under these circumstances. . . .

The Colorado Supreme Court held in People v. Lujan that a lawyer whose mental disability caused her to steal from her law firm did "not deserve to be disbarred."[20] In that case, the lawyer suffered a head injury requiring surgery when she was involved in a serious automobile collision in Egypt. Although she initially had no memory of the accident, she later recalled that she had been sexually assaulted on the side of the road just after the accident. Upon returning to the practice of law, she began to submit falsified charges to her law firm, using the money she obtained through the fraudulent charges to purchase clothes costing in excess of two thousand dollars a month. She was diagnosed with major depression and obsessive compulsive disorder, which she subsequently controlled through the use of medication. The hearing board determined, after considering expert medical testimony, that "the respondent's obsessive compulsive disorder caused the misconduct" and that this mitigating factor should be accorded the greatest weight because the lawyer's misconduct was solely attributable to her disability. The Colorado Supreme Court upheld the imposition of a year-long suspension.

In People v. Boyer, the court approved a conditional admission of misconduct and imposed a 180-day suspension upon an attorney who engaged in sexual relationships with two clients, drove while drunk, lied to a police officer, and used cocaine.[27] The court found that such misconduct typically would warrant a longer suspension, but the respondent's lack of prior discipline, his full and free disclosure to disciplinary counsel, his remorse, and a bipolar personality

20. 890 P.2d 109, 110 (Colo. 1995).
27. 934 P.2d 1361, 1362-63 (Colo. 1997).

disorder, which was exacerbated by alcohol and chemical dependency and which substantially contributed to the misconduct, justified a reduced sanction. . . .

The Hearing Board also draws guidance from other jurisdictions' decisions, including those cited in the comment to ABA *Standard* 9.3(i). In several of those decisions, courts have determined that the severity of a lawyer's misconduct was not sufficiently mitigated by a mental disability to overcome a presumption of disbarment, or that disbarment was appropriate because the attorney had the capacity to refrain from misconduct. But our review of disciplinary case law identified far more examples of cases in which a demonstrated mental disability or chemical dependence warranted a departure from the presumptive sanction, including in cases involving such egregious misconduct as the conversion of client funds. . . .

Finally, . . . we briefly address Respondent's argument in his written supplement to oral closing argument that "[s]anctions applied after a period of disability for conduct occurring during that period of disability may be illegal under the terms of the Americans with Disabilities Act" ("ADA").[36] The Colorado Supreme Court previously held that the ADA did not preclude it from suspending a lawyer who suffered from depression while chronically neglecting client matters and misusing client funds.[37] The court followed decisions from the Florida and Oklahoma supreme courts holding that, even if a mental disability is a cause of attorney misconduct, attorneys who commit serious misconduct are not qualified to serve as members of the bar, and no "reasonable modifications" can be made for such individuals.[38] In other words, otherwise qualified attorneys with mental disabilities that prevent them from meeting the essential requirements of their work are not entitled to protections under the ADA. Accordingly, we reject Respondent's argument that the ADA bars the imposition of disciplinary sanctions in this matter.

V. CONCLUSION

Respondent's conversion of funds from twelve clients and his wholesale abandonment of client matters is an example of the most serious misconduct in which an attorney can engage. Such extensive misconduct not only has harmed Respondent's clients but also has brought disrepute upon the legal profession. Yet sanctions for attorney misconduct may be tempered where, as here, the evidence

36. The ADA offers protections to a "qualified individual with a disability," meaning "an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for . . . the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2).

37. *People v. Reynolds*, 933 P.2d 1295, 1305 (Colo. 1997). In *Reynolds*, the respondent's depression did not qualify as a mitigating factor under ABA *Standard* 9.32(i) because he had not been fully rehabilitated.

38. *See Fl. Bar v. Clement*, 662 So. 2d 690, 699-700 (Fla. 1995); *State ex rel. Okla. Bar Ass'n v. Busch*, 919 P.2d 1114, 1119-1120 (Okla. 1996); *see also In re Marshall*, 762 A.2d 530, 539-40 (D.C. 2000) (holding that an attorney's disbarment did not constitute discrimination based upon his disability and observing that the ADA does not require authorities to accommodate a disabled individual by overlooking violations of the law); *Cincinnati Bar Ass'n v. Komarek*, 702 N.E.2d 62, 67 (Ohio 1998) ("The ADA does not prevent disciplinary authorities from disbarring an attorney with a bipolar disorder who had misappropriated client funds.").

establishes that a professionally-diagnosed mental disability was principally responsible for the attorney's misconduct and where the evidence also shows that treatment and monitoring will allow the attorney to successfully resume his professional duties. Under the particular facts of this case, the Hearing Board finds that the sanction for Respondent's misconduct is appropriately lowered from the presumptive sanction of disbarment to a three-year suspension.

Kentucky Bar Association v. Helmers

353 S.W.3d 599 (Ky. 2011)

JOHN D. MINTON JR. . . .

The Board of Governors of the Kentucky Bar Association has recommended to this Court that Respondent, David L. Helmers, . . . who was admitted to practice law in Kentucky in 1997, . . . be permanently disbarred from the practice of law as a result of six ethical violations. . . .

Respondent worked for the law firm of Gallion, Baker, and Bray as a clerk during law school and subsequently as an associate after being admitted to the Bar in 1997. He worked almost exclusively on researching potential claims for injuries arising from the use of the diet drug Fen-Phen. In 1998, a class action (hereinafter referred to as the *Guard* case) was filed in the Boone Circuit Court against American Home Products (AHP) consisting of plaintiffs who alleged they were injured by Fen-Phen. The plaintiffs signed contingent fee contracts with William Gallion, Shirley Cunningham, Melbourne Mills, Jr., and Richard Lawrence for representation. The contingent fee contracts provided that the attorneys were entitled to fees equaling 30% to 33.3% of any recovery in addition to expenses. Respondent, working under Gallion's supervision, spent countless hours on the *Guard* case. In fact, Respondent served in many occasions as a contact person for the plaintiffs and opposing counsel.

In 2001, the Boone Circuit Court ordered the parties to mediate. Respondent attended the mediation, along with Gallion, and took notes. Respondent also signed the final settlement agreement, which gave an award of $200,000,000 to the plaintiffs. The settlement was contingent on the decertification of the class action claims. It also required that unless 95% of the plaintiffs sign a release by a certain date, the settlement could be terminated by AHP. How the settlement award would be allocated among the various plaintiffs was the responsibility of their attorneys, including Respondent. Respondent subsequently appeared with Gallion, Chesley, and Cunningham in the Boone Circuit Court to decertify the class action and dismiss the case. The judge granted their request.

After the dismissal, Gallion instructed Respondent to prepare a schedule setting the monetary amount that each of the settling plaintiffs would receive. Respondent's work in the preliminary stages of the case made him the most knowledgeable of the plaintiffs' attorneys on the relative damages sustained by each plaintiff. Respondent created the schedule and presented it to AHP for approval.

Gallion then instructed Respondent to meet with many of the settling clients. Following Gallion's instructions, Respondent met with thirty-nine clients and obtained their releases.

When meeting with the individual clients, Respondent presented a proposed settlement amount, and led the client to believe that the settlement award offer came straight from AHP. He did not inform them that their attorneys (including himself) had decided how much their individual monetary award would be, that the individual client's case was just one of 440 cases that had been settled for an aggregate sum of $200,000,000.00, that the class action had been decertified and dismissed by the Boone Circuit Court, or that $7,500,000 of the settlement fund was being held to indemnify AHP against certain other claims.

Furthermore, Respondent had been instructed by the other attorneys to offer each client an amount substantially below the amount assigned to that client in the predetermined allocations that AHP had approved. If the client refused the initial offer, he or she was presented with a larger offer at a later date. This continued until the client agreed to the settlement, and simulated from the client's perspective, an actual settlement negotiation with AHP. The clients were never informed by Respondent that they could entirely refuse the offer and were not provided copies of the documents they signed. Additionally, Respondent told many of the clients that if they spoke to others about their settlement award, they could face a penalty assessment of $100,000.

Apparently, Gallion had misinformed Mills about the true terms of the settlement, and in early 2002, Mills discovered that the total settlement award was $200,000,000 and not $150,000,000 as Gallion had told him. To assuage Mills, Gallion instructed Respondent to make a second distribution of settlement money to the clients. Respondent set up meetings with the clients he had previously met with and presented them a letter stating that the trial court had authorized a second distribution. This letter also revealed to clients for the first time that an unspecified amount was being held in escrow to indemnify certain third parties, if necessary. Respondent also asked if the plaintiffs would object if some of the undistributed award money was given to charity. A donation to the "Kentucky Fund for Healthy Living, Inc." in the amount of $20,000,000 was made.[4]

Because of their actions in the *Guard* case, most of the attorneys with whom Respondent worked have been disbarred. See Gallion v. Ky. Bar Ass'n, 266 S.W.3d 802 (Ky. 2008); Kentucky Bar Association v. Cunningham, 266 S.W.3d 808 (Ky. 2008); Kentucky Bar Association v. Mills, 318 S.W.3d 89 (Ky. 2010).

In February 2002, the KBA Inquiry Commission opened an investigative file on Respondent. This investigation led to an Inquiry Commission complaint in October 2005. Respondent was subsequently charged with the following eight ethics violations.

> Count One charged that the Respondent was guilty of violating [Rule] 1.4(b) "by failing to inform his clients in the Guard case of relevant information, including but not limited to: the amount of the total aggregate settlement offer from AHP; the process that had been used to determine the amount that each of the clients would receive; the options available to the client in the event that participation in the aggregate settlement was refused by the client;

4. The Kentucky Fund for Healthy Living, Inc. paid board of directors consisted of Gallion, Mills, and Cunningham.

the fact that the small amount of money left over after the second payment to clients was actually over $20 million; accurate information as to how and why the second distribution occurred; and by instructing or allowing others to give his clients inaccurate information about multiple aspects of the case."

- Count Two charged that the Respondent violated [Rule] 1.8(g) "by, including but not limited to: failing to explain to his clients that AHP had agreed to an aggregate settlement of the claims of 440 clients and the total amount thereof; failing to explain that the settlement agreement stated that the attorneys would determine the amount that each client would receive from the aggregate settlement; failing to disclose or explain the proposed allocations in the settlement agreement; failing to communicate the amount of the total settlement from AHP to his clients; or failing to obtain the informed consent of his clients to participate in an aggregate settlement."
- Count Three charged that the Respondent violated [Rule] 2.1 "by failing to exercise independent professional judgment in the settlement distribution process or by failing to render candid advice to his clients during the representation, including advice relating to their participation in the aggregate settlement."
- Count Four charged that the Respondent violated [Rule] 5.2(a) "by violating Rules of Professional Conduct in part at the direction of Gallion, Cunningham, and/or Chesley."
- Count Five charged that the Respondent violated [Rule] 5.3(b) "by failing to appropriately supervise non-lawyer staff persons in order to ensure that their conduct was compatible with his ethical duties in their dealing with the clients and discussions about settlement matters."
- Count Six charged that Respondent violated [Rule] 8.4(a) "by violating the Rules of Professional Conduct by knowingly assisting the other lawyers, non-lawyers working for the lawyers, and the Boone Circuit Judge to violate the Rules of Professional Conduct."
- Count Seven charged that Respondent violated [Rule] 8.4(c) "by, including but not limited to: deceiving his clients into accepting the individual settlement amounts offered; deceiving clients about their claims even after demand for more specific accounting; misrepresenting to the Boone Circuit Court that his clients had agreed to donate a substantial portion of the total settlement received from AHP to charity; failing to inform the Boone Circuit Court that the attorneys had contingent fee contracts with all their clients which set a specific fee; misrepresenting the amount of attorneys' fees paid to the lawyers relative to the payments to the clients; failing to disclose to clients that "extra funds were being held for various contingencies, or even that such contingencies existed; or providing, or assisting in providing false or misleading information to the Boone Circuit Court about the fees and expenses, as well as the manner in which the settlement had been reached with the clients."
- Count Eight charged that the Respondent violated [Rule] 5.1(c)(1) in that "The Respondent is fully responsible for any conduct of the lawyers in the Guard litigation, including Shirley Cunningham, William Gallion, Melbourne Mills, and Stanley Chesley, that he ratified with knowledge of their conduct by virtue of [Rule] 5.1(c)(1)."

The Trial Commissioner held a hearing and determined that Respondent should be found guilty of Counts One, Two, Three, Four, Six, and Seven. His report recommended that Respondent be suspended from the practice of law in this Commonwealth for a period of five years. The Trial Commissioner expressly noted that Respondent was not the mastermind of the scheme, that he was subordinate to Gallion, Cunningham, and Mills, and that he cooperated with the criminal investigation into the matter. The Board of Governors of the Kentucky Bar Association by a vote of eleven to five decided to consider the matter *de novo* instead of accepting the Trial Commissioner's recommendation. After oral arguments, the Board of Governors by a vote of sixteen to zero found Respondent guilty of Counts One, Two, Three, Four, Six, and Seven and not guilty of Counts Five and Eight. By a vote of eleven to five,[5] the Board recommended that Respondent be permanently disbarred from the practice of law in Kentucky and that he pay all costs associated with this action. . . .

We are aware that Respondent has had no other disciplinary issues raised against him. We are aware that Respondent was a young law student when he first began working for Gallion, and that Gallion was then a well-regarded and reputable attorney. We are aware that as a new attorney working with Gallion, Cunningham, and Mills, Respondent was inexperienced, impressionable, and may have been influenced, and perhaps even led astray, by those more seasoned lawyers. But, we cannot ignore the fact it takes no technical expertise or experience in the settling of class action lawsuits, or any sophisticated understanding of the rules of ethics to know that Respondent's course of conduct, personally and directly deceiving his clients, some of whom had been egregiously injured, was wrong. That he did so at the direction of his employer does not permit us to overlook the serious deficiency in character revealed by the facts before us.

In light of the serious ethical violations committed by Respondent, permanent disbarment from the practice of law in Kentucky is reasonable. . . .

Thus, it is ORDERED that:

1) Respondent, David L. Helmers, is adjudged guilty of violating [Rules] 1.4(b), 1.8(g), 2.1, 5.2(a), 8.3(a), and 8.3(c) and is hereby permanently disbarred from the practice of law in Kentucky. Respondent thusly, may never apply for reinstatement to the Bar under the current rules;

2) Respondent in accordance with SCR 3.390, shall notify all Courts in which he has matters pending and all clients for whom he is actively involved in litigation and similar matters, of his inability to continue representation;

3) Respondent shall immediately cancel and cease any advertising activities in accordance with SCR 3.390;

4) In accordance with SCR 3.450, Respondent is directed to pay all costs associated with these disciplinary proceedings in the amount of $39,673.53, for which execution may issue from this Court upon finality of this Order.

All sitting. All concur.

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5. The five members voting against permanent disbarment instead voted to suspend Respondent from the practice of law for five years as recommended by the Trial Commissioner.

A Lawyer's Duty to Report Professional Misconduct of Other Lawyers and Judges

Kentucky Bar Association Ethics Opinion E-430 (2010)

Introduction

. . . [Rule] 8.3 [imposes an obligation on] Kentucky lawyers . . . to report certain types of ethical misconduct of other lawyers and judges. The obligations imposed by the rule are designed to preserve the integrity of the profession and to assure public confidence in the judicial system. Because the legal profession has the privilege of self-regulation it has the corresponding responsibility of assuring that the profession's high standards are respected. Rule 8.3 reflects that privilege and responsibility.[3]

In many circumstances, lawyers are in the best position to know of another lawyer's misconduct and to minimize its consequences to others. Not only do lawyers know the standards by which lawyers and judges are expected to conduct themselves, lawyers also work closely with them and may be the first ones actually to observe the acts of misconduct. In many cases, the victim of the misconduct may not even be aware of it. As officers of the legal system, lawyers must take the affirmative responsibility to assure that both the bench and bar maintain the highest standards, and to assure that those who do not conform to these standards are disciplined. It is only by taking an active role in the disciplinary process that the profession is deserving of the public's trust and confidence.

The reason for the reporting obligation is summarized in the Preamble to [the] Rules of Professional Conduct:

> [12] The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Many questions have been raised about the rule's application. . . . This opinion is designed to provide a framework for that analysis. In questionable cases, lawyers should seek further advice from their District Member of the Ethics Hotline.

I. Under what circumstances does Rule 8.3 impose a duty to report professional misconduct of others? . . .

Before a lawyer has an obligation to report the conduct of another lawyer or judge, the following specific conditions must be met:

3. ABA Formal Op. 04-433 (2004).

- The reporting lawyer must "know" of the violation.
- In the case of a lawyer, the violation of the Rules of Professional Conduct must raise "a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."
- In the case of a judge, the violation of the Rules of Judicial Conduct must raise "a substantial question as to the judge's fitness for office."
- The information that serves as the basis of "knowledge" must not be "protected by Rule 1.6 or other law" nor have been "receive(d) in the course of participating in the Lawyer Assistance Program [KYLAP] . . ."

If the above conditions are met, and none of the exceptions discussed below apply, then the lawyer with "knowledge" must report. If the misconduct raises a substantial question as to a lawyer's honesty, trustworthiness or fitness, the report must be made to Bar Counsel. . . . If the misconduct raises a substantial question as to a judge's fitness for office, the report must be made to the Judicial Conduct Commission. The duty to report to Bar Counsel or the Judicial Conduct Commission is independent of any other reporting obligations, such as a lawyer's obligation to report perjury to a tribunal under [Rule] 3.3(a)(3). Lawyers cannot satisfy their obligations under Rule 8.3 by advising the tribunal of misconduct or by making a referral to KYLAP. The duty to report is an individual duty. It is not satisfied because a report has been made to another person or by another lawyer.

II. When does a lawyer "know" a violation has occurred?

Before a lawyer's duty to report is triggered, the lawyer must "know" of the violation [as] . . . is defined by [Rule] 1.0 [f] (Terminology) . . . :

The standard is an objective one. As the Louisiana Supreme Court recently observed:

> A lawyer will be found to have knowledge of reportable misconduct, and thus reporting is required, where the supporting evidence is such that a reasonable lawyer under the circumstances would form a firm belief that the conduct in question had more likely than not occurred. As such, knowledge is measured by an objective standard that is not tied to the subjective beliefs of the lawyer in question.[7]

In order to trigger the reporting requirement, absolute certainty is not required; but mere suspicion is insufficient to trigger the reporting requirement. While lawyers cannot turn a blind eye to obviously questionable conduct, as a general rule they do not have a duty to investigate. However, there may be circumstances where another rule or principle of law may impose an independent duty to investigate. For example, under [Rule 5.1], a supervising lawyer who suspects a subordinate lawyer is engaging in unethical conduct would have a duty to investigate further. Similarly, an independent duty to investigate misconduct might arise under [Rule] 1.5, which permits the division of fees between unrelated lawyers,

7. *In re Riehlmann*, 891 So.2d 1239, 1247 (La. 2005).

but requires the lawyers to assume joint ethical and financial responsibility for the representation, as if they were partners. . . .

If lawyers have doubt as to their duty to report, any reasonable doubt should be resolved in favor of reporting. It is then up to the appropriate authority . . . to follow-up and determine if an investigation should go forward or if the matter should be terminated.

III. What constitutes a "substantial question" within the meaning of Rule 8.3?

Both Rule 8.3(a), applicable to lawyers, and Rule 8.3(b), applicable to judges, use the term "substantial question." . . .

The intent of these two provisions is to require reporting of serious violations. [The committee cites Rule 8.3, Comment [2].]

Thus, not every violation must be reported. For example, an isolated failure to respond to a discovery request in a timely manner may be a violation of [Rule 3.4 (c)], which states that the lawyer shall not fail to comply with the rules of the tribunal. However, Rule 8.3 would not normally require the reporting of this violation because it does not involve a substantial violation of the rules reflecting on the lawyer's trustworthiness, honesty or fitness.

It would be impossible to list all of the situations in which a lawyer would be obligated to report. Clearly any conduct that would result in disbarment or suspension must be reported. Typical examples of conduct which have led to disbarment or suspension . . . include theft, conversion, abandonment of clients, credit card fraud, perjury, tampering with evidence, comingling of client funds, fraud, failure to act with reasonable diligence or keep client reasonably informed, mishandling of trust accounts, refusal to return unearned fees, and failing to take appropriate action to protect the client upon withdrawal or termination. . . .

Although most situations which require reporting involve dishonesty and untrustworthiness, Rule 8.3 also contains a catch-all provision, which requires reporting when conduct raises a substantial question as to the lawyer's "fitness in other respects . . . ." Reported examples include breach of a confidentiality agreement, egregious conflicts of interest, improper contact with jurors, and misconduct by a suspended lawyer. The catch-all provision may also apply to chronic neglect. Examples include situations in which a lawyer has repeatedly, and without explanation, missed court dates, failed to comply with court orders or failed to honor deadlines imposed by the court or the rules. In addition, any conduct which results in a contempt order by the court would normally fall within the catch-all provision and trigger the duty to report.

Misconduct, particularly neglect of duty, often arises when a lawyer is suffering from some kind of impairment. Impairment may arise as a consequence of senility, dementia, alcoholism, drug addiction, substance abuse, chemical dependency or mental illness. While not all impairments must be reported, any impairment that materially affects the fitness of the lawyer or the judge must be reported, unless one of the exceptions described below applies.

IV. Does a lawyer have a duty to report conduct unrelated to the practice of law or to judicial duties?

. . . Although most of the duties under the Rules of Professional Conduct relate to the representation of clients, some do not. [Rule] 8.4, especially subsections (b) and (c), may involve behavior unrelated to the practice of law. Specifically, the Rule provides that it is professional misconduct to "commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer . . . " or "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." . . . Thus, for example, a lawyer could be disciplined for fraud in connection with the sale of a personal residence, falsification of documents for personal use, or embezzlement from a non-profit organization with which the lawyer does volunteer work. All of these examples raise a substantial question as to the lawyer's honesty and trustworthiness. Similarly, a lawyer would have a duty to report a judge who engaged in the activities described above, because they would raise a substantial question as to the judge's fitness for office. Whether a lawyer has a duty to report activities unrelated to the practice of law or judicial responsibilities will depend on the nature of the act and the circumstances under which it was committed. Clearly, theft, fraud or other serious misrepresentation, even when unrelated to professional activities, must be reported.

V. Does a lawyer have a duty to report information protected by [Rule] 1.6 . . .?

Rule 8.3 provides [that] a . . . lawyer may not, without the client's consent, report misconduct of another if the knowledge is based on information protected by Rule 1.6. In the context of Rule 8.3, the lawyer's duty of confidentiality takes precedence over any obligation to report misconduct.

Having recognized the exception for knowledge protected by Rule 1.6, two points must be made. First, the rule specifically authorizes the client to consent to disclosure, thus permitting the lawyer to report. "Informed consent" is defined by the Rule 1.0(e) [Terminology] . . . Reporting is designed to protect the public and lawyers are encouraged to discuss possible waiver and reporting with their clients, especially where the public faces a serious risk of harm. . . .

In addition to the exception for information protected by Rule 1.6, Rule 8.3 (c) does not require disclosure of information obtained while participating in a lawyer assistance program. . . . This reporting exception does not relieve a lawyer who is not a staff member or volunteer from reporting an impaired lawyer or judge whose conduct raises a substantial question as honesty, trustworthiness or fitness. The rule attempts to balance the goal of assisting impaired lawyers by providing a confidential support network, with the need to protect the public. . . .

VI. Does a lawyer have a duty to self-report his or her own misconduct or that of an associate?

Rule 8.3 requires a lawyer to report certain misconduct of "another lawyer" or "judge." As a general rule, a lawyer does not have to self-report. This is not to

say that a lawyer should not self-report and in some circumstances it may be the best course of action.

However, self-reporting is required under SCR 3.453, which provides that lawyers must report discipline from other jurisdictions, including federal court. In addition, SCR 3.166 requires a lawyer who has pleaded "guilty to a felony, including a no contest plea or a plea in which the member allows conviction but does not admit the commission of a crime, or is convicted by a judge or jury of a felony, in this state or in any other jurisdiction" to self-report.

A lawyer's obligation under Rule 8.3 may require a lawyer to report a partner or associate. This may have consequences for the reporting lawyer, but there is nothing in the rule to suggest that the duty to report does not extend to one with whom the reporting lawyer is or was associated. For example, if a lawyer knows that another lawyer in the firm falsified material documents for trial, the lawyer is obligated to report that misconduct unless one of the exceptions applied.

VII. Does a lawyer have a duty to report a suspended or disbarred lawyer?

A lawyer who has been suspended is still subject to application of certain Rules of Professional Conduct. If a suspended lawyer engages in unprofessional conduct, including the unauthorized practice of law, then a lawyer who knows of that misconduct has a duty to report. It is particularly important to report suspended lawyers who have engaged in misconduct because they may ultimately apply for reinstatement. One of the primary considerations on the application for reinstatement will be whether the suspended lawyer complied with the terms of suspension, and the rules during the period of suspension.

A disbarred lawyer is no longer a lawyer, and not subject to the Rules of Professional Conduct. . . . The Kentucky Bar Association has no authority over a disbarred lawyer's general conduct, but it does have the authority to investigate unauthorized practice and initiate proceedings. If a lawyer is involved in a matter in which a disbarred lawyer is engaged in the unauthorized practice of law, the failure to report the unauthorized practice of law could result in the lawyer's violation of [Rule] 5.5(a), which prohibit a lawyer from assisting another in the unauthorized practice of law. . . . The interests of both the public and the profession are best served by reporting the disbarred lawyer who is engaged in the unauthorized practice of law. . . .

IX. Is the reporting lawyer immune from civil or criminal liability?

A lawyer who makes a report in good faith is immune from civil or criminal liability or disciplinary action by the bar . . . .

X. What are the procedures for reporting a violation and when must the report be made?

. . . The purpose of the rule is to permit Bar Counsel or the Judicial Conduct Commission to begin an inquiry into the alleged misconduct. Thus, the reporting lawyer should report the facts underlying the belief that there is a substantial

question as to the reported lawyer's honesty, trustworthiness or fitness as a lawyer or the reported judge's fitness for office. Reporting the facts underlying the belief further demonstrates the reporting lawyer's good faith basis for making the report. . . .

It is clear that an anonymous report does not comply with the rule and affords no protection to the reporting lawyer.

The rule does not address the question of when one must make the report. Because the purpose of the rule is to protect the public, under most circumstances the report should be made within a reasonable time after discovery. There may be cases in which a report might have a detrimental impact on the reporting lawyer's client. This might be the case where there are on-going relationships between the client and the lawyer who has engaged in misconduct. Assuming that the information came to the reporting lawyer in the course of the representation of the client, it would be protected by Rule 1.6; absent client consent, the lawyer could not report. To the extent that the client's interests are not protected by the Rule 1.6 exception, it is the view of the Committee that where an immediate report would have a detrimental impact on the client, the lawyer may delay reporting to protect the client's interests. The lawyer would be well served to document any discussions with the client and the reasons for delaying the reporting. . . .

Conclusion

Under amended Rule 8.3, a lawyer does not have a duty to report every known violation of the rules, but must report those that underlie the core values of the profession: honesty, trustworthiness and fitness. . . . It is not easy to file a report against a fellow lawyer or judge, particularly if the reporting lawyer has a personal relationship with the lawyer or judge or knows of some unfortunate circumstances involving either. Nevertheless, the Rules require lawyers to report lawyers and judges who have engaged in serious misconduct. A lawyer's obligation to the profession and to the public outweighs any personal reservations the lawyer may have about reporting another lawyer or judge. Again, it is not the lawyer's duty to determine another lawyer's or judge's guilt, but merely to make the report so that the appropriate disciplinary authorities can make that determination.

☐ The Law Governing Lawyers: *Admission and Discipline*

The materials in this chapter illustrate aspects of the system of professional licensure and discipline that form the backbone of the professional regulation of lawyers. *Converse* illustrates that bar applicants bear the burden of proving the requisite character and fitness; *Helmers* and *Walker* indicate that once licensed, bar counsel bears the burden of proving a professional code violation. Courts have inherent power to regulate the practice of law. They do so by establishing substantive and procedural requirements for professional admission and discipline.

Becoming a Licensed Lawyer

Most states require those who seek bar admission to satisfy five criteria: age, education or experience, examination, the taking of an oath, and good moral character.

To facilitate consideration of character and fitness to practice law, bar applicants are required to complete a lengthy questionnaire that canvasses relevant topics related to these criteria.[1] Court rules, like those relied on in *Converse*, focus on general criteria such as honesty, respect for law, and the ability to act professionally. The inability to act honestly can be evidenced by a criminal record, civil judgment,[2] academic misconduct, or neglect of professional or financial obligations.[3] Bar examiners treat any lack of candor in the bar admission application itself as equally serious.[4] The ability to act professionally in a manner that engenders respect for law and the profession can be evidenced by letters of reference, by reports of law school administrators, or the absence of a history of drug or alcohol dependence or mental illness or successful treatment for these conditions.[5]

In deciding whether an applicant has met the necessary criteria, courts assess how these factors predict future ability to practice.[6] They often also consider

1. Applicants have a continuing obligation to update their bar applications until they gain bar admission. *E.g.*, *In re Strzempek*, 962 A.2d 988 (Md. 2008) (bar applicant who failed to disclose guilty plea to driving under the influence that occurred after he submitted bar application denied admission for failure to timely report).

2. *E.g.*, *In re Application of Chapman*, 630 N.E.2d 322 (Ohio 1994) (consent decree in civil action by State Attorney General against bar applicant alleging deceptive and unconscionable sales practices in connection with a business demonstrated recent pattern of highly questionable and outright illegal behavior that justified rejection of bar applicant; renewed application that would demonstrate substantial change in applicant's conduct may allow for admission at a later date).

3. *E.g.*, *In re Griffin*, 943 N.E.2d 1008 (Ohio 2011) (bar applicant with $170,000 in student loans and $16,500 in credit card debt denied admission because he worked only part time, had made no payments on any debt, and had no plans to begin repayment; neglect of financial obligations is conduct constituting "a record manifesting a significant deficiency in the honesty, trustworthiness diligence, or reliability of an applicant."); *In re Steffen*, 261 P.3d 1254 (Ore. 2011) (filing for bankruptcy alone not enough to deny bar admission, but bar is entitled to inquire about details of bankruptcy, with an eye to determining whether it was triggered by "extraordinary hardship" or arose from "selfishness, a disregard of fiscal and moral responsibilities, or other irresponsible conduct," which would suffice to deny bar admission); *In re Stewart*, 240 P.3d 666 (Okla. 2010) (bankruptcy discharge precludes consideration of debt in lawyer's application for bar license under 11 U.S.C. § 525(a)).

4. *E.g.*, *Radtke v. Bd. of Bar Examrs.*, 601 N.W.2d 642 (Wis. 1999) (lawyer who misstated material fact on his bar application about his earlier plagiarism did not satisfy character and fitness requirement).

5. *E.g.*, *In re Ralls*, 849 N.E.2d 36 (Ohio 2006) (two DUI convictions during law school combined with failure to accept responsibility for alcohol abuse precluded applicant from admission until he demonstrated sustained period of compliance with alcohol treatment programs); *In re Covington*, 50 P.3d 233 (Or. 2002) (three years of sobriety not enough time to establish that applicant's past abuse of drugs and alcohol would not recur).

6. Courts use similar criteria in assessing reinstatement after suspension or disbarment. *E.g.*, *Milligan v. Bd. of Profl. Resp.*, 301 S.W.3d 619 (Tenn. 2009) (suspended lawyer failed to show moral qualifications to practice law required for reinstatement, measured by honesty, remorse,

whether past conduct would have violated a professional code requirement if the candidate had been licensed at the time. If so, the applicant usually will not succeed in showing the requisite character and fitness to practice law.[7] Most obvious are prior criminal convictions, where applicants must show rehabilitation to be admitted.[8] Less obvious are troubling patterns of behavior, like those in *Converse*, which indicate disruptive characteristics that probably will cause future trouble with clients, opponents, and tribunals.[9]

Converse also illustrates how courts respond when confronted with First Amendment challenges. Bar admissions officials may ask about membership in specific associations, so long as such a membership is relevant to fitness to practice.[10] On the other hand, a question that asks candidates to list memberships in all organizations during law school is overbroad and not rationally related to the ability to practice law.[11] For example, in a fairly recent Illinois Bar admission case, applicant Matthew Hale readily admitted that he headed an organization

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positive conduct during suspension, and detailed character testimony from witnesses who know the specifics of the lawyer's misconduct and payment of disciplinary costs).

7. *E.g., In re Mustafa,* 631 A.2d 45 (D.C. App. 1993) (because applicant's conduct if undertaken by a lawyer would have resulted in disbarment for at least five years, applicant should wait for a similar period of time from proven misconduct before good moral character can be established).

8. Courts look to the timing, number, and nature of the convictions as well as the applicant's recognition of the wrongfulness of the conduct and change in behavior over a period of time since the criminal activity. *In re R.M.W.,* 428 F. Supp. 2d 389 (D. Md. 2006) (adopting uniform procedure and criteria for applicants with prior criminal convictions); *In re Hamm,* 123 P.3d 652 (Ariz. 2005) (no person ever convicted of first-degree murder has been able to make the extraordinary showing of good moral character for bar admission); *In re Prager,* 661 N.E.2d 84 (Mass. 1996) (16 years of marijuana use, international smuggling, and living as a fugitive not outweighed by 7 years of a credible work history and successful completion of probation and law school, but applicant could reapply in 5 years).

9. Lawyers have been disbarred for conduct strikingly similar to Converse's. *See, e.g., Off. of Disc. Counsel v. Baumgartner,* 796 N.E.2d 495 (Ohio 2003) (lawyer who "repeatedly harmed her client's interests, manipulated the legal system, and publicly accused dozens of people of criminal wrongdoing" and whose "actions were done as a means to retaliate against anyone who defied her" disbarred). *See also Grievance Admin'r. v. Fieger,* 719 N.W.2d 123 (Mich. 2006), *cert. denied,* 127 S. Ct. 1257 (2007) (lawyer who castigated appellate judges in radio broadcasts, calling them Nazis and "three jackass Court of Judges," and announcing that they deserved anal violation publicly reprimanded).

10. *Law Students Civ. Rights Research Council, Inc. v. Wadmond,* 401 U.S. 154 (1971) (upholding an inquiry into whether the applicant specifically intended to further an organization's advocacy of violent overthrow of the government while a member of the organization); *Schware v. Bd. of Bar Exam'rs. of N.M.,* 353 U.S. 232, 246-247 (1957) (Communist Party membership prior to World War II could not be used as the basis to infer moral unfitness to practice law because such past membership had no rational connection to evil purposes or illegal conduct); *Konigsberg v. St. Bar of Cal.,* 366 U.S. 36, 52 (1961) (state can inquire about current Communist Party membership and can deny bar admission to an applicant who refused to answer, because of the state's interest "in having lawyers who are devoted to the law in its broadest sense, including . . . its procedures for orderly change").

11. *Baird v. St. Bar of Ariz.,* 401 U.S. 1 (1971) (overturning a general inquiry not connected to knowing membership); *In re Stolar,* 401 U.S. 23 (1971) (overturning inquiry that asked whether applicant has been or is a member of any organization that advocates the overthrow of the government of the United States by force).

called the World Church of the Creator, which did not sanction violence, but called for white racial supremacy and the use of political power to provide for the deportation of all other races, including Jews, blacks, and other "mud races" so that the United States could then become a "white race"–only country. He claimed he would follow the law until he could change it by peaceable means. A hearing panel focused on Hale's conduct, rather than his beliefs, denying him admission because he had admitted he would follow the Rules of Professional Conduct "only when he felt like it." They held that he was "absolutely entitled to his beliefs, but at the same time the public and the bar are entitled to be treated fairly and decently by attorneys."[12]

The Supreme Court also has invalidated two licensure requirements—citizenship and residency—on constitutional grounds. It barred citizenship requirements for lawyers on Equal Protection grounds, holding that the state could not prove a compelling interest that would overcome the strict scrutiny required by the Fourteenth Amendment to protect resident aliens.[13] It overturned residency requirements under the privileges and immunities clause in Art. IV, § 2 of the Constitution, concluding that the state could require lawyers to be familiar with local law, obey the jurisdiction's professional codes, participate in *pro bono* work, or be available to appear in court, but could not use residency as a surrogate for such restrictions.[14] The same principles were applied to federal court residency requirements in *Frazier v. Heebe,* where the Court exercised its inherent power to invalidate a local district court residency requirement.[15]

The net result of these decisions is that states remain free to impose admission requirements on residents and nonresidents alike, so long as the prerequisites do not favor resident lawyers.[16] Several courts also have upheld similar prerequisites to *pro hac vice* admissions (to represent a client with tribunal permission in one particular matter).[17]

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12. W. Bradley Wendel, *Free Speech for Lawyers,* 28 Hastings Const. L.Q. 305 (2001). The Illinois Supreme Court refused to hear the case on appeal, but one justice dissented, characterizing Hale's conduct as "open advocacy of racially obnoxious belief." *In re Hale,* 723 N.E.2d 206 (Ill. 1999). Since being denied bar admission, Hale has been convicted of soliciting the murder of a federal judge. Natasha Korecki & Frank Main, *Supremacist Gets 40 Yrs.; Hale Given Maximum for Trying to Have Judge Murdered, Chicago Sun-Times* (Apr. 7, 2005).

13. *In re Griffiths,* 413 U.S. 717 (1973).

14. *Piper v. S. Ct. of N.H.,* 470 U.S. 274 (1985). *See also Barnard v. Thorstenn,* 489 U.S. 546 (1989) (invalidating similar residency requirements in the Virgin Islands); *S. Ct. of Va. v. Friedman,* 487 U.S. 59 (1988) (invalidating residency requirements as a condition of admission on motion).

15. *Frazier v. Heebe,* 482 U.S. 641 (1987).

16. *E.g., Tolchin v. S. Ct. of N.J.,* 111 F.3d 1099 (3d Cir. 1997) (upholding a requirement that lawyers maintain a local bona fide office and attend continuing legal education courses).

17. *See, e.g., Paciulan v. George,* 229 F.3d 1226 (9th Cir. 2000) (residents not admitted to the bar not allowed to appear *pro hac vice*); *Mowrer v. Warner-Lambert Co.,* 1998 U.S. Dist. LEXIS 12746 (E.D. Pa. 1998) (local counsel of record required for *pro hac vice* admission); ABA Model R. on Admission by Motion (2012) *available at* http://www.abanow.org/wordpress/wp-content/files_flutter/13442860792012AM_105E.pdf.

Professional Discipline

Once admitted to the practice of law, lawyers become subject to Rules of Professional Conduct, violation of which can result in professional discipline.

Over the past 40 years, state and federal courts have extensively reformed the substance of these Rules of Professional Conduct, updated the procedures for disciplinary enforcement, and implemented guidelines to standardize disciplinary sanctions. The result has been more extensive discipline for a wider variety of professional misconduct. At the same time, because professional discipline continues to reach only a small fraction of client and third-party complaints, other remedies, such as malpractice, fee forfeiture, disqualification, and procedural sanctions also have expanded to fill the regulatory void.

The Emergence of Modern Disciplinary Systems

Professional disciplinary procedures are *sui generis*, neither civil nor criminal in nature.[18] The potential for loss of professional license is less serious than loss of liberty, but a more severe penalty than civil damages. These realities explain why the Supreme Court has required procedural due process guarantees such as notice of the charge,[19] and the right to invoke a Fifth Amendment privilege against self-incrimination in disciplinary proceedings.[20] At the same time, the Fifth Amendment protection against double jeopardy does not apply because the purpose of a disciplinary proceeding is not to punish the lawyer, but to protect the public.[21] The unique nature of the process further justifies the use of a jurisdiction's rules of civil procedure and evidence, a requirement of clear and convincing evidence, adjudication by judges or other lawyers rather than a jury, and a right to appeal a hearing committee decision.[22] The Supreme Court also has applied the *Younger* abstention doctrine to state disciplinary proceedings, requiring federal courts to refrain from considering constitutional challenges to pending state proceedings that afford the lawyer an opportunity to present the constitutional issues.[23]

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18. ABA Model R. for Law. Disc. Enforcement, R. 18(A) (1999).

19. *In re Ruffalo,* 390 U.S. 544 (1968) (lawyer entitled to notice of charge in disbarment proceeding). The adequacy of due process in a state disciplinary proceeding also determines whether a federal court can impose reciprocal discipline for the same conduct without plenary review. *See Selling v. Radford,* 243 U.S. 46 (1917); *Ruffalo,* 390 U.S. at 550; *In re Edelstein,* 214 F.3d 127 (2d Cir. 2000).

20. *Spevack v. Klein,* 385 U.S. 511 (1967) (lawyer cannot be disbarred for properly invoking the Fifth Amendment privilege against self-incrimination in disciplinary proceeding). A federal court has added the constitutional right to clear and convincing evidence, *In re Medrano,* 956 F.2d 101 (5th Cir. 1992).

21. *See, e.g., In re Cardwell,* 50 P.3d 897 (Colo. 2002); *In re Caranchini,* 160 F.3d 420 (8th Cir. 1998); *In re Brown,* 906 P.2d 1184 (Cal. 1995); *Disc. Counsel v. Campbell,* 345 A.2d 616 (Pa. 1975).

22. ABA Model R. for Lawyer Disc. Enforcement, *supra* note 18, R. 11 and R. 18.

23. *Middlesex County Ethics Comm'n. v. Garden St. Bar Assn.,* 457 U.S. 423 (1982).

Today, continual improvements in state and federal disciplinary proceedings[24] mean that professional staff now administer lawyer discipline, usually as part of an official court agency.[25] Many states now conduct public disciplinary hearings,[26] and most grant immunity to complainants.[27] The ABA's Center for Professional Responsibility administers a National Lawyer Regulatory Data Bank, which has enabled jurisdictions to share information about public lawyer regulatory sanctions and thus enhance reciprocal discipline (sanctions based on prior discipline in another jurisdiction).[28] *Walker* illustrates state court acceptance of the ABA Model Rules for Lawyer Disciplinary Enforcement and Standards for Imposing Lawyer Sanctions, which have encouraged uniform procedures and expanded the range of sanctions. One example is interim suspension, which now routinely occurs for conviction of a serious crime or where serious harm to the public is threatened, such as by a lawyer who abandons a law practice.[29] A few jurisdictions have expanded the scope of professional regulation even further by making law firms as well as individual lawyers subject to disciplinary sanctions.[30]

The scope of public protection has been further expanded by the judicial branch's addition of complementary agencies, such as client protection funds, fee arbitration, mediation of malpractice complaints, law practice assistance, and substance abuse counseling.[31] These additional agencies address issues that

24. *E.g., In re Jaffe,* 585 F.3d 118 (2d Cir. 2009) (court disbarred lawyer rejecting disciplinary committee's recommendation that lawyer be allowed to resign to avoid reciprocal discipline).

25. Courts also rely on their inherent power to discipline lawyers, *e.g., In re Lehtinen,* 564 F.3d 1052 (9th Cir. 2009) (bankruptcy courts have inherent power to suspend lawyers from practicing before the court). Federal agencies may require additional admission and disciplinary standards. *See, e.g.,* FTC Rules of Practice, 16. C.F.R. Parts 0-5.

26. *Landmark Commun. Inc. v. Va.,* 435 U.S. 829 (1978) (state law that made it a crime to disclose information about grievance proceedings violates First Amendment); *R.M. v. N.J. S. Ct.,* 883 A.2d 369 (2004) (rule that required confidentiality in grievance records unconstitutional prior restraint on free speech).

27. *State v. Rutherford,* 863 So. 2d 445 (Fla. 4th Dist. App. 2004) (absolute civil immunity for complainants did not bar criminal perjury charges).

28. *E.g., In re Demos,* 875 A.2d 636 (D.C. 2005) (lawyer-stricken from the roll of attorneys in Arizona federal court for lying on bar application disbarred for the Arizona conduct in D.C.); *Gadda v. Ashcroft,* 377 F.3d 934 (2004) (federal law does not preempt state regulation of lawyers and allows for disbarment by the state of California, and reciprocal disbarment by federal board of immigration appeals, as well as Ninth Circuit); *Atty. Grievance Comm'n. v. McCoy,* 798 A.2d 1132 (Md. 2002) (lawyer disbarred in Delaware disbarred in Maryland for the same conduct).

29. ABA Model R. for Law. Disc. Enforcement, *supra* note 18, R. 19, 20; Ex parte Case, 925 So. 2d 956 (Ala. 2005) (lawyer entitled to procedural due process guarantees before interim suspension except when convicted of a serious crime or genuine emergency exists).

30. *See, e.g.,* N.Y. Rule 5.1. *See also* Ted Schneyer, *Professional Discipline for Law Firms?* 77 Cornell L. Rev. 1 (1991).

31. ABA, *A National Action Plan on Lawyer Conduct and Professionalism* 80 (1999); ABA Model R. for Law. Disc. Enforcement, *supra* note 15 at R. 1(A). For a discussion of the impact of practice assistance programs as an alternative to discipline, *see* Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers,* 52 Emory L.J. 1221 (2003).

may be dismissed as less serious than those that warrant formal discipline; by doing so, they respond to a greater number of legitimate client complaints that cannot otherwise be addressed by the disciplinary system. The American Bar Association (ABA) recommends additional client protections, such as financial record keeping, trust account maintenance and overdraft notification, random audits of trust accounts, the maintenance of malpractice insurance, and a program of recertification.[32]

Which Lawyers Are Disciplined?

Complaints to disciplinary authorities can come from clients, judges, other lawyers, or third parties.[33] In 2009 (when the total lawyer population was 1,482,271), state disciplinary agencies received 126,696 complaints, investigated 77,832 of them, and imposed public and private sanctions against 6,769 lawyers.[34]

Longstanding commentary and empirical evidence indicates that solo practitioners and small-firm lawyers such as the lawyer in *Walker* are subject to discipline much more often than their large-firm or inside-counsel counterparts.[35] One report identified several "factors unique to the practice environment" that explain this result. First, lawyers in large firms tend to represent clients with more money and power—very often, large institutions. If these clients become dissatisfied, they have the ability to change lawyers, negotiate reduced fees, or litigate. On the other hand, clients of small-firm lawyers tend to be individuals who often lack the money or power to leverage such alternatives. They therefore may be more likely to seek the assistance of bar authorities when something goes wrong.

Lawyers in law firms also have a great deal more peer assistance available to them. Colleagues can cover for lawyers who become ill or overwhelmed. Larger firms are more likely to institutionalize procedures and policies that can prevent many violations, such as those dealing with client trust funds and conflicts of interest. Small firm lawyers might lack such support systems or office procedures. Financial and time pressures could cause missed deadlines, failure to communicate with clients, or "borrowing" from client trust accounts.

Helmers makes clear, however, that each and every lawyer in the firm who engages in misconduct is subject to discipline. Model Rule 5.1 and 5.3 further make supervisory lawyers responsible for the conduct of others when they know

32. *National Action Plan, supra* note 31, at 37 (1999).

33. Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap,* 73 Ohio St. L.J. 437 (2012).

34. ABA, Standing Comm. on Lawyer Disc., *Survey on Lawyer Discipline Systems 2009, available at* http://www.americanbar.org/groups/professional_responsibility/resources/survey_lawyer_discipline_systems_2009.html (last visited Mar. 1, 2012); Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics,* 35 J. Legal Prof. 1 (2011).

35. *E.g.*, St. Bar of Cal., *Investigation and Prosecution of Disciplinary Complaints Against Attorneys in Solo Practice, Small Size Law Firms and Large Size Law Firm* (June 2001) *available at* http://www.calbar.ca.gov/LinkClick.aspx?fileticket=OydXJk36ys4%3D&tabid=224&mid=1534.

about the conduct and fail to take timely reasonable measures to mitigate it.[36] Helmers, the junior lawyer, argued that his reliance on his supervisors' professional judgment should not subject him to discipline under Rule 5.2. The court acknowledged that he may have been "led astray" by the direction of his "well-respected" supervisors, but found no "reasonable resolution of an arguable professional duty" in his egregious deceit of clients.

What Behavior Triggers Discipline?

The Kentucky Bar Opinion states that Model Rule 8.4(a) makes every lawyer code rule violation, as well as every attempted rule violation, grounds for professional discipline.[37] Anyone can initiate a disciplinary complaint, including lawyers, clients, and judges. Most jurisdictions also authorize disciplinary authorities to investigate matters without a request for investigation. The Rule also prohibits inducing others to violate the rules of professional conduct. For example, lawyers who use an agent to solicit cases or to make contact with a represented person have been disciplined under this provision,[38] as have those who direct others, such as legal assistants or secretaries, to commit acts that violate the professional rules.[39]

Model Rule 8.4(b), which prohibits lawyers from committing criminal acts that reflect adversely on their ability to practice law,[40] and Model Rule 8.4(c), which prohibits dishonesty, fraud, deceit, and misrepresentation,[41] also provide grounds for professional discipline. Violations of either of these provisions nearly always raise a "substantial question about the lawyer's honesty, trustworthiness

36. *E.g., In re Phillips,* 244 P.3d 549 (Ariz. 2010) (lawyer who delegated too much responsibility to nonlawyer employees and burdened lawyers with too much work created an environment making ethical violations practically inevitable, suspended for six months for violating Rules 5.1 and 5.3); *In re Foster,* 45 So. 3d 1026 (La. 2010) (five members of law firm's management committee who failed to adequately supervise marketing claims put on firm's website by firm employee publicly reprimanded for violating Rule 5.3); *State ex rel. Oklahoma Bar Ass'n v. Martin,* 240 P.3d 690 (Ok. 2010) (lawyer who facilitated employee's unauthorized practice by failing to supervise employee's "research center" in lawyer's office publicly reprimanded for violating Rule 5.3); ABA Formal Op. 08-451 Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services.

37. *E.g., Columbus Bar Assn. v. Ashton,* 840 N.E.2d 618 (Ohio 2006) (lawyer failed to advise clients of lack of professional liability insurance).

38. *E.g., In re Brass,* 696 So. 2d 967 (La. 1997) (lawyer who paid investigator to refer personal injury and criminal cases suspended for two and one-half years); *Emil v. Miss. Bar,* 690 So. 2d 301 (Miss. 1997) (lawyer who asked highway patrol officer to refer automobile injury cases in exchange for 15 percent of eventual settlements indefinitely suspended).

39. *E.g., In re Ositis,* 40 P.3d 500 (Or. 2002) (lawyer who directed a private investigator to pose as a journalist to interview a potential opposing party to a legal dispute suspended for 30 days); *In re Morris,* 953 P.2d 387 (Or. 1998) (lawyer who directed legal assistant to alter and file final account in a probate matter after it had been signed and notarized, suspended for 120 days); *Disc. Counsel v. Bandy,* 690 N.E.2d 1280 (Ohio 1998) (lawyer who tried to validate a will naming himself as beneficiary by requesting that his former secretary, who was not present when the will was signed, nevertheless sign it as an additional witness suspended for two years).

40. The Bounds of the Law: *Criminal Conduct, infra* p. 270.

41. The Bounds of the Law: *Duties to Nonclients, infra* p. 155.

or fitness as a lawyer"[42] and apply to lawyer conduct both inside and outside law practice.[43]

Model Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice, also has been applied in a wide variety of contexts,[44] for example, to lawyers who abandon law practice without notifying clients,[45] and prosecutors who seriously misuse their discretion.[46] The Rule has provided the basis for discipline for misconduct during litigation, such as shoving another lawyer in the courtroom,[47] making court appearances while intoxicated,[48] or making insulting remarks during a deposition[49] or in a trial brief.[50] Lawyers have been uniformly unsuccessful in challenging Model Rule 8.4(d) as void for vagueness.[51]

Model Rules 8.4(e) and (f) further prohibit specific kinds of conduct that are prejudicial to the administration of justice. Model Rule 8.4(e) proscribes conduct that suggests a lawyer can obtain results by improperly influencing a

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42. MR 8.3.

43. *E.g., Bosse's Case,* 920 A. 2d 1203 (N. H. 2007) (lawyer who falsified signatures as a real estate agent suspended for two years); *State ex rel. Okla. Bar Assn. v. Pacenza,* 136 P.3d 616 (Okla. 2006) (lawyer's deceit in sale of a home suspended for two years and one day); *In re Barrett,* 852 N.E.2d 660 (Mass. 2006) (lawyer who served as corporate executive and took company funds suspended for two years).

44 *E.g., Disc. Counsel v. Engel,* 2012 Ohio LEXIS 1262 (state government lawyer who recklessly disclosed inspector's general's confidential information engaged in conduct prejudicial to the administration of justice). Former president Bill Clinton agreed to a five-year suspension from practice for violating Rule 8.4(d), rather than the more specific dishonesty standard in Rule 8.4(c), for knowingly giving "evasive and misleading answers" in a court proceeding. Tom Brune, *No Clinton Indictment; President Makes a Deal,* Newsday A 05 (Jan. 20, 2001).

45 *E.g., In re Kendrick,* 710 So. 2d 236 (La. 1998) (lawyer who moved without notifying bankruptcy client, resulting in repossession of client's vehicles, suspended from practice for one year and a day and ordered to pay restitution); *People v. Crist,* 948 P.2d 1020 (Colo. 1997) (lawyer who left state, abandoning law practice of 60 pending cases, disbarred).

46. *In re Christoff,* 690 N.E.2d 1135 (Ind. 1997) (prosecutor and chief deputy prosecutor who renewed a long-dormant criminal investigation against another lawyer who sought the prosecutor's job suspended for 30 days and publicly admonished).

47. *In re Jaques,* 972 F. Supp. 1070 (E.D. Tex. 1997) (lawyer who, inter alia, assaulted a person and verbally abused another lawyer during a deposition suspended).

48. *In re Wyllie,* 952 P.2d 550 (Or. 1998).

49. *In re Golden,* 496 S.E.2d 619 (S.C. 1998) (lawyer who made threatening and degrading comments during two depositions publicly reprimanded); *Paramount Communications v. QVC Network,* 637 A.2d 34 (Del. 1993) (lawyer who "improperly directed the witness not to answer certain questions," was "extraordinarily rude, uncivil, and vulgar," and "obstructed the ability of the questioner to elicit testimony to assist the Court in this matter" demonstrated an "astonishing lack of professionalism and civility" warned in appendix to court decision that the court's summary contempt powers may be appropriate to address such conduct in the future).

50. *In re Abbott,* 2007 Del. LEXIS 199 (lawyer who made unfounded accusations in trial court brief that trial court might rule other than on the merits publicly reprimanded).

51. *See, e.g., Florida Bar v. Zamft,* 814 So. 2d 385 (Fla. 2002) (ex parte communication with a judge by a lawyer who did not represent either party in the matter); *In re Stanbury,* 561 N.W.2d 507 (Minn. 1997) (refusing to pay a law-related judgment and make payment on a court filing fee); *In re Stuhff,* 837 P.2d 853 (Nev. 1992) (intentionally interfering with sentencing of a criminal defendant by filing a disciplinary complaint against a judge just before the sentencing hearing); *In re Haws,* 801 P.2d 818 (Or. 1990) (failure to respond to bankruptcy trustee's inquiry and disciplinary complaint); *State of Nebraska ex rel. Nebraska Bar Ass'n. v. Kirshen,* 441 N.W.2d 161 (Neb. 1989) (failing to respond to bar complaint and properly supervise office staff).

governmental agency or official.[52] The rule also has been applied to judges who misuse their positions.[53] Model Rule 8.4(f) further prohibits lawyers from assisting judges in violating the rules of judicial conduct, for example, by making loans to judges before whom they appear.[54]

Some jurisdictions have added additional grounds for discipline to Model Rule 8.4. For example, Massachusetts and New York prohibit lawyers from engaging in "any other conduct that adversely reflects on the lawyer's fitness to practice law."[55] Colorado, California, and Florida provisions make nonpayment of child support obligations grounds for license suspension.[56]

Several jurisdictions also have enacted express prohibitions against discriminatory conduct—in a "law practice,"[57] in employment,[58] or more generally, unlawful discrimination in any context.[59] Courts have not had trouble disciplining lawyers for similar, truly outrageous conduct under the more general language of Model Rule 8.4(d), conduct prejudicial to the administration of justice.[60]

Disciplinary Sanctions

Once disciplinary counsel has met the burden of proof, disciplinary sanctions are imposed.[61] An increased range of sanctions and sanction uniformity has been encouraged by the ABA Standards for Imposing Lawyer Sanctions, relied

52. *Disc. Counsel v. Cicero*, 678 N.E.2d 517 (Ohio 1997) (lawyer who led prosecutor and client-defendant to believe he was having a sexual relationship with a judge after she recused herself from the case suspended from practice for one year); *Disc. Proceedings Against Bennett*, 376 N.W.2d 861 (Wis. 1985) (lawyer who, inter alia, told his client a bankruptcy matter could be handled in some "extralegal" way suspended for six months).

53. *E.g., In re Yaccarino*, 564 A.2d 1184 (N.J. 1989) (judge who contacted police and prosecutor about the arrest of his daughter and who conspired to obtain property that was the subject of a lawsuit over which he presided properly removed from office and subject to disbarment).

54. *Lisi v. Several Attys.*, 596 A.2d 313 (R.I. 1991) (lawyers who made loans to judges before whom they appeared subject to suspension and reprimand).

55. Mass. R. Prof. Conduct 8.4(h) (2007); N.Y. Code of Prof. Resp. DR 1-102(a)(7) (2007).

56. Cal. Bus. & Prof. Code § 490.5 (2007); Colo. R. C. P. § 251.8.5(b) (2007); Fla. R. Prof. Conduct 4-8.4(h) (2007).

57. Cal. R. Prof. Conduct 2-400 (2007).

58. D.C. R. Prof. Conduct 9.1 (2003). *See also* Mich. R. Prof. Conduct 6.5 (2010) (requiring lawyers to treat persons involved in the legal process "with courtesy and respect").

59. Ill. R. Prof. Conduct 8.4(a)(9)(A) (2003) (discrimination in violation of federal, state, or local law); N.Y. Code of Prof. Resp. DR 1-102(a)(6) (2007); Ohio R. Prof. Conduct 8.4(g) (2007). *See also* Minn. R. Prof. Conduct 8.4(g) (2009) (prohibiting harassment on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference, or marital status); Tex. Disc. R. Prof. Conduct 5.08 (2009) (prohibiting lawyers from manifesting "by words or conduct bias based on race, color, national origin, religion, disability, age, sex, or sexual orientation").

60. *E.g., In re Monaghan*, 743 N.Y.S.2d 519 (App. Div. 2002) (race-based abuse of opposing counsel at a deposition was conduct prejudicial to the administration of justice and unlawful discrimination); *Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001) (sexist, racial, and ethnic insults constituted conduct prejudicial to the administration of justice); *In re Charges of Unprofessional Conduct*, 597 N.W.2d 563 (Minn. 1999) (prosecutor who sought to disqualify defense counsel solely on the basis of race engaged in conduct prejudicial to the administration of justice).

61. There is no statute of limitations in disciplinary proceedings in most jurisdictions, and other defenses, such as laches or entrapment have not been successful. *See, e.g., In re Carson*, 845 P.2d 47 (Kan. 1993) (ten-year delay in disciplinary proceedings not available as a defense where no

on in *Walker*.[62] These Standards recognize a wide spectrum of sanctions, including disbarment, suspension, reprimand, admonition, probation, restitution, assessment of costs, limitation upon practice, appointment of a receiver, requiring that a lawyer take continuing legal education or retake all or part of a bar examination, and any other requirement deemed "consistent with the purposes of lawyer sanctions."[63] In determining the appropriate sanction, the Standards list four factors to be considered by a court: the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct, and the existence of aggravating and mitigating factors.[64]

Aggravating factors include past discipline, dishonest or selfish motive, a pattern of misconduct or multiple offenses, obstruction of a disciplinary proceeding, refusal to acknowledge responsibility, a vulnerable victim, substantial experience in law practice, and illegal conduct.[65] Mitigating factors encompass personal and emotional problems, physical or mental disability, the absence of prior disciplinary violations or selfish motive, timely efforts to rectify harm, a cooperative attitude toward the disciplinary board, delay in the disciplinary proceedings, inexperience in law practice, good character and reputation, other penalties or sanctions imposed for the same conduct, remorse, and remoteness of prior offenses.[66] Advice of counsel is not a defense, but may be evidence of mitigation if the lawyer disclosed all relevant facts and followed the advice.[67]

One disability that plagues lawyers—substance abuse—has been the cause of a large number of disciplinary complaints. Here, most courts regard successful treatment for substance abuse as a mitigating factor, and failure to seek treatment as an aggravating circumstance.[68] *Walker* also illustrates how a disability can mitigate (but not prevent) a disciplinary sanction, but only if the disability caused the problem and can be accommodated to prevent it in the future.

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prejudice to lawyer occurred); *In re Porcelli*, 397 N.E.2d 830 (Ill. 1979) (entrapment not available as a defense to a lawyer who paid a police officer to alter a client's blood alcohol report).

62. ABA, *Standards for Imposing Lawyer Sanctions* (1991).

63. *Id.* at Standards 2.1-2.8.

64. *Id.* at Standard 3.0.

65. *Id.* at Standard 9.2.

66. *Id.* at Standard 9.32.

67. *Disc. Counsel v. Levine*, 2006 Haw. LEXIS 118 (reliance on advice may be a mitigating factor, but is not a defense to practicing law while suspended from practice); *Atty. Grievance Comm'n. of Md. v. Johnson*, 876 A.2d 642 (Md. 2005) (lawyer cannot rely on advice of counsel defense or use it as mitigation when she failed to show that she disclosed all facts to her lawyer).

68. *Standards for Imposing Lawyer Sanctions* at Standard 9.32 (mental disability or chemical dependency are mitigating factors only when they caused the misconduct, have been confirmed by medical evidence, and recovery is demonstrated by a meaningful and sustained period of successful rehabilitation, which arrested the misconduct and makes recurrence unlikely).