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1999
CASELAW REVIEW

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1999 Caselaw Review

This 1999 Caselaw Review provides brief summaries of disciplinary cases decided from June 15, 1998 through June 30, 1999. Which involve alcoholism, substance abuse, and mental illness. The cases are grouped into four categories: (I) Cases in which alcohol or drug use was an aggravating circumstance or provided independent or additional grounds for discipline; (II) Admission and reinstatement cases; (III) Cases which discuss whether alcoholism or addiction should be viewed as mitigating factors in determining discipline to be imposed; and (IV) Cases which discuss whether other forms of mental illness should be viewed as mitigating factors. Within each category, cases are listed alphabetically by state, and then alphabetically by respondent within each state. Each case is listed only once, even though some cases fall into more than one category, particularly categories (I) and (III) in which drug use and recovery, for example, are taken into account both as a disciplinary offense or aggravating factor and as a mitigating factor.

This paper is the joint effort of Paul J. Berman, Charles L. Reischel, Jennifer A. Smith, Robert A. Boraks and Steven G. Polin, all of whom are attorneys practicing or teaching in Washington, DC, and members of the District of Columbia Bar Lawyer Counseling Committee ("LCC"), which administers and supports DC’s Lawyer Counseling Program.

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I. Aggravating Circumstances

I. Alcohol or Drug Use as Grounds for Discipline or as an Aggravating Circumstance


In May of 1994 claimant knocked on the door of what he thought was his girlfriend's house, frightened the occupant and was ultimately arrested. Claimant pleaded guilty to disorderly conduct and neglected to report the conviction to the Office of Disciplinary Counsel (ODC). Buskirk’s sentence for the disorderly conduct charge was deferred.

In August of 1995, “after leaving a downtown bar” Buskirk drove his car and hit another vehicle. Buskirk then fled the scene. Buskirk turned himself in to the police the next day and ultimately pleaded guilty to hit and run and careless driving. In July of 1996 Buskirk pleaded guilty to driving under the influence of alcohol based on an April, 1996 event. Buskirk was sentenced to jail time, community service and alcoholism education for the hit and run, careless driving, and DUI convictions.

The court suspended Buskirk from practicing law for 6 months with the requirement that he petition for reinstatement because he had demonstrated a pattern of misconduct. The court considered the absence of prior disciplinary actions, Buskirk’s cooperation with the investigation, his remorse, and the criminal penalties and sanctions that had already been imposed as mitigating factors.


In 1990, Hughes’ driver’s license was suspended for 5 years based on 3 convictions for driving under the influence of alcohol. During those 5 years, Hughes was convicted of driving under suspension, speeding, no proof of insurance and related offenses. In December 1995, claimant was charged with a “class 6 felony” as a result of the other offenses and a warrant for his arrest was issued. Hughes had left the state, however, and he was not subsequently arrested.

The Office of Disciplinary Counsel filed a complaint against Hughes which was ultimately served upon him, and to which he responded in a manner that indicated, to the court, “the presence of personal or emotional problems”. The court considered those indications to be mitigating factors. The court also considered the aggravating factors of previous disciplinary actions in Hughes’ past, his pattern of misconduct, and his substantial experience in the law. The court suspended claimant for 3 years and placed conditions upon his reinstatement which included resolving the outstanding criminal matters and establishing that “his alcohol abuse [was] under control”.

**Colorado v. Madrid**, 1998 Colo LEXIS 790, 967 P.2d 627 (per curiam)

Madrid made conditional admissions in his disciplinary proceeding that he had filed a motion to continue trial and withdraw due to non-payment of fees in a client’s matter.
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I. Aggravating Circumstances

Thereafter, Madrid failed to appear at trial and he was subsequently (11/10/97) fined and held in contempt.

Madrid also admitted that on January 31, 1999, he drove a friend’s car while intoxicated, with an expired license, and hit another vehicle. In June 1997, Madrid pleaded guilty to driving while impaired and with no proof of insurance. On May 16, 1998, Madrid was arrested for accepting one ounce of cocaine from a client as payment of fees. Madrid pleaded guilty to felony possession of a controlled substance and was sentenced to four years, judgment deferred with conditions.

The court accepted Madrid’s admissions and noted the aggravating factors of two prior disciplinary actions (an admonition, and a year and a day suspension from which he was not reinstated for 6 years); multiple violations of the Colorado Rules of Professional Conduct in this case; substantial experience in the law; and, illegal conduct involving a controlled substance.

The court gave little weight to the mitigating factors Madrid put forward save one: chemical dependency. The court rejected this as a mitigating factor, however, because claimant had not established that the chemical dependency caused his misconduct, and because he did not have a sustained period of successful rehabilitation. Madrid was suspended for 3 years.

In re Myers. 1998 Colo. 6076, 969 P.2d 701 (per curiam)

Myers was charged with driving under the influence of alcohol. She failed to appear at her November 7, 1996, trial, but the bench warrant issued was stayed until November 4, 1997 upon Myers’ motion. (Myers had begun teaching in a foreign country in early November, 1996). Myers’ again failed to appear on November 4, 1997. A disciplinary action was brought against Myers and she failed to respond to this as well.

Finding the charges admitted by default, the court adopted the grievance committee’s recommendation for a suspension of one year and a day, adding a further requirement that Myers not be reinstated to practice without reinstatement proceedings. The court stated that Myers’ violation of the criminal law would have possibly warranted only public censure, but that her failure to appear for trial aggravated her misconduct. The court also considered Myers’ failure to respond to the disciplinary proceedings and a prior suspension for disciplinary purposes.

In re Myers. 1999 Colo. 2625 (per curiam)

Myers violated 4 Rules of Professional Conduct based on conversations she had with the complaining witnesses in a criminal case in which she represented the defendant. The conversations consisted generally of statements interpretable as threats and bribes and of misrepresentations of her role in the case, a complaining witness’ criminal record, and the law.
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I. Aggravating Circumstances

At the time of this disciplinary action, Myers was serving a year and a day suspension for driving under the influence of alcohol and failing to appear in county court in connection with that charge. The court considered this fact (and other disciplinary actions and facts) as aggravation factors in the instant disciplinary action, and concluded that a 90 day suspension consecutive to the year and a day suspension was the appropriate sanction.


In 1993, Reedy failed to provide an accounting for the services he rendered in exchange for his client’s retainer, and he failed to take any action at all on a separate matter for the same client. Reedy did not perform services but he did keep the $100.00.

In 1996 Reedy was retained to represent another client in a criminal matter. Reedy appeared on her behalf but neglected to tell her she needed to be in court. The court denied Reedy’s motion to enter his appearance as counsel, and even though he could not represent her, he refused to return her retainer. On that same day, Reedy was charged with 2 counts of driving under the influence of alcohol. In 1997, Reedy agreed to a plea offer on the charge but denied such an agreement 2 months later in court. At the aborted plea hearing, the prosecutor requested that Reedy be administered a breathalyzer test, the results of which revealed that Reedy had a blood alcohol level of 0.098%. The next day Reedy pleaded guilty and he was sentenced to probation, suspended jail time, and community service. Reedy did not report the conviction to the Office of Disciplinary Counsel.

As a result of a complaint brought by the Office of Disciplinary Counsel, the court suspended Reedy for a year and a day. The court further required that he petition for reinstatement and establish that he was, *inter alia*, “free of alcohol-related problems”.

**In re Michael B. McNeil**, 704 N.E. 114 (Indiana)(December 30, 1998)

McNeil was convicted of possession of marijuana, and possession of paraphernalia, both misdemeanor offenses. He was sentenced to one-year imprisonment, imposition of sentence suspended, placed on probation and fined. McNeil was publicly reprimanded by the Indiana Supreme Court for his criminal conduct. The Court found several mitigating factors: he voluntarily submitted to drug testing on a monthly basis; he was evaluated for substance abuse; and he publicly apologized for his actions to the court, community and his family via the local newspaper and in open court.

**In re Islas**, 266 Kan. 679, 972 P.2d 764 (1999) (per curiam)

Ilas was found to have violated the Model Rules of Professional Conduct and the Kansas Supreme Court Rules based on 5 complaints brought against him for events occurring between 1994 and 1998. In 4 of the 5 complaints Islas failed to cooperate with the Disciplinary Administrator’s investigation, and in the same 4 cases Islas violated the MRPC regarding
communication, safekeeping of client property, diligence, and/or professional misconduct generally. The 5th complaint occurred as a result of Islas being found in criminal contempt after missing two court appearances on April 7, 1998 (Ilas had missed many others previously). At the contempt hearing on April 10, 1998, Islas admitted his drug use after refusing urinalysis and the judge sentenced him to 4 hours in jail.

At the disciplinary hearing on the 5 complaints, Islas stipulated to all factual findings. The court noted the aggravating factors of prior disciplinary actions, misconduct, failure to cooperate, substantial legal experience (and thus he should have known better), and illegal use of a controlled substance (cocaine). The court also noted the mitigating factors of absence of dishonest or selfish motive, candor at the contempt hearing, cooperation during the disciplinary hearing, and remorse. Additionally, Islas had obtained treatment for his addictions and cooperated significantly with the Disciplinary Administrator.

The court indefinitely suspended Islas from the practice of law but stayed the suspension and placed him on 2 year’s supervised probation. The terms of Islas’ probation included supervision by an attorney who had access to Islas’ practice and medical records; that Islas remain drug and alcohol free, submit to random drug testing, participate in an after care program, and attend 2 meetings of a 12-step program each week.

**In re Lober.** 266 Kan. 404, 969 P.2d 885 (1998) (per curiam)

Several of Lober’s clients filed complaints against him in the office of the Disciplinary Administrator based on events occurring in 1995 and 1997. The cases alleged, *inter alia*, violations of the Model Rules of Professional Conduct concerning diligence, competence, communication, declining or terminating representation, candor towards the tribunal, misconduct, and the Supreme Court Rule on cooperating with disciplinary investigations. Lober did not dispute the allegations in the complaints.

The court noted the aggravating factors of Lober’s two prior informal admonitions, the similarity of the offenses committed with regard to each of the instant complaints, his failure to cooperate with the investigation, and the fact that Lober did not recognize his alcoholism or acknowledge the validity of his clients’ complaints until 1 month prior to the hearing. In mitigation, the court considered Lober’s current recognition of his alcoholism, the fact that he suffered from alcoholism and depression, that he had begun treatment, had not misused his clients’ funds, and the letters of support he provided from members of the community. The court suspended Lober from practice for 2 years and placed him on supervised probation for 2 years, with conditions including abstinence from alcohol, continuation of his treatment for alcohol, and acquisition of liability coverage.
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I. Aggravating Circumstances

**In re Deshotels, 719 So. 2d 402 (La. 1998)**

Deshotels was charged with failing to terminate properly an attorney-client relationship. The underlying facts appear somewhat egregious, involving a failure to perfect an appeal of a criminal conviction, resulting in the client's arrest and incarceration. The other charge against Deshotels involved three criminal convictions, two DWI's and a disturbing the peace.

The Supreme Court rejected the board's recommendation of a public reprimand and imposed a six month suspension, all but 60 days deferred, followed by a two year probation. The Court found a pattern of behavior suggestive of a substance abuse problem and included enrollment in the Lawyers' Assistance Program as a condition of probation.

**In re Chacon, 581 N.W.2d 355 (Minn. 1998)**

The Supreme Court of Minnesota disbarred Chacon for two convictions of check forgery and two instances of client neglect.

In 1995, after receiving a retainer, Chacon failed to draft a settlement document for one client and subsequently failed to show up for a meeting with him. In a matter involving another client, Chacon did not show up for hearings, did not file for a continuance, and caused the client's case to be dismissed. When disciplinary charges were filed against her, Chacon failed to respond, except for one phone call to the disciplinary authorities to inform them she was in treatment for chemical dependency. The Supreme Court of Minnesota suspended her from practice in 1996 providing that she could move to vacate the suspension within a year, which she failed to do.

In 1996, Chacon pled guilty to forging a series of checks, on a friend's bank account, and another series of checks on her mother's bank account. She admitted that she misappropriated in this way perhaps $5000. After she was placed on probation, in 1997, Chacon was again charged with new instances of check forgery involving $920.

The Court disbarred Chacon for repeatedly engaging in criminal conduct involving dishonesty and her neglect of client matters. The Court deemed the neglect admitted. It also found the dishonesty serious, even though client matters were not involved.

**In re Foushie, 156 N.J. 553, 722 A.2d 709 (N.J. 1998)**

The Supreme Court of New Jersey ordered that the previously imposed three year suspension of Foushie from practice be extended an additional three months by reason of his criminal conviction of third-degree possession of cocaine.
I. Aggravating Circumstances


The Appellate Division suspended Evans for a minimum of two years -- conditioned on his commencing an alcohol outpatient counseling program for 6 months, submitting to an evaluation by the Lawyer Assistance Program; and submitting reports from his psychiatrist -- after Evans was convicted of the misdemeanor of offering a false instrument for filing, and disclosing at sentencing his psychiatric and substance abuse concerns.


The Appellate Division publicly censured an attorney who had been convicted of a federal misdemeanor for failing to file income taxes, noting that he had since been convicted of driving under the influence, but not increasing his discipline because of it. This was because the jurisdiction in which Henry resided, Pennsylvania, did not increase his discipline because of that conviction.


The Appellate Division suspended Shoob for a period of 5 years for pleading guilty in New York to the misdemeanor of possessing a controlled substance; for pleading guilty in Massachusetts to the misdemeanor of operating a motor vehicle under the influence of drugs; and for failing to make a timely report of these convictions to the New York Licensing authorities.

**Office of Disciplinary Counsel, et al., v. Nentwick**, 84 Ohio St. 3d 491, 705 N.E.2d 668 (1999) (per curiam)

Between August of 1996 and April 30, 1998, the Office of Disciplinary Counsel and the Columbiana County Bar Association charged Nentwick with 29 violations of the Disciplinary Rules. After a June, 1998, hearing, the court found Nentwick had committed all violations charged, which primarily involved the neglect of client matters, misuse of clients’ funds, and engaging in conduct which reflected adversely upon his fitness to practice law and involved moral turpitude. Nentwick had a habit of obtaining advanced fees and then neglecting the client’s matters, to the end that some clients’ matters were dismissed or barred.

The conduct generating the complaints occurred over a period of 4 years (December, 1993, through December, 1997). In December 1997, Nentwick was incarcerated for 11 months for violating the terms of a drug treatment program. Claimant was addicted to crack-cocaine and alcohol; he made attempts at recovery but relapsed frequently. Because Nentwick had the potential of continuing to harm his clients, the court permanently disbarred him from practicing law in Ohio.
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I. Aggravating Circumstances

Akron Bar Association v. Thomas, 84 Ohio St 3d, 704 N.E.D. 562 (1999) (per curiam)

The Akron Bar Association filed a complaint against Thomas in October 1997, and after a hearing, the Board of Commissioners on Grievances and Discipline of the Supreme Court found that Thomas, in April of 1997, was convicted of conspiracy to distribute, and possession with intent to distribute cocaine. The board further found that Thomas’ conduct violated three Disciplinary Rules: conduct (1) involving moral turpitude and (2) involving dishonesty, fraud, deceit or misrepresentation; and, (3) adversely reflecting on his fitness to practice law.

The court noted that Thomas began using cocaine in the 1980’s and by 1990 he was addicted. In 1995 and 1996, Thomas lent money to his supplier so that the latter could purchase cocaine to sell to Thomas and others. When charged with the crimes, Thomas took immediate responsibility and cooperated with the authorities. Thomas was sentenced to 30 months in prison of which he spent 7 months incarcerated, 4 months in a halfway house, and was serving the remainder under electronic home monitoring. At the time of the hearing (and since 1996) Thomas was participating in drug treatment programs, his drugs tests had been negative throughout, and the terms of his supervised release from prison included an additional 4 years of drug testing and treatment. Thomas’ drug addiction did not interfere with his practice of law or harm his clients—he had worked in insurance since the 1980’s.

The court suspended Thomas for 2 years, and stayed 1 year of that provided Thomas continued to “successfully control his drug addiction”.

Columbus Bar Association v. Wolfrom, 83 Ohio St. 3d 1, 697 N.E.2d 593 (1998) (per curiam)

In 1994, Wolfrom contacted a client’s parents and indicated that he could get their son paroled by Christmas. After accepting a $8,500 retainer, he attempted to do so but was unsuccessful. Thereafter, Wolfrom did not respond to the parents’ attempts to contact him for more than a year, and he would not return the retainer. In 1995 Wolfrom received a $5,000 retainer from another client as an additional attorney to handle a misdemeanor matter. Wolfrom learned that his client would be charged with a felony and he did nothing further in the misdemeanor.

A complaint was filed against Wolfrom in 1997 and the Board of Commissioners on Grievances and Discipline found that Wolfrom violated five Disciplinary Rules and refused to assist in the disciplinary investigation. Wolfrom stated he was addicted to alcohol and going through a divorce at the time of the violations. Also, 2 months after the disciplinary investigation began he entered the Ohio Lawyers Assistance Program and was in compliance therewith at the time of the hearing. The court suspended Wolfrom indefinitely from the practice of law, ordered him to pay costs, and to make restitution of unearned fees and bring his child support obligations current.
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I. Aggravating Circumstances

In re McEnaney, 718 A.2d 920 (R.I. 1998)

McEnaney pled nolo contendere to possession of crack cocaine and marijuana and was given probation. Under Rhode Island law it was unclear whether this constituted a criminal conviction for disciplinary purposes. The Supreme Court found that the plea established the commission of a crime for disciplinary purposes regardless of whether it technically amounted to a conviction and imposed a 30-day suspension and required that the drug tests from his criminal probation be provided to disciplinary counsel. This was despite the finding that the conduct was unrelated to the practice of law and did not involve a crime of dishonesty.

Note that the case mentions McEnaney's substance abuse problem and the treatment he was receiving for that, but does not discuss its significance to the decision.

In re Daniel Kanera, 592 NW 2d 636 (Wisconsin)(May 14, 1999)

Kanera was suspended from the practice of law following his felony conviction of manufacturing a controlled substance, THC, as a result of the discovery of 11 marijuana plants growing on his land. He pled no contest to the charges. He was placed on 18 months probation. He was ordered to spend 45 days in jail between the hours of his employment, directed to have an alcohol and other drug abuse assessment and follow thorough and submit to random urine screens.
II. Admission and Reinstatement After Mental Illness or Alcohol or Drug Use

In re Barry J. Clyman, 713 A.2d 313 (District of Columbia)(July 2, 1998)

Clyman was suspended from the practice of law following reciprocal disciplinary proceedings from the state of Florida. In December 1993 he was arrested and charged with felony possession of cocaine. The charges were dismissed on the condition that he abstain from drugs and alcohol and that he attend a treatment program. He successfully completed a court sponsored drug rehabilitation program. At the Florida disciplinary proceeding he testified that he had not used cocaine since August, 1993. Florida suspended him for 91 days, requiring proof of rehabilitation as a condition of reinstatement. He was also placed on probation for one year. After his suspension he entered a rehabilitation program supervised by Florida Lawyers’ Assistance Program. His petition for reinstatement was granted in April 1996, with probation until January, 1998.

Clyman’s reinstatement petition was granted by the District of Columbia Court of Appeals. It found that Clyman fully recognized the seriousness of his misconduct and had taken steps, including the successful completion of two separate drug treatment programs to remedy his past wrongs. Clyman was found to be not only candid about his wrongdoing, but that he took complete responsibility for his acts.

In re Carricarte, 1999 Fla. LEXIS 575 (Fla. Sup. Ct. April 8, 1999)

Carricarte was a member of a family, which owned a business. He served as in-house counsel to that business until he was terminated by other family members. He then threatened to disclose, and did disclose, confidential information. He was suspended for 90-days, followed by a 3-year probation, one condition of which was to be evaluated and treated for mental illness by the Florida Lawyers Assistance program. He objected that he had no fair notice of the possibility of this condition being imposed. The Court upheld the condition.

In re Gail Robbers, 721 So. 2d 283 (Florida)(October 22, 1998)

Roberts was conditionally admitted to the Florida Bar in 1986 based on her admission of prior drug use and an 1981 arrest in Iowa for possession of a controlled substance. She was placed on three years probation and required to submit to monthly and random urinalysis. She always tested negative, but some reports were filed late. Based on her failure to file all of the monthly reports, the Bar filed a contempt proceeding after the end of her conditional probationary period asking that her conditional admission be revoked. Several months later a stipulation was entered into where the Bar withdrew its petition and Roberts' probationary admission period was extended for another three years.
II. Admission & Reinstatement

In 1991, she pleaded no contest to a charge of purchasing cocaine. She was given probation and adjudication was withheld. She was suspended from membership in the Bar based on that plea. Her suspension ended in April 1996 and she filed a petition for reinstatement in 1997.

Her petition for reinstatement was denied notwithstanding a recommendation from the hearing referee that her petition be granted. The basis of the denial of her petition was the number of worthless checks she had written, coupled with her past history, i.e. drug conviction during her probationary period, reflects that she is financially irresponsible and she is a potential danger to the public should she be placed in a position of handling trust funds. She is eligible to reapply for reinstatement in two years. During the interim, she must continue to submit to drug testing, not miss drug testing requirements, and must establish financial responsibility.

**In re Anzalone**, 718 So. 2d 968 (La. 1998)

Order (without opinion) readmitting Anzalone to the practice of law on a five year conditional basis including supervised probation. The conditions are heavily focused on monitoring continuing recovery from addiction.

**In re Williams**, 719 So. 2d 397 (La. 1998)

Williams petitioned for reinstatement approximately nine years after his voluntary disbarment based on multiple serious charges of misconduct including conversion of client funds. As the Court found, "substance abuse was the primary cause of the misconduct."

The primary issue surrounding reinstatement was Williams' failure to make restitution. Finally, an agreed upon restitution plan was worked out, and Williams was conditionally reinstated on two years probation. Conditions included adherence to the restitution plan, a practice monitor and the entry into a "recovery agreement" with the Lawyer's Assistance Program.

**In re Massey**, 722 So.2d 452 (Miss. 1998)

With sweeping language, the Mississippi Supreme Court denied the petition for reinstatement of Massey, who had been disbarred in 1990 after his conviction for distributing methamphetamine and cocaine. The court said that distributing drugs reflects a serious lack of moral character, and that "[t]his Court will not reinstate a convicted drug dealer to the practice of law." On the other hand, it pointed out that Massey was a "major distributor of illicit drugs," and that his offenses had occurred after "he had achieved maturity and occupied a number of positions of trust in the community." The Court stated "we cannot imagine circumstances sufficient to show rehabilitation" and that "Massey can never demonstrate the requisite moral character to practice law in Mississippi."
In re Nelson, 510 S.E. 2d 718 (S.C. 1999)

Nelson exhibited an extensive pattern of behavior involving sexual harassment as the result of active alcoholism. He was placed on incapacity inactive status and underwent treatment. He was also subjected to disciplinary proceedings. At the time of the decision in the disciplinary proceedings, he was petitioning for removal from incapacity inactive status. The Court ordered a nine-month suspension beginning when and if the removal petition was granted.

Unglaub v. Texas Bd. of Law Examiners, 979 S.W. 2d 842 (Tex. 1998)

Texas has a procedure allowing for the issuance of a temporary, conditional license to practice law to a candidate for admission based on a finding of present chemical dependency. Unglaub was issued such a license. One of the conditions was abstinence. Based on evidence of relapse, the temporary license was not made permanent, but a probationary license was issued with additional conditions. Upon a hearing on Unglaub’s application for a regular license, a finding was made of a failure to adhere to all the conditions and a new probationary license with yet more conditions was issued.
III. Mitigation

Alcoholism and Addiction as Mitigating Factors

**In re Corbin.** 1999 Colo. 969, 973 P.2d 1273 (per curiam)

Corbin received patent and trademark applications, and filing and advance fees from several clients in 1995 and 1996. Over the ensuing 2 years, Corbin filed the applications and paid the attendant fees, but he thereafter failed to communicate with his clients or advise them of developments in their applications. Ultimately, Corbin stopped communicating with them altogether and converted fees to his own use.

A stipulated admission of misconduct was entered and the court decided to suspend Corbin for 3 years rather than disbar him due to mitigating circumstances. The court found it persuasive that Corbin was experiencing personal and emotional problems, had no previous discipline, and had demonstrated remorse. Corbin also "indicate[d] the presence of a chemical dependency including alcohol abuse."

The court declined to make the suspension retroactive to the date of Corbin's immediate suspension because (1) he had demonstrated a pattern of misconduct, and (2) the misconduct was directly related to the practice of law. (The third factor when considering retroactive discipline--whether the passage of time has mitigated the misconduct--was not addressed by the court.)

**Colorado v. Torpy.** 1998 Colo. 4744, 966 P.2d 1040 (per curiam)

Torpy was found by the hearing board to have knowingly misappropriated client funds from one client between December 31, 1993, and February 15, 1995. The board recommended, and the hearing panel of the grievance committee generally agreed, that a 3-year suspension was the appropriate sanction due to mitigating circumstances.

The hearing board and panel found the following mitigating circumstances. Torpy began having marital problems in 1986 for which he saw a psychiatrist. The marriage ended in an "exceptionally hostile and prolonged dissolution." Torpy was in a car accident and confined to a wheelchair in 1990. During this period, Torpy also filed for bankruptcy, and his law practice deteriorated. Torpy returned to the psychiatrist in 1994 and was diagnosed with depression, decreasing function, and diminished ability to perform. That same year Torpy had a severe heart attack. In May 1996, Torpy voluntarily placed himself on disability inactive status with the Bar and in March Torpy began treatment with a social worker and therapist for abuse of alcohol.

In connection with the disciplinary proceedings, Torpy was evaluated by a psychiatrist and psychologist both of whom agreed he was depressed and, generally, his ability to function was impaired. The psychiatrist acknowledged Torpy's alcoholism, and both considered his misconduct to have been knowing (but for different reasons). The court also noted the quality and sincerity of Torpy's support, his remorse, cooperation, and his abstinence from alcohol since June, 1996.
Nonetheless, the court disbarred Torpy because he *knowingly* misappropriated his clients' funds, his mitigating circumstances were not sufficient, and because disbarment was required to maintain the public's confidence in the integrity and trustworthiness of lawyers.

**In re Anthony Thomas Makin,** 698 N.E. 2d 767 (Indiana)(August 26, 1998)

Makin was charged with professional misconduct as a result of being prosecuted for obtaining prescription drugs fraudulently. He was charged in two jurisdictions with prescription fraud when he attempted to phone in prescriptions for a fictitious patient. In a plea arrangement, he plead guilty to these charges.

It was stipulated by the parties that Makin has made a full disclosure of his chemical dependency and has made significant progress toward recovery during the pendency of the disciplinary proceedings. Makin was suspended for two years, with reinstatement conditioned upon specific chemical dependency aftercare provisions. During his suspension, he is required to remain drug and alcohol free; he must participate in the monitoring or aftercare program in which he was participating; and he must attend at least two meeting a week of Alcoholics Anonymous or other appropriate 12 step programs. He must have a recovery monitor, and is required to submit a written monthly report to the monitor.

**Board of Professional Ethics and Conduct v. Roger W. Sunleaf,** 588 N.W. 126 (Iowa) (January 21, 1999)

Sunleaf was admitted to practice to law in 1963. He specialized in probate and personal injury cases. An investigation was commenced as a result of a letter from his former secretary who accused him of commingling his own funds with his client's trust accounts. Sunleaf denied the charge, but the commingling was established as a result of an independent audit. It was established that he used his trust account for the deposit of earned fees and for the payment of both personal and business expenses. He did so to hide funds from the Internal Revenue Service which had levied on his business account for two unpaid payroll tax obligations.

Sunleaf denied the allocations and presented evidence in mitigation of sanctions that he had a personal health crisis, pressing financial problems, and alcoholism. He presented evidence that he was addressing his alcoholism. There was no evidence of misappropriation. He was publicly reprimanded for his misconduct.


Christians failed to file a client's bankruptcy and then misled the client. A hearing panel recommended a 6-month suspension. Based on post-hearing evidence of treatment for alcohol dependency, the Court suspended the imposition of the sanction and placed Christians on probation for 18-months. One of the conditions was adherence to a suitable treatment program.
In re Davison, 266 Kan 395, 969 P.2d 892 (1998) (per curiam)

The Kansas Board for Discipline of Attorneys filed a complaint against Davison alleging several violations of the Model Rules of Professional Conduct. After a hearing on February 24, 1998, the Board found Davison had violated the MRPC on due diligence and communication.

In determining the proper sanction, the Board considered the aggravating factors of two prior disciplinary actions (1987, informal admonition, and 1988, public censure for neglect), and 20 years of legal experience. In mitigation the Board considered the absence of a dishonest or selfish motive in Davison’s violations, and the fact that he suffered from a “significant depression” and was treating it with medication and therapy. Also, Davison had made efforts to rectify his misconduct and make restitution to his client. Finally, Davison was “affected by a chemical dependency”, which was the cause of his misconduct, and a recurrence of misconduct was unlikely as long as Davison remained in treatment for the dependency.

The court thus suspended Davison for 2 years and placed him on supervised probation with conditions that included his continuing the treatment for depression. The court’s order had no provision regarding Davison’s chemical dependency.


In 1995 Parker received in patient treatment for alcoholism whereupon he stayed sober for a year. Thereafter, he relapsed and left a trail of destruction for the next couple of years, including 2 DWI’s and a felony conviction for cocaine possession. At the time of the disciplinary hearing he had gotten clean and sober again and had been for a year. The disciplinary panel recommended an 18-month suspension because this was a case based on “human frailty.” The Court determined to reject the recommendation and ordered indefinite suspension.

In re Hollis, No. 98-0444 (La. June 19, 1999), 714 So. 2d 693 (per curiam)

After receiving a $500 non-refundable retainer in June of 1995, Hollis did not return his clients’ telephone calls and on 10 occasions failed to appear at meetings he had scheduled with them. The clients filed a complaint with the Office of Disciplinary Counsel in September 1995, who in turn made several requests for information of Hollis. Hollis never responded to ODC’s requests or to a subpoena which was ultimately issued. ODC filed formal charges in May 1996, but Hollis did not answer; a memorandum on the issue of sanctions was filed, and because Hollis presented no mitigating evidence, no hearing was held.

In March 1997, the “committee” recommended one year suspension and one year supervised probation because, in addition to the above, Hollis was indifferent to making restitution. He had not cooperated with the ODC, he had been admonished in 1994, he had not
paid his bar dues for various periods in 1994 and 1995, and he had not complied with the continuing legal education requirements between November, 1995, and January, 1996. The "board" recommended a lesser sanction because it found (among other things) that the prior admonition was inadmissible since no details of it were available, Hollis’ indifference to restitution could not be considered an aggravating factor, and Hollis “was in substance abuse recovery” at the time he took the $500 retainer.

The court followed the committee’s recommended sanction because the board erred in not considering the prior disciplinary action. The board also erred in determining that Hollis’ indifference to restitution was not an *aggravating* factor, because by doing so Hollis’ indifference became a *mitigating* factor.

**In re Scariano**, 719 So. 2d 407 (La. 1998)

Scariano, who had a history of prior misconduct, was charged with failing to file an action he had undertaken to file for a client and then lying to the client about it. Scariano stalled, delayed and failed to participate meaningfully with the disciplinary process.

Before the Supreme Court for the first time, Scariano raised his alcoholism as a cause of his conduct in order to mitigate the three-year suspension he received from the disciplinary board. The Court did not adjust the sanction, but did allow Scariano to apply for conditional readmission after one year and a day if he registered with the Lawyer’s Assistance Program and successfully underwent treatment for alcoholism.

**Nebraska State Bar Association v. Christopher Aupperle**, 594 N.W. 602 (Neb. May 21, 1999)

Aupperle was charged with several disciplinary violations including dishonesty, conduct prejudicial to the administration of justice, failure to withdraw from representation after being discharged by his client, neglect and knowingly making a false statement of law or fact. He admitted most of the factual allegations in the bar complaint. He was found to have committed all of the disciplinary violations with the exceptions of knowingly making a false statement of fact to his client.

At his hearing, he admitted his misconduct and acknowledged responsibility for his actions. He was asked if he had a “problem with alcohol” during 1997. He initially stated no. He filed an affidavit after the hearing stating that he “had been in denial regarding my drinking problem” at the time of the hearing. He stated that he received a citation for driving under the influence in May 1998 and he sought help from the Nebraska Lawyers Assistance Program (NLAP). With the help of NLAP he admitted himself to an inpatient alcoholism treatment program for 17 days. He presented evidence that he satisfactorily completed outpatient therapy and that attends at least five meetings of Alcoholics Anonymous per week. He voluntarily ceased the practice of law in July 1997, several months prior to his temporary suspension.
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III. Mitigation

He was credited by the Court with making a sincere and productive effort to confront his condition and obtain necessary professional treatment. His misconduct did not involve the misappropriation or commingling of client funds. Sanctions were mitigated upon the finding of his alcoholism and subsequent efforts of seeking and maintaining his sobriety. He was suspended from the practice of law for a period of two years. Upon reinstatement he must present independent third party proof that he has continued his active participation in a recovery program and that he has maintained abstinence from the use of alcohol during the period of suspension. Further, upon reinstatement he is to be placed on probation for a period of two years where his recovery is to be monitored by NLAP and Bar Counsel.

**Office of Disciplinary Counsel v. Bell**, 83 Ohio St.3d 310; 699 N.E.2d 925 (Ohio 1998)

Bell was convicted of felonies for presenting on two occasions a false or forged prescription for a controlled substance (Darvocet). A panel of the Board of Commissioners on Grievances and Discipline heard evidence in mitigation that Bell had a history of back pain which led to his drug use and his forging prescriptions, that he had entered a plea of guilty, and that he had completed a drug dependency program. The panel recommended that Bell be publicly reprimanded, and the Supreme Court adopted that recommendation.

**Cuyahoga County Bar Association v. Bogart**, 711 N.E. 2d 659 (Ohio, June 23, 1999)

Bogart was charged in a bar complaint with appearing in court several times before October 14, 1997 after he had consumed alcoholic beverages. On October 14 he appeared again in court intoxicated. The alcohol impaired his ability to represent his client. In addition, he was not wearing a suit coat or tie on that day. A judge inquired as to the odor of alcohol about him. Bogart denied he was intoxicated and declined to take a breathalyzer test. The judge did not permit him to proceed that day. He was ordered to contact the Bar Association and to enroll in an alcohol treatment program. Bogart admitted that he has experienced an ongoing alcohol problem since 1990, and that he has experienced withdrawal symptoms and blackout. He further admitted that he regularly drank alcohol in the morning “to take the edge off.”

At his hearing, Bogart stated that he was sorry for his conduct, that he had an alcohol dependency problem and that he stopped drinking and was attending Alcoholics Anonymous (“AA”) on a regular basis. However, on cross-examination he conceded that he had not attended alcohol treatment programs regularly and that he had not read the book provided by AA. Bogart was suspended for a period of 18 months, with the suspension stayed on the conditions that he undergo psychiatric or psychological evaluation and treatment for depression; that he enter into an Ohio Lawyers Assistance Program Contract and successfully complete the terms of that agreement; and, that he be placed on probation for 18 months with assignment of a monitor.
Toledo Bar Association v. Hayes, 708 N.E. 2d 201 (Ohio)(April 7, 1999)

Hayes was charged in a bar complaint with neglect, failing to cooperate in the bar investigation, and, failing to carry out an employment contract. He failed to answer the complaint. He was found to have violated these disciplinary rules. Evidence of mitigation was presented that Hayes is an alcoholic. He had been convicted twice of driving under the influence. He received an 18-month jail term for the second offense. Hayes was indefinitely suspended from the practice of law. His readmission was conditioned upon his entering into and complying with the conditions of a contract with the Ohio Lawyers Assistance Program.

Office of Disciplinary Counsel v. Maxwell, 83 Ohio St.3d 7; 697 N.E.2d 597 (Ohio, 1998)

After Maxwell stipulated to a variety of serious ethical violations, the Supreme Court of Ohio suspended him for two years, with one year stayed on condition that he make restitution.

Maxwell took on a number of clients and then did not attend to their cases -- resulting in an appeal being dismissed in one case; a child custody action being dismissed in another; and a client arrested for driving without a license (which Maxwell had told the client had been taken care of) in a third. In addition, he forged and notarized clients' signatures in several cases; entered into a settlement without his client's authorization in another; and manufactured a bogus "Report of Court Action" to mislead a client in still another case. He routinely refused to respond to disciplinary counsel's inquiries when grievances were filed in these cases.

Maxwell put on as mitigation evidence that he was an alcoholic; had become a member of Alcoholics Anonymous; had been alcohol-free for over 8 months; had made restitution to those who filed grievances against him; and had stipulated to his misconduct.

The Disciplinary Panel that heard the mitigation evidence recommended a two year suspension with one year stayed pending full restitution; and that Maxwell's recovery program be monitored by the Ohio Lawyer Assistance Program, with random testing, among other things. The Supreme Court adopted the Disciplinary Panel's recommendation.

Cleveland Bar Association v. Stebbins, 85 Ohio 3d 7, 706 N.E.2d 762 (1999) (per curiam)

Board of Commissioners on Grievances and Discipline of the Supreme Court found that Stebbins violated 4 Disciplinary Rules in connection with a personal injury matter that he handled. Stebbins settled the case for his client in September 1989 and received funds which the client instructed Stebbins to use to pay the medical bills associated with the matter. Stebbins neglected to do so but instead deposited the funds in his private account where they remained for more than 6 years. In December 1995, after the (former) client filed suit, Stebbins paid the client for the medical bills, and attorney fees and court costs.
Stebbins had not been previously disciplined, and he had suffered health problems resulting in a liver transplant during part of the period in which the client's matter was pending. Also during that period Stebbins moved his office, which caused him to lose files and not receive some of the client's medical bills. Now, however, he regularly attended Alcoholic Anonymous meetings, had made restitution, and there was no evidence that the conversion of the client's funds was deliberate. Stebbins was suspended from practice for 1 year, with the suspension stayed.

**Cleveland Bar Association v. Sterling**, 84 Ohio St. 2d 268, 703 N.E.2d 765 (1998) (per curiam)

The Ohio Board of Commissioners on Grievances and Discipline of the Supreme Court instituted disciplinary actions against Sterling and he was suspended for two years in March, 1994, and again in May of 1994. In 1997 the Cleveland Bar Association filed a complaint against Sterling alleging 11 violations of the Disciplinary Rules and 1 violation of the Rules for the Government of the Bar between 1987 and 1995. After hearing, the court found that Sterling (among other violations) had forged a client's signature on an affidavit, undertaken matters he was not competent to handle, neglected client matters, practiced while under suspension, and prejudiced or damaged a client.

The court considered mitigating factors (raised by the Bar's counsel): Sterling was a Vietnam veteran suffering from post-traumatic stress syndrome, "he had battled alcoholism" and been through a divorce. Further, Sterling entered the Ohio Lawyer's Assistance Program in May 1994, complied fully with the May 1994, suspension by obtaining 90 hours of CLE. Also, claimant was a respected adversary of the Bar's counsel and had fully cooperated with the Bar's investigation. The court therefore followed the Board's recommendation and suspended Sterling indefinitely, ordering that he comply with OLAP's requirements as a condition of reinstatement.


The Ohio Supreme Court suspended Sweeney from practice for 2 years in 1994 and stayed 1 year of that suspension conditioned upon his making restitution in all money claims against him. In January 1996, Sweeney was convicted of a felony (mail fraud), for which he was incarcerated (5 months) and ordered to make restitution. In March, 1996, the Ohio Supreme Court suspended Sweeney indefinitely, and in April (1996) the Office of Disciplinary Counsel filed a complaint against him, charging conduct involving moral turpitude; dishonesty, fraud, deceit or misrepresentation; and conduct adversely reflecting on his fitness to practice law.

Only evidence in mitigation was heard at the hearing on the ODC's complaint. Sweeney entered evidence that, *inter alia*, he was addicted to alcohol and cocaine for some time prior to the felony conviction; he had been free from alcohol and drugs for the 18 months prior to the ODC hearing; he attended Alcoholic Anonymous meetings, and church; and, he had served the 5 months in prison on the felony conviction.
The Ohio Supreme Court disbarred Sweeney because he had not made the restitution ordered by the federal court in the felony matter, nor was there evidence that Sweeney had made the restitution that the court had ordered in connection with the 1994 suspension.

**In re Murdock,** 968 P.2d 1270 (Ore. 1998)

Murdock was disbarred for embezzling from a law firm where he was employed as an associate. The case contains an extensive discussion of ABA Standard 9.32(i) regarding chemical dependency as a mitigating factor in bar discipline. The significance of this mitigation varies depending on whether the misconduct is solely attributable to chemical dependency (greatest weight), principally attributable (very great weight), a substantial contributing factor (great weight) and otherwise (very little weight). In this case Murdock was disbarred because of the paucity of the record on this issue.


Galford prepared a will for a client but neglected to designate the principle beneficiary. The client died and the principle beneficiary brought the error to Galford’s attention. Galford admitted the error and suggested that they execute a new will, backdate it, forge the deceased’s signature on it, and file it. The beneficiary did not immediately agree to do this but instead contacted the state police, and then returned to Galford’s office where the deed was done.

Galford plead *nolo contendere* to a reduced charge of conspiracy to commit a misdemeanor which proved, as a matter of law, an ethical violation arising from the conviction. The Office of Disciplinary Counsel moved to suspend or annul Galford’s license, and during the mitigation hearing held thereon, Galford’s “personal problems concerning his divorce and his drinking problem” were disclosed. The board recommended to the court that Galford be suspended for one year with automatic readmittance to one year of supervised practice, that he refrain from alcohol or drug use during the suspension and period of supervised practice, and that he pay all costs. The court refused to let “personal problems ... be utilized and excused to the point that our legal profession is destroyed” and adopted the board’s recommendation except that it removed the period limitation to the order that Galford refrain from alcohol or drug use, and required him to reimburse his law office for its related expenses and to pay the beneficiary’s legal fees.

**Lawyer Disciplinary Board v. Richard E. Hardison,** 1999 W.Va. LEXIS 72 (July 9, 1999)

A bar complaint was filed against Hardison as the result of several complaints filed by clients, former clients or doctors of clients as the result of his mishandling of several personal injury or medical malpractice claims. Hardison was charged with failure to safeguard property, failure to exercise reasonable diligence, failure to notify clients of the receipt of funds, failure to
keep a client reasonably informed about the status of the case, dishonesty, conduct prejudicial to the administration of justice, and charging an unreasonable fee.

Hardison presented evidence that he had a long and difficult history with alcoholism. He had participated in a number of inpatient treatment programs for alcoholism and cross-addiction to pain pills. In 1996 he was involuntarily committed to Huntington State Hospital. He attends Alcoholics Anonymous on an average of four times per week. He testified that his problems with alcohol were not a contributing factor to any of his conduct. The Lawyer Disciplinary Board found, however, that it believes his involuntary alcohol addiction most likely contributed to his conduct and that his return to the practice of law should involve continuing treatments for addictions. Hardison was suspended indefinitely with leave to petition for reinstatement upon the completion of one year of sobriety and complete abstinence of alcohol and controlled substances.

This case is noteworthy for the enlightened discussion of the Court of alcoholism as an illness. Hardison was suspended because the Court was convinced that he was still impaired by alcoholism, and it compliments him on his legal abilities by stating that: “[Hardison] will be a credit to the legal system if he can only control his alcohol addiction and take the steps to prevent relapses and recurrences of the conduct which gives rise to these complaints”.

In re Cahill, 579 N.W. 2d 231 (Wisc. 1998)

Cahill was charged with a number of theft-related criminal offenses as well as multiple DWI’s. A disciplinary proceeding was brought based on that conduct. She was found to have a medical incapacity based on alcoholism. She was suspended for six months to be followed by a two-year period of conditional reinstatement relating to a treatment plan for her alcoholism to which she and the disciplinary board had stipulated.
IV. Mental Illness

**Colorado v. Waitkus**, 1998 Colo. 3900, 962 P.2d 977 (per curiam)

Waitkus settled his client’s personal injury suit without her permission, and for a lesser amount ($1,500.00) than he advised they would receive ($2,000.00). Moreover, when the settlement check arrived, Waitkus altered it so that he could deposit it into his operating account and then gave his client a check for $2,000.00. Waitkus also paid the $500.00 balance due on his client’s doctor’s bill.

The client inadvertently obtained a copy of the settlement agreement, discovered the dastardly deed, and an investigation ensued. The grievance committee’s inquiry panel recommended public censure or a 30 days suspension. The court publicly censored Waitkus because, although intentionally deceiving a client requires suspension, injury to the client by that intentional deception is also required. Waitkus’ client had not been injured (indeed, she had benefited) by his deception. Additionally, the court found that Waitkus was undergoing "tremendous personal and emotional problems" at the time, and had not been previously disciplined.


Evans consented to a 3-year suspension, which, due to the fact that he had mental and emotional problems for which he had received treatment, among other mitigating factors, was deemed relating back to 1994, presumably making him eligible for reinstatement.

**In re Ronald J. Freeman**, 506 S.E. 2d 872 (Georgia)(October 13, 1998).

Disciplinary proceedings were instituted against Freeman after a special master found that Freeman, while acting as the guardian of the estate of an incapacitated adult, wrote two estate checks in the amount $935.13 as a loan to his brother, who was having financial problems. In a second matter, Freeman wrote two checks totaling over $4800.00 from an account of a second estate for the benefit of that estate. An audit uncovered these transactions, and Freeman confessed to a law partner about his misdeeds. He repaid the funds in question, and reported himself to the Bar. At the time of his misconduct Freeman began seeing a psychiatrist. He was diagnosed as having major depression. The depression was traced to significant personal and family stress. His psychiatrist testified that the clinical depression impaired his judgment; and that Freeman’s misconduct “unequivocally” was out of character for him; and that his misconduct was the result of his depression.

Freeman was suspended for 90 days. He was ordered to continue his psychotherapy for a minimum of one year, and that a report must be submitted on a quarterly basis with the Committee on Lawyer Impairment. If at the end of the year it is determined that he no longer needs psychotherapy, then the treatment may cease.
In re Michael Morgan, 506 S.E. 2d 868 (Georgia)(October 5, 1998)

Morgan was charged in a Bar complaint with dishonesty, failure to refund an advanced fee which was not earned, willfully disregarding or abandoning a legal matter entrusted to him, and failure to respond to a disciplinary complaint. Based upon his failure to respond he was found to have admitted all allegations. Mitigating factors found by the special master include an undefined psychological impairment. Morgan was suspended indefinitely, with eligibility to apply for reinstatement after two years. Reinstatement is conditioned, inter alia, that he obtain a favorable determination from the Lawyer Assistance Program and that he is emotionally and psychologically fit to resume the practice of law.

In re Eager, 708 N.E.2d 584 (S. Ct. Ind. April 14, 1999)

Eager engaged in a pattern of neglect of matters entrusted to him, including the falsification of documents and reports to keep his neglect from being discovered. Eager proffered an obsessive/compulsive disorder for which he was being treated as mitigation. He was suspended for 3 years with a requirement that he demonstrate that he received successful assistance for his impairment as a condition of reinstatement.

In re Blazek, 590 N.W.2d 501 (S. Ct. Iowa March 24, 1999)

Blazek was convicted of the felony of taking indecent liberties with his 11-year-old nephew by marriage. He was also subjected to bar discipline. His acceptance of responsibility and continuing course of treatment were deemed to be mitigating factors. His license was suspended indefinitely with no right to reapply for 2 years, whereupon he would have the burden of showing that his sexual dysfunction was under control and properly attended to.

Iowa Supreme Court Board v. Schatz, 1999 Iowa Sup. LEXIS 130 (June 3, 1999)

Schatz embezzled money from his law firm and was convicted criminally of that and income tax evasion. The Court noted that the usual penalty for such conduct was license revocation and imposed that sanction despite evidence of successful treatment of depression.

Iowa Supreme Court Board of Professional Ethics and Conduct v. Thompson, 1999 Iowa Sup. LEXIS 128 (June 3, 1999)

Thompson was convicted of misdemeanors stemming from an altercation with a man who was seeing Thompson’s teenage daughter in violation of a domestic abuse no contact order. Based on these convictions and an incident where a client’s appeal was dismissed because of Thompson’s neglect, the Grievance Commission recommended a 30-day suspension. Thompson sought review from the Court and reduction of the sanction to a reprimand. Instead, the Court increased the sanction to an indefinite suspension with no possibility of reinstatement for two months. At the disciplinary hearing, Thompson’s treating psychiatrist testified as to Thompson’s
problems with depression and alcohol. The Court gave lip service to Thompson’s emotional problems as a mitigating factor, but it did not seem to help him much. It is noted that no showing of improvement as to emotional problems or alcohol abuse was required for reinstatement.

_In re Metz_, 266 Kan. 118, 967 P.2d 821 (1998) (per curiam)

Metz failed to rectify a check, returned for insufficient funds, which had been drawn on his trust account to pay a client’s filing fee. The clerk of court called Metz once and wrote him twice in a period of 19 days, advising him that the action filed would be dismissed and his privilege to practice before that court revoked if the situation was not corrected (within 5 days of the last letter).

Metz did not correct the situation and the office of the Disciplinary Administrator filed a complaint. Metz did not contest the facts alleged in the complaint. Metz explained, in mitigation, that he was alcoholic and bipolar, and that he had suffered the death of a good friend. These circumstances, plus the facts that Metz had no prior disciplinary record, was extremely remorseful, had made full restitution, and the absence of aggravating factors, resulted in the order that Metz be suspended from practice for 1 year and pay all costs.

_In re Scimeca_, 265 Kan. 742, 962 P.2d 1080 (1998) (per curiam)

The Kansas Board for Discipline of Attorneys found Scimeca had violated several of the Model Rules of Professional Conduct and suspended him indefinitely from the practice of law. Scimeca took exception to the Board’s sanction and sought modification with the court.

Scimeca raised his mental health as a defense to the most egregious charge against him, however, the court appears to not have considered this evidence. Scimeca claimed that his depression was directly responsible for his conduct, but since he had been in treatment for approximately 1½ years, it should not bar a modified sanction of supervised probation. Scimeca’s psychiatrist, testifying at the Board hearing, would not say that Scimeca’s depression “caused” his misconduct. In a subsequent letter to the court, however, the psychiatrist said depression was the cause of Scimeca’s misconduct.

The court declined Scimeca’s request for probation and followed the Board’s recommendation of indefinite suspension. The court relied upon _In re Jantz_, 243 Kan. 770, 763 P.2d 626 (1988), and held that Scimeca’s circumstances were not “unique” such that a suspension of sanction would be appropriate. The court thought Scimeca was likely to repeat his misconduct, as he had engaged in professional misconduct a number of times in the past. Thus, probation was not appropriate.
In re Bivins, 724 So. 2d 198 (La. 1998)

Among other instances of alleged misconduct, Bivins precipitately abandoned her practice and disappeared. She was prosecuted in absentia through a curator. There was evidence of mental illness from a lawyer who had shared office space with her.

The hearing committee recommended a suspension for a year and a day, followed by an 18-month suspension with conditions of reinstatement. The committee noted that were it not for Bivins’ disappearance, she would probably have been the subject of a transfer to disability inactive status.

The disciplinary board agreed with the year and a day suspension, but did not recommend reinstatement conditions. The Supreme Court agreed with the board, but left open the possibility that if Bivins reappeared and presented sufficient evidence of mental disability, that a request for transfer to disability inactive status would be entertained.

In re Dunn, 717 So. 2d 639 (La. 1998)

Dunn was charged with several offenses based on his failure to discharge his responsibilities to two separate clients and his failure to cooperate with disciplinary counsel. He acknowledged the violations but offered in mitigation medical evidence of major depression. The disciplinary board recommended a one year suspension deferred in its entirety pending successful completion of a one year supervised conditional probation (major conditions - restitution, treatment, and probation monitor).

The Supreme Court disagreed, noting the actual harm caused to clients and a prior disciplinary history, which, despite the existence of a mitigating medical condition, required a period of actual suspension of one year, followed by two years probation.

In re Estess, __________ So.2d (S. Ct. La. 1/8/99)

Estess was a solo practitioner. After being diagnosed with attention deficit hyperactivity disorder, he was prescribed amphetamines which had severe physical, mental and emotional side effects such as compulsive gambling, binge drinking and sleep deprivation. He exhibited “bizarre behavior.”

He received a large settlement on behalf of a client and deposited it in his client trust account. He paid the clients their proper share, but left the attorney’s fees ($190, 000) in the trust account which he then used for his personal purposes. He was charged with commingling.

Estess and Disciplinary Counsel reached an agreed upon disposition consisting of a one-year suspension with nine months deferred followed by a two-year period of supervised
probation with nine conditions, including practice monitor, psychological counseling and abstention from gambling and drinking.

The Court accepted the agreed upon disposition finding that, while there was no misuse of client funds, "there was the potential that such conversion could have occurred."

**In re Kelly**, 713 So. 2d 458 (La. 1998)

Charges were brought against Kelly for embezzling from his law firm by causing clients to make payments due the law firm directly to Kelly. Among the claimed mitigation factors were depression. A hearing committee recommended supervision for a year and a day followed by a two year supervised conditional probation. The Supreme Court, noting that the baseline sanction for the kind of conversion shown in the case was disbarment, imposed a three-year supervision. While it is not entirely clear, it appears that the alleged depression did not play a significant role in the case.

**In re Lyons**, 722 So. 2d 998 (La. 1998)

Lyons was charged with a number of instances of taking money from clients, doing no work, avoiding communicating, not refunding unearned fees and not cooperating with the disciplinary process. The hearing committee recommended a sanction short of disbarment based on Lyons' claim that he had "mental problems." The board and the Court went with disbarment because the record was insufficient to allow consideration of mental incapacity as a mitigating factor.

**In re Nichols**, 723 So. 2d 410 (La. 1998)

Nichols was charged with several violations which included misappropriation of client funds as to which he was criminally convicted, received a fine and probation and was removed from his position as a City Court Judge.

Based on a mitigation factor of mental disability (major depression), Nichols was suspended for three years, one year deferred, retroactive to his interim suspension based on his criminal conviction. Consequently, he was immediately eligible for readmission.

**In re Schambach**, No. 98-2432 (La. Jan. 29, 1999), 726 So.2d 892 (per curiam)

In 1991, Schambach borrowed $40,000 from Dianne Womble, a client with whom he was having a sexual affair, and gave her a promissory note. Ms. Womble sought repayment in 1992 but Schambach was not able to pay her. Ms. Womble filed a complaint against Schambach in 1996 and Schambach was ultimately charged with violating two rules (conflict of interest and improper transaction with a client) and not cooperating with the investigation. Two days before the disciplinary hearing, Schambach repaid Ms. Womble $47,000.
One month prior to the disciplinary hearing on Ms. Womble’s complaint, Schambach saw a clinical psychologist who testified that, over the preceding 10 years, Schambach, who was psychologically immature, had become chronically anxious and depressed. In 1997, Schambach again sought treatment with a psychiatrist and a social worker.

In mitigation, the court considered Schambach’s mental health history, and his efforts at treatment. In aggravation, the court found that Schambach had caused Ms. Womble serious harm by having a sexual relationship (albeit consensual) because it interfered with his professional responsibilities to her, borrowing money from her, discharging the debt in bankruptcy, and his failure to attempt restitution until 2 days before the disciplinary hearing. The court suspended Schambach from practice for 3 years.

**Attorney Grievance Commission v. Brugh,** 727 A.2d 913 (Md. April 14, 1999)

Brugh was charged by the Attorney Grievance Commission with violations of several rules of professional conduct in three cases in which he was retained as counsel. The common theme in each case was that he accepted employment, was paid a retainer fee, neglected the matter and failed to communicate with his clients. He did not contest the charges. He offered evidence in mitigation of sanctions. He became overwhelmed by his caseload, mail was left unopened and telephone calls went unanswered. He avoided his clients. In 1997, he began therapy and taking antidepressants. He was able to function more fully in his law practice and in the representation of his clients. He credits his recovery to the taking of the anti-depressants and the therapy sessions.

There was no evidence of alcohol or substance abuse. He was evaluated by three psychiatrists. One psychiatrist opined that he suffered from “an adjustment disorder.” She did not believe that he suffered from a major depression. She opined that he had difficulty at times functioning as an attorney, it was not a complete disjunction, as he continued to provide service to some clients. A second psychiatrist diagnosed him with having a “depressive disorder NOS” (not otherwise specified). A third psychiatrist diagnosed him with having had “major depression severe in full to partial remission.” The trial court credited the diagnosis of the first psychiatrist by finding that Brugh experienced an adjusted disorder not amounting to a major depression. “[W]hile the dysfunction certainly affected [his] ability to practice law, it did not totally disable him in his law practice and it certainly was not the sole cause of his neglect in the three cases . . .” Brugh was suspended for 60 days. Conditions of reinstatement were imposed which included engagement at this own expense of an attorney monitor acceptable to bar counsel.

**In re Bishop,** 582 N.W.2d 261 (Minn. 1998)

The Minnesota Supreme Court suspended Bishop indefinitely for engaging in a pattern of conduct in which he failed to represent four separate clients (resulting in the entry of summary judgment against one and a default judgment against another); to communicate with them (and, indeed, for lying to one of them about whether court documents were filed); or to return their
files; and for failing to respond to the disciplinary authorities. Bishop claimed that his misconduct was caused by illness, but, after some initial disclosure of his (unspecified) condition, Bishop stopped cooperating, or even communicating, with the disciplinary authorities.

The Court suspended Bishop indefinitely, permitting him to seek reinstatement if he can show by clear and convincing evidence that he is fit to practice law.

**In re Otis**, 582 NW.2d 561 (Minn. 1998)

The Minnesota Supreme Court refused to disbar Otis for sexual harassing conduct that had caused the Supreme Court of New Hampshire to disbar him six years earlier.

In 1977 Otis fractured his skull in a fall and thereafter had seizures which, he claimed, caused him to misbehave sexually. He made repeated sexual comments to five clients, all of whom fired him. He sexually assaulted a sixth client, who had undertaken to work for him to reduce her bill. At his disciplinary hearing in New Hampshire, a neurologist and a psychologist who had both treated Otis testified that his misconduct was caused by his seizures. The professional conduct committee put on a doctor who disagreed, and who testified that medication was unlikely to prevent such behavior in the future. The New Hampshire Supreme Court disbarred Otis in 1992.

Otis did not report his disbarment to Minnesota because, he said, he was unaware of Minnesota's rule requiring him to do so. However, the Minnesota authorities learned of Otis's discipline in 1996 and brought proceedings seeking reciprocal discipline.

In the Minnesota proceedings Otis produced evidence showing that he had not engaged in misconduct since 1991 when his seizure medication was changed. The Supreme Court of Minnesota, with two Justices dissenting, held that it would be unjust to disbar Otis now. In light of Otis's exemplary behavior since 1991, the Court credited the testimony of the doctors who had treated Otis over that of the doctor called by the New Hampshire disciplinary authorities -- who had testified that medication was unlikely to prevent Otis from repeating his misconduct in the future. The Court concluded that Otis's record of six years of responsible conduct showed that his misconduct was unlikely to recur. The Court ordered that Otis be suspended for five years, after which he can seek reinstatement.

Two justices dissented on the grounds that Otis is profiting from his failure to report his New Hampshire discipline.

**Nebraska State Bar Ass'n v. Johnson**, 256 Neb. 495, 590 N.W.2d 849 (Neb. 1999)

The Supreme Court of Nebraska found that Johnson, recently admitted to the Bar, had neglected a number of clients, by, among other things, abandoning their cases in mid-course and failing to appear for hearings. A majority of the Court held that Johnson should be suspended for
four years with his reinstatement conditioned on a showing that his conduct during the suspension must demonstrate his character and fitness.

Two of the justices dissented in part on the grounds that, given the intemperate and bizarre filings Johnson had made during his disciplinary proceeding, the court should order a psychiatric examination and condition his readmission on the recommendations that would result from such an examination.


The Supreme Court of New Jersey disbarred Greenberg who engaged in a pattern of diverting money from his law firm, even though there was considerable evidence showing that this conduct was the product of depression and all the experts found that it was unlikely to recur. The Court reasoned that it was so important to demonstrate to the public that knowing misappropriation of funds will not be tolerated, that the only defense in cases of such conduct is a showing that the attorney was so impaired that his conduct was not "knowing."

In 1992, Greenberg suffered a series of serious personal and professional setbacks. During 1992, Greenberg began diverting funds from his law firm. By 1993, he had fraudulently obtained more than $34,000 in firm funds. Greenberg confessed to a close friend that he had been defrauding the firm and asked the friend to alert the firm, which was done.

In the New Jersey Supreme Court, the State Bar Association argued that disbarment should not automatically result from misappropriation. The Supreme Court held to the contrary and extended the rule beyond misappropriation of client funds to misappropriation of law firm funds because it feared the public would not understand a distinction. The Court ruled that the only defense which might avoid disbarment was a showing that, because of the severity of the impairment, the misappropriation was not "knowing," *i.e.*, that the attorney "was out of touch with reality."

The Court ruled that Greenberg’s mental illness would not mitigate his offense on the grounds that "[w]e could not excuse respondent without exonerating every lawyer who suffers personal hardships..."

The dissenting justices argued that, while a harsh, unvarying rule was perhaps justified when client funds were misappropriated, the rule should not be extended to misappropriation of firm funds. They argued that Greenberg’s was a clear case for mitigating the punishment.

Hegarty was charged with failing to cooperate with the Grievance Committee, neglect. He did not contest the findings of these violations made by the Special Master. He presented evidence of mitigation of depression during the time period of the misconduct through the testimony of his treating psychiatrist. He was suspended from the practice of law for one year, and that he is eligible to apply for reinstatement after six months.


The Appellate Division, Second Department, disbarred Rose for failing to safeguard, and converting to his personal use, funds in his client escrow account. Although several checks to clients were not honored due to Rosen's withdrawing money from the escrow account for his personal use, none of his clients suffered any financial loss. Nevertheless, and despite Rosen's 25 years of dedicated public service, the Court refused to consider his depression and entry into treatment as mitigating his penalties.

In re Walker, 244 A.D.2d 3; 675 N.Y.S.2d 68 (App. Div., 1st Dept. 1998)

Walker was indicted in federal court for immigration fraud. Prior to his trial date, he was struck by a car and suffered head injuries. He claimed in his federal case that he was incapable of proceeding to trial, in part because of mental deficits caused by his head injury. He also responded to bar disciplinary authorities that those disabilities precluded him from participating in the disciplinary process, submitting a report from a neuropsychologist to substantiate this assertion. The Department Disciplinary Committee then moved that Walker be suspended indefinitely from practice on the ground of mental incapacity. Walker's attorney consented but asked that the order not be published. The Appellate Division, First Department, suspended Walker indefinitely but published the order on the grounds that such a suspension was not punishment, but was only designed to safeguard the public.

Office of Disciplinary Counsel v. Harris, 84 Ohio St.3d 3; 701 N.E.2d 682 (Ohio 1998)

Harris was convicted of the federal felony, conspiracy to commit an offense because of her conduct in participating in a telemarketing scheme. She created documents that overvalued the paintings that were sold in the enterprise. A panel of the Board of Commissioners on Grievances and Discipline heard mitigation evidence that Harris had long been depressed and had mood swings. The panel recommended an indefinite suspension, and the Court adopted that recommendation.


On July 28, 1997, the Ohio Board of Commissioners on Grievances and Discipline of the Supreme Court (the “Board”) found that between 1992 and 1995, Komarek committed more than
40 violations of the Disciplinary Rules and in five instances he failed to comply with the Rules for the Government of the Bar. In response to the Board’s complaint, and again in his answer to the amended complaint, Komarek stated that at all times mentioned he was mentally ill. The Board’s doctor diagnosed Komarek as suffering from bipolar II disorder.

After a July 1998, hearing, the court suspended Komarek indefinitely from the practice of law and placed several conditions (all concerning restitution to his former clients) upon his application for reinstatement. The court noted that disbarment was the usual sanction for misappropriating clients’ funds and neglecting client matters. However, after considering the duties Komarek had violated, the injury caused, and his psychological disorder and recovery therefrom, the court suspended him indefinitely.

**Columbus Bar Association v. Lockhart**, 84 Ohio St. 3d 7, 701 N.E.2d 686 (1998) (per curiam)

In 1996 Lockhart pled guilty to shoplifting and was fined and placed on one year’s probation. That same year, Lockhart was convicted of petty theft and sentenced to 10 days in jail. In connection with the petty theft charge, Lockhart whitewashed her signature on an affidavit she obtained from the court record. Consequently, Lockhart was convicted of 2 counts of tampering with records, sentenced to 6 months in jail, of which she served 33 days.

The Toledo Bar Association filed a complaint against Lockhart, which she defended by acknowledging she suffered from depression, low self-esteem and self-destructive behavior at the time of the violations. The Ohio Board of Commissioners on Grievances and Discipline of the Supreme Court recommended that she be suspended indefinitely. However, because Lockhart had made efforts to rehabilitate herself “[s]ince 1996” through therapy with a clinical therapist and a physician, the court suspended her for 2 years, with 1 year of that suspension stayed. Lockhart was required to submit to a psychiatric examination to determine her emotional fitness to practice law prior to readmission.

**Office of Disciplinary Counsel v. Robinson**, 83 Ohio St.3d 319; 699 N.E.2d 931 (Ohio, 1998)

Robinson had a client’s suit dismissed for want of prosecution but continued to inform the client that he was working on the matter. Ultimately, the client recovered a $33,000 judgment against Robinson for malpractice. Disciplinary Counsel alleged that Robinson’s conduct involved fraud and deceit and a panel of the Board of Commissioners on Grievances and Discipline so found.

The panel heard evidence in mitigation that Robinson had bipolar disorder. For that reason, and because he was remorseful, the panel recommended that Robinson be suspended for six months, but that the suspension be stayed while Robinson completed a two year supervision by a monitor. The probation should include regular consultation with a psychiatrist and that he undergo a program with a clinical neuropsychologist. The Supreme Court adopted the panel's
recommendation of a six-month suspension stayed while Robinson undergoes the recommended two-year program.


In 1996, West accused a United States Bankruptcy Court judge of scheduling numerous unnecessary hearings because the judge received a kickback from the bankruptcy trustee whose fees were increased by the number of hearings. West requested that the judge recuse himself and pursued the matter (unsuccessfully) to the federal district court.

In June 1997 the Office of the Disciplinary Counsel brought charges against West and at the disciplinary hearing West conceded that the judge had had no financial interest in his client’s bankruptcy case. In September 1997, West had begun treatment, including medication, for clinical depression at a Veterans Administration Outpatient Clinic. West attributed his suspicions of and allegations against the judge to his untreated depression.

The court suspended West for 18 months and stayed 12 of those, provided he continued psychiatric treatment and agree to monitoring by the Bar. Evidence that his treatment enabled him to properly and effectively practice law would be required before he could resume the practice of law.

**Ohio State Bar Ass'n v. Zuckerman**, 83 Ohio St.3d 148; 699 N.E.2d 40 (Ohio 1998)

The Supreme Court of Ohio suspended Zuckerman for one year for making payments to another attorney for referring Zuckerman corporate business without the corporation’s knowledge. After hearing evidence in mitigation, including evidence that Zuckerman was dependent on Prozac, a panel of the Board of Commissioners on Grievances and Discipline recommended a public reprimand. The Supreme Court held that this was too lenient a sanction for conduct that Zuckerman had to know was improper and instead imposed a one-year suspension.

**In re Heard**, 136 Wash.2d 405; 963 P.2d 818 (Wash. 1998)

The Supreme Court of Washington suspended Heard for two years for subordinating the client’s financial interests to his own, and for sexually exploiting a vulnerable client.

Heard represented a young woman who had suffered severe head injuries in an automobile accident, which rendered her mental competence questionable, and who had a history of drug and alcohol abuse. Heard negotiated a settlement of her claim, pursuant to which all cash paid went for his fee, and the client obtained claims of questionable value. Heard also got his client drunk and had sex with her (although he claimed he had been so drunk he could not remember having sex).
The Court held that, in the settlement, Heard had put his interests before his client's. The Court also held that in exploiting his vulnerable client sexually, Heard had committed an act involving moral turpitude. The Court suspended Heard from practice for two years.

One Justice dissented on the grounds that the Court had improperly allowed the Disciplinary Board to substitute its judgment for that of the hearing examiner. He also argued that Heard's sexual conduct was not proscribed by the ethics rules because it was consensual, and there was no showing that the client was incompetent to consent.
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APPENDIX: Finding the Cases

This year's Caselaw Review covers 81 cases. Cases for the Caselaw Review are searched in the LEXIS STATES/COURTS database using the following search:

(attorney or lawyer!) w/40 (misconduct or disciplin! or grievan!) w/seg (disorder or depression or sex! or impairment or mitigati! or alcohol! or drug* or cocaine) and date aft [most recent june 15, or 15 days prior to last update]

This search is very over inclusive and finds, for example, a large number of criminal drug cases (and criminal cases where drugs are involved) in which the defendant claims attorney misconduct, but it is difficult to further restrict or fine tune the search without losing relevant cases. Typically the search turns up about 700-900 cases per year, of which about 250-350 are attorney discipline cases and 125-175 are relevant. This year however, only 81 cases were relevant.

Where attorney sexual misconduct leads to discipline (there are always a number of cases where the lawyer-client relationship is abused), only mitigation (recovery from mental illness) cases are included in the Caselaw Review. Some states, such as California, do not publish attorney discipline cases and are not represented.