

LOWERING THE BAR: HOW LAWYER DISCIPLINE IN NEW YORK FAILS TO PROTECT THE PUBLIC

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INTRODUCTION

Every court decision that disciplines a lawyer tells a short tale of human frailty and failure. But it does something else, too. The discipline reveals the seriousness with which the court views the lawyer's conduct and what it believes is required to protect the public. The decisions are often quite brief, sometimes so brief that it is impossible to say precisely how the lawyer erred and the court's reasons for the sanction it imposed. Other times, a court will recount the lawyer's behavior in more detail, along with the aggravating and mitigating circumstances that purport to explain the sanction.

Many of the stories are banal. Here is a lawyer who suffered financial loss and used client money held in trust, but has since repaid it. Here is another lawyer who neglected the matters of several clients, but in mitigation cites a previously "unblemished" career. A third lawyer, who assaulted his girlfriend and pled guilty to a misdemeanor, cites his explosive personality disorder and current psychological treatment. A final lawyer did not pay substantial taxes for several years (although he had the money) and pled guilty to a tax charge. In mitigation, his expert witness describes an obsessive-compulsive disorder. What sanction should these lawyers suffer? Whose conduct deserves the greatest sanction? These are actual cases. The story of each lawyer is told here along with many others.

Disciplinary opinions rarely attract academic interest.¹ Every story of a wayward lawyer may appear to tell its own sad tale, seem-

1. There are exceptions. Fifteen years ago, Leslie Levin's thorough national treatment identified rampant problems with the standards for imposing lawyer discipline. She concluded:

Too often, courts and disciplinary boards impose discipline without reference to any discernible standards. Even when standards are consulted, they are applied unevenly and yield inconsistent results. Too many lawyers are permitted to engage in repeated misconduct before they receive public sanctions. Too little is known about the effectiveness of the sanctions that are currently imposed.

It appears that the most frequently used lawyer sanction—the private admonition—has little deterrent or rehabilitative effect. Some of the other

ing to defy helpful generalization, and of little interest to scholars. In successful lawyers, we search for the qualities that contributed to success, which we admire and may emulate. But every errant lawyer can seem to have lapsed for reasons deep within his or her psyche or for a motive as trite as greed. If there are lessons to learn from their failures, let psychologists find them. There appears no grand theory here worthy of a law teacher's time. The media is also uninterested. Nor do other government bodies or citizen groups afford oversight. So the world of lawyer discipline, largely or entirely the province of the courts, escapes serious scrutiny outside the profession.

This is unfortunate. The standards for and administration of lawyer discipline, as with bar admission, determine the quality of our justice system. After all, it is through the intermediation of lawyers that the public most directly and personally encounters the rule of law. We have bar admission standards because we care about whom we will allow to serve in this role. The same with discipline, or so we claim.

This Article takes a close look at lawyer discipline in New York. Research offers two ways to do so. We can evaluate and propose substantive and procedural rules generally. What does due process require?² What should be the burden of proof?³ What factors are

sanctions imposed on lawyers—including brief suspensions and community service—are imposed without careful consideration of the goals of discipline

. . . Standards for imposing lawyer sanctions must be mandatory, not voluntary. They should be written to serve as a counterweight against any unconscious bias on the part of judges and lawyer-dominated disciplinary boards. They must be drafted to place protection of the public above protection of the lawyer's reputation or livelihood

Leslie Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 80 (1998). I part from Professor Levin's solution of mandatory sanctions across the board, although that option may become more attractive if the courts fail to pay attention to the defects she and I discern. The value of focusing on one jurisdiction, as I do here, is that it should be harder to avoid the evidence. When failure is about everyone, it's easier to ignore as about no one in particular.

For other work on the subject, see generally RICHARD ABEL, *LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS* (2008). Professor Levin reviews the book at Leslie Levin, *Bad Apples, Bad Lawyers or Bad Decision-making: Lessons from Psychology and from Lawyers in the Dock*, 22 GEO. J. LEGAL ETHICS 1549 (2009) (book review).

2. See, e.g., *In re Ruffalo*, 390 U.S. 544 (1968) (concerning procedural due process afforded to attorneys in disciplinary proceedings); *In re Franco*, 410 F.3d 39 (1st Cir. 2005) (same).

3. A majority of states require clear and convincing evidence. Burden of Proof [Practice Guides] Law. Man. on Prof. Conduct (ABA/BNA) 101:2106 (2011). Elsewhere, a preponderance of evidence is needed. *In re Barach*, 540 F.3d 82, 85 (1st Cir.

aggravating or mitigating?⁴ What sanctions are appropriate for different transgressions?⁵

Answers to these generic questions do not tell us what courts actually do case by case. By contrast, sifting through court decisions is laborious. It demands reading many opinions in an attempt to infer antecedent principles or the lack of them. Can the opinions be reconciled? Do they satisfy the law's goal of consistency? Do they satisfy the professed purposes of discipline? I have chosen this second approach as most likely to be fruitful because, so far as I can tell, it gets little attention academically or, indeed, anywhere else.

Raw numbers do not tell the story. Or they tell only a part of it. They can also mask it. Statistics may tell us that in a given year so many lawyers were suspended for however long, so many were disbarred, and so many censured, for identified categories of conduct. Raw numbers, however, do not allow us to evaluate the quality of the work of disciplinary bodies and courts. Detail is lost. The courts' explanations are lost. Fine comparisons are impossible.

Proper evaluation requires a close look at the narratives of discipline. A project of this size must concentrate on one state. I focus on New York, which does not make the task easy. New York cloaks its process in secrecy unless and until a court imposes public discipline.⁶ Furthermore, published opinions are often skimpy at best. I read all 577 New York opinions imposing discipline between June 2008 and December 2013 inclusive and selectively among opinions between January 1982 and June 2008.⁷ New York, with a 2013 lawyer popula-

2008) (holding that the preponderance standard, though a minority view, satisfies due process).

4. The American Bar Association Standards for Imposing Lawyer Sanctions identify the following as common aggravating factors: prior discipline, a dishonest or selfish motive, and failure to cooperate with the disciplinary process. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 9.22 (1992) [hereinafter ABA STANDARDS], available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/corrected_standards_sanctions_may2012_wfootnotes.authcheckdam.pdf. The following factors are among those that may be deemed mitigating: personal or emotional problems, absence of a dishonest or selfish motive, and a good character or reputation. *Id.* § 9.32.

5. The ABA has attempted to answer this question in its Standards for Imposing Lawyer Sanctions. *See id.* pt.I.

6. N.Y. JUD. LAW § 90(10) (McKinney Supp. 2014).

7. The 577 number includes cases that disbar a lawyer following a New York felony conviction or a felony conviction elsewhere for which there is an equivalent New York felony. These convictions result in automatic disbarment. *Id.* § 90(4)(b), (e). The number also includes lawyers who are disciplined based on discipline in another U.S. jurisdiction (reciprocal discipline). And it includes lawyers who are suspended pending a hearing because of risk of harm to the public. *See infra* note 66. I used the following Westlaw search terms to generate the 577 cases cited in the text:

tion of 166,317,⁸ offers further instruction. Disciplinary authority is assigned to four intermediate appellate courts, divided geographically, permitting intrastate comparison.⁹ I found that sanctions are uneven.¹⁰ For the same conduct, an errant lawyer will fare better or worse, at times significantly so, depending on the location of her office. Some of my conclusions will be particular to New York, such as the need for a statewide body that can bring consistency to sanctioning decisions. Other conclusions will have national import.¹¹

My investigation—reading hundreds of cases to evaluate what judges do in fact—is an old-fashioned model of empirical research. It risks being called anecdotal, non-scientific, and statistically unreliable. I appreciate, of course, that it is possible to do this job by coding variables and generating numerical data, creating an impression of greater rigor and perhaps less, but not no, subjectivity. But reading widely among the court decisions, many of them several times, adds information beyond the charts and graphs that statistical methodologies can offer. The task allows informed judgment. At least for the questions here, we need not debate which approach will give us more trustworthy and persuasive answers. Neither precludes the other.¹²

I did not set out to find fault with New York’s lawyer disciplinary system. Rather, in casual reading over the years, I occasionally happened on New York disciplinary cases whose results I found disturbing or conflicting. So I read extensively in the years described to

HG(DISCIPLIN!) BG(DISCIPLIN!) SY(DISCIPLIN!) & DI(ATTORNEY /2 CLIENT) & TI(“MATTER OF”) & da(aft 5/2008 & bef 1/2014) & CO(LOW).

8. AM. BAR ASS’N, NATIONAL LAWYER POPULATION BY STATE (2013), available at http://www.americanbar.org/content/dam/aba/administrative/market_research/2013_natl_lawyer_by_state.authcheckdam.pdf.

9. An appellate division’s choice of sanction is final. The jurisdiction of the New York Court of Appeals, the state’s highest court, is limited to appeals raising questions of law. N.Y. JUD. LAW § 90(8). The First Department encompasses New York County (Manhattan) and Bronx County. The Second Department comprises the rest of New York City, the two Long Island counties, and five other downstate counties. The Third Department, based in Albany, includes northern counties. The Fourth Department, based in Buffalo, encompasses western counties. N.Y. CONST. art. VI, §§ 4, 6 (1938). The four appellate divisions and their geographical jurisdiction can be found at *Appellate Divisions*, NYCOURTS.GOV, <http://www.nycourts.gov/courts/appelatedivisions.shtml> (last updated Mar. 15, 2013).

10. See *infra* Part II.C.

11. Further research may benefit from comparison to California, the state with the second largest lawyer population. In 2013, California had 163,163 lawyers. AM. BAR ASS’N, *supra* note 8.

12. The cases discussed here are, of course, a small number of all of the disciplinary cases that I read in the chosen years. Selection always risks misrepresentation of the whole, even with the best of intentions, but I am confident that the cases I describe are representative.

see if those cases were aberrations or could be understood in a broader context. I conclude that they were not aberrations.

My findings and recommendations are signaled throughout this Article and detailed in Part IV. Here it suffices to offer two observations.

First, the lawyer disciplinary system in New York is deficient in design and operation. It fails the professed purpose of protecting the public and the administration of justice. Some of the problems I identify may also trouble disciplinary systems elsewhere. One problem, intrastate disparity, appears to be unique to New York.¹³ This disparity is aggravated by the fact that opinions in the Second, Third, and Fourth Departments often lack detail, any explanation of the court's reasons for the chosen sanction, and citation to the department's own decisions addressing similar misconduct.

Second, the New York courts should authorize a study of the state's disciplinary process and performance, including decisions that state law makes secret and which, therefore, outside researchers like me cannot evaluate. Such a study would be the single best first step in repairing a broken system.¹⁴

I.

THE GOALS OF LAWYER DISCIPLINE AND SANCTION OPTIONS

We must know the goals of discipline before we can hope to understand and grade a jurisdiction's performance or recommend change. Various sources are in substantial agreement on these goals.

A. *New York*

In 1975, the New York Court of Appeals wrote:

The proper frame of reference, of course, is the protection of the public interest, for while a disciplinary proceeding has aspects of the imposition of punishment on the attorney charged, its primary focus must be on protection of the public. Our duty in these circumstances is to impose discipline, not as punishment, but to protect the

13. See discussion *infra* Part II.C.

14. Outside evaluation is available. Ellyn S. Rosen, Deputy Director of the ABA Center for Professional Responsibility, informs me that the Association's Standing Committee on Professional Discipline has since 1980 conducted fifty-nine reviews (including revisits) of the efficiency and effectiveness of lawyer discipline by invitation of state courts. The reviews look at the "structure, operation, practice, and procedures of the disciplinary system." E-mail from Ellyn Rosen, Deputy Dir., Am. Bar Ass'n Ctr. for Prof'l Responsibility, to author (Nov. 4, 2013, 03:46 EST) (on file with author).

public in its reliance upon the presumed integrity and responsibility of lawyers.¹⁵

Years later, the court further distanced itself from a view of discipline as punishment in *In re Rowe*:

A disciplinary proceeding is concerned with fitness to practice law, not punishment. Criminal culpability is not, therefore, controlling The primary concern of a disciplinary proceeding is the protection of the public in its reliance on the integrity and responsibility of the legal profession Thus, the inquiry is not directed to the attorney's subjective mental processes, but to the objective and qualitative nature of the conduct, for it is the acts themselves which the public sees and which guide its perception of the Bar Although respondent was not criminally responsible for his acts, they tended to undermine public confidence in the Bar and, as such, they properly provided a basis for disciplinary action.¹⁶

Rowe had been acquitted of homicide by reason of insanity.¹⁷ The appellate division disbarred him but the Court of Appeals held that one basis for the disbarment order was error and remanded for further consideration.¹⁸ While New York courts generally reject psychological factors as a defense to a misconduct charge, these factors may mitigate the sanction.¹⁹

Intermediate state appellate courts in New York are more expansive in describing the goals of discipline. Some statements are inconsistent with the goals the Court of Appeals identified. One court, introducing a deterrence function, has written, and often repeated, that “the purpose of a sanction in a disciplinary proceeding is to protect the public, to *deter* similar conduct, and to preserve the reputation of the bar.”²⁰ It is unclear whether the goal is to deter the particular lawyer, to deter other lawyers, or both. But another intermediate appellate court, expanding on these purposes, opted for both general and specific deterrence.

It has been repeatedly enunciated that the purpose of disciplinary proceedings is not punishment per se but protection of the public

15. *Levy v. Ass'n of the Bar of N.Y.*, 333 N.E.2d 350, 352 (N.Y. 1975) (internal quotation marks omitted).

16. *In re Rowe*, 604 N.E.2d 728, 730 (N.Y. 1992) (citation omitted).

17. *Id.* at 729.

18. *Id.* at 730–31. The Court of Appeals wrote that the lower court had erred in finding that Rowe had violated an earlier order of suspension by publishing an article with “J.D.” after his name. *Id.* at 728. On remand, Rowe was again disbarred. *In re Rowe*, 595 N.Y.S.2d 499, 501 (App. Div. 2d Dep't 1993).

19. *See supra* note 4 and text accompanying notes 239–246.

20. *In re Casey*, 490 N.Y.S. 2d 287, 290 (App. Div. 3d Dep't 1985) (emphasis added).

from the ministrations of the unfit Protection is afforded not only by the revocation of the license to practice but by a lesser sanction which would have the effect of a deterrent to the person at fault . . . and to others who might be similarly tempted An equally important factor is the preservation of the reputation of the bar . . . to the end that the public will have confidence in the character of its members.²¹

Despite the often repeated rejection of punishment as a goal of lawyer discipline, the same court, forty years later, wrote that discipline serves the “punitive purpose of demonstrating that such unbridled misconduct will not go unpunished.”²² And yet, on four occasions in the ensuing decade, the court wrote the opposite. In *In re Samuel*, it held: “As in all disciplinary proceedings ‘[our purpose] is not to punish the respondent attorney, but rather to determine the fitness of an officer of the court and to protect the courts and public from attorneys that are unfit for practice.’”²³

B. California

Today, nearly all discipline in California is decided by the State Bar Court.²⁴ But occasionally the California Supreme Court, which has ultimate authority over lawyer discipline, will speak. It has described the goal of discipline this way: “The primary purposes of disciplinary proceedings conducted by the State Bar of California and of

21. *In re Rotwein*, 247 N.Y.S.2d 775, 777 (App. Div. 1st Dep’t 1964) (citation omitted). In 1991, the same court quoted this language in *In re Levine*, 571 N.Y.S.2d 696, 697 (App. Div. 1st Dep’t 1991).

22. *In re Law Firm of Wilens & Baker*, 777 N.Y.S.2d 116, 119 (App. Div. 1st Dep’t 2004) (citation omitted).

23. 959 N.Y.S.2d 471, 473 (App. Div. 1st Dep’t 2013) (alteration in original) (citation omitted). The same language appears in *In re Zulandt*, 939 N.Y.S.2d 338, 340–41 (App. Div. 1st Dep’t 2012); *In re Balis*, 890 N.Y.S.2d 507, 509 (App. Div. 1st Dep’t 2009); and *In re Lever*, 869 N.Y.S.2d 523, 525 (App. Div. 1st Dep’t 2008).

24. “California is the only state in the nation with independent professional judges dedicated to rulings on attorney discipline cases.” The State Bar Court acts as the administrative arm of the California Supreme Court and has statutory authority to hold attorney disciplinary proceedings and recommend discipline to the California Supreme Court. STATE BAR CT. OF CAL., <http://www.statebarcourt.ca.gov> (last visited Feb. 21, 2014). A Westlaw search reveals only seven reported cases from 1992 to 2013 in which the California Supreme Court has reviewed discipline imposed by the State Bar Court. They are *In re Silverton*, 113 P.3d 556 (Cal. 2005); *In re Lesansky*, 17 P.3d 764 (Cal. 2001); *In re Paquirigan*, 17 P.3d 758 (Cal. 2001); *In re Duxbury*, No. S087517, 2000 WL 34003050 (Cal. June 19, 2000); *In re Rose*, 993 P.2d 956 (Cal. 2000), *In re Brown*, 906 P.2d 1184 (Cal. 1996); and *In re Morse*, 900 P.2d 1170 (Cal. 1995). In addition, on September 11, 2013, the Court disbarred a lawyer named Duane Lynn Tucker. Tucker, No. S199050, 2013 Cal. LEXIS 9148, at *1 (Cal. Sept. 11, 2013).

sanctions imposed . . . are the protection of the public, the courts and the legal profession; the maintenance of high professional standards by attorneys and the preservation of public confidence in the legal profession.”²⁵

The court is quoting from Standard 1.3 of the Standards for Attorney Sanctions for Professional Misconduct adopted in 1986 by the State Bar of California.²⁶ Standard 1.3 adds this sentence: “Rehabilitation of a member is a permissible object of a sanction imposed upon the member but only if the imposition of rehabilitative sanctions is consistent with the above-stated primary purposes of sanctions for professional misconduct.”²⁷

C. ABA Standards for Imposing Lawyer Sanctions

In 1986, the American Bar Association (ABA) adopted the Standards for Imposing Lawyer Sanctions to encourage consistency. “Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.”²⁸ The Standards can be seen as the lawyer discipline counterpart to sentencing guidelines in the criminal context. The Standards state: “The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.”²⁹

Some states use the Standards as a guide to determine sanction.³⁰ Other states never do, New York and California among them. But California has its own standards.³¹ New York has none. This is unfortunate. If there were statewide standards, or if the New York courts all used the ABA Standards, the New York Appellate Divisions courts

25. *In re Silverton*, 113 P.3d at 563 (alteration in original) (internal quotation marks omitted); see also *In re Brown*, 906 P.2d at 1191 (“[A]ttorney discipline is imposed to protect the public, to promote confidence in the legal system, and to maintain high professional standards.”).

26. STANDARDS FOR ATT’Y SANCTIONS FOR PROF’L MISCONDUCT § 1.3 (State Bar of Cal. 1986). The Standards were reorganized and restyled in 2014. The relevant section is now Section 1.1.

27. *Id.* § 1.1.

28. ABA STANDARDS, *supra* note 4, pt.1.

29. *Id.*

30. See, e.g., *In re Eugster*, 209 P.3d 435, 445–46 (Wash. 2009) (en banc); *In re Cardwell*, 50 P.3d 897, 901–02 (Colo. 2002) (en banc), *reinstated sub nom.* *Cardwell v. People*, 148 P.3d 481 (Colo. O.P.D.J. 2006).

31. See *supra* text accompanying notes 26–27.

might come closer to imposing substantially the same sanction in similar circumstances throughout the state. Today, they do not.³²

D. Summary of the Goals of Lawyer Discipline

The dominant goals of lawyer discipline are protecting the public and the administration of justice and promoting the public's confidence in the legal system. These are repeatedly stated, often with no mention of any other purpose. But the goals may also include specific and general deterrence and, in California, rehabilitation if it is consistent with the dominant goals (deterrence and rehabilitation may also be seen as goals that will in turn serve to protect the public and the administration of justice and promote public confidence in the legal system). Because of repeated disclaimers of a purpose to punish, punishment should not be seen as a goal despite occasional reference to a "punitive" function in several lower court New York opinions. In none of the New York opinions read for this article has a court articulated a need for punishment in determining the proper sanction. Rather, the word "punishment" is better viewed as a synonym for "sanction."

Protecting the public and the administration of justice and promoting the public's confidence in the legal system are overlapping but distinct goals. Suspending a lawyer who has abused a client purports to protect new clients who might retain that lawyer during the period of suspension. Disbarment purports to offer permanent protection.³³ I use the word "purports" because we do not know if the lawyer would have again misbehaved if permitted to practice. It may be more accurate to say that the suspension or disbarment eliminates risk through incapacitation. The disbarred lawyer is incapacitated from committing the same conduct and the suspended lawyer is, too, for the period of suspension. Separately, the sanction may promote public confidence in the legal system. The public sees that the courts will weed out lawyers who shirk their duties to clients or the law. We are careful about whom we allow to practice law is the message we give.

32. See discussion *infra* Part II.C., which compares the First and Second Departments in detail. To avoid undue length, I do not do the same for the Third and Fourth Departments, but my reading of the cases reveals that they are as or more lenient than the Second Department. Even with statewide standards, New York decisions would likely lack consistency because sanctions are decided by four separate courts with no statewide tribunal available to reconcile decisions. See discussion *infra* Part II.C. Equally problematic, only the First Department's discipline opinions regularly compare the sanction imposed in a case with those imposed in cases involving the same conduct from the same court in an effort to achieve consistency. See discussion *infra* Part II.C.

33. In New York, a disbarred lawyer may apply for reinstatement after seven years. N.Y. JUD. LAW § 90(5)(b) (McKinney Supp. 2014).

But what about a lawyer whose misconduct occurs outside law practice, say a lawyer who has failed to pay taxes, is convicted of driving while intoxicated, or pleads guilty to assault? Can these acts be the basis for concluding that the lawyer who commits them will disserve clients? Perhaps those that reveal dishonesty, like tax evasion, do have predictive value. But others, like assault or drunk driving, may not. So then a suspension or disbarment for conduct outside law practice and which does not entail dishonesty must rest on the proposition that the sanction is needed to tell the public that some conduct renders a person *unfit* to be a licensed lawyer regardless of how she would behave in practice. We banish the lawyer, at least for a time. By doing so, we claim to encourage public trust in and respect for the bar. While a censure does not exclude the lawyer from practice, it also announces to the public that same conduct is inconsistent with our standards for fitness but not so inconsistent as to warrant a harsher sanction. Indeed, the idea of “fitness” appears in disciplinary cases and rules³⁴ and also in the world of bar admission, most obviously in the existence of character and fitness committees.³⁵

E. Sanction Options

Although the labels may vary, especially at the mild end, the ABA Standards are illustrative of the sanctions available in discipline.³⁶ A private admonition is “non-public discipline which declares the conduct of the lawyer improper.”³⁷ One rung up in severity is a public censure (or reprimand). Like an admonition, a censure does not prevent the lawyer from continuing to practice, but it is more serious both because it is public and because it may be judicially imposed in an opinion describing the lawyer’s misdeed.³⁸

Next in severity is suspension for a defined period after which the lawyer is permitted to apply for reinstatement.³⁹ Disbarment is the

34. *In re Holtzman*, 577 N.E.2d 30, 33 (N.Y. 1991) (rejecting a vagueness challenge to a disciplinary rule forbidding a lawyer to engage in “conduct” that “adversely reflects” on a lawyer’s “fitness to practice law”). Today, the New York rule specifies “illegal conduct” that so reflects. N.Y. RULES OF PROF’L CONDUCT R. 8.4(b) (2013). The ABA Model Rules use the term “criminal act.” MODEL RULES OF PROF’L CONDUCT R. 8.4(b) (2013).

35. *See, e.g.*, N.Y. COMP. CODES R. & REGS. tit. 22, § 602.1(b) (2013) (requiring applicants for admission to the New York bar from within the First Department to receive approval from the court’s Committee on Character and Fitness).

36. ABA STANDARDS, *supra* note 4, §§ 2.1–2.8.

37. *Id.* § 2.6.

38. *Id.* § 2.5.

39. *Id.* § 2.3.

harshest sanction because it “terminates the individual’s status as a lawyer.”⁴⁰

II.

THE DISCIPLINARY PROCESS IN NEW YORK:

STRUCTURAL DEFECTS

Before examining the sanctions that are actually imposed and trying to understand the variations—the subject of Part III—I ask three other questions about discipline in New York. The first two questions are equally germane to discipline elsewhere: How long is the delay between the misconduct or the filing of charges and the sanction? How easy is it for the public (and a potential client) to learn the disciplinary history of a lawyer? The third question, which appears to be unique to New York because it lacks a statewide disciplinary authority, is whether sanctions are consistent among the four New York appellate divisions.

A. *Unacceptable Delay in New York Undermines the Goals of Discipline*

No one can ever accuse the New York disciplinary machinery of undue speed. Of course, much can be said in favor of deliberation because much is at stake. But quite often, the time between transgression and sanction, or between the filing of charges and sanction, is unconscionably long. It mocks the professed goal of protecting the public and the administration of justice if a lawyer who will be (and should be) suspended or disbarred is left to practice for years until the day of sanction. Imagine misconduct in year one, charges in year two, and suspension from practice or disbarment in year four. A lawyer who deserves suspension will have been able to practice for three years after the misconduct that supports the suspension or disbarment.

But there is no need to imagine. Here are four unremarkable examples of unacceptable, indeed unconscionable, delay.

40. *Id.* § 2.2. The ABA Standards add other sanctions including probation, restitution, a requirement that the lawyer retake the bar or professional responsibility examinations. California identifies the same core sanctions: “Attorney discipline does not take the form of traditional criminal sanctions, such as monetary fines or incarceration, but rather consists of reproof, suspension from the practice of law, or disbarment.” *In re Brown*, 906 P.2d 1184, 1191 (Cal. 1995). New York law lists removal from office (disbarment), suspension and censure as sanctions available to the court. N.Y. JUDIC. LAW § 90(2) (McKinney Supp. 2014). The rules of each of the appellate divisions recognize milder discipline—a private admonition or reprimand—by a court committee. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 603.9(a), 691.6(a), 806.4(c)(1), 1022.19(d)(2)(v) (2013).

In January 2009, Mark Costantino's client, Skender Gashi, agreed to settle a claim for \$30,000.⁴¹ Costantino then directed the opposing lawyer to issue the settlement check "in [his] name only."⁴² On or about February 4, 2009, the respondent deposited the \$30,000 settlement check into his own personal account, and thereafter used the settlement money for his own use and benefit. The respondent refused to return the \$30,000 settlement proceeds to Mr. Gashi, despite due demand from Mr. Gashi.⁴³

Costantino was disbarred but not until April 2012, more than three years later.⁴⁴ It took more than a year for the disciplinary authorities even to petition the court for a sanction.⁴⁵ It took another year for the matter to come to a hearing due to "multiple adjournments."⁴⁶ The hearing referee sustained the charges.⁴⁷ It took another year for the disbarment order.⁴⁸ So Costantino continued in practice for more than three years after he converted his client's money.⁴⁹ Yet the factual question here—did the lawyer convert client money to his own use—could not have been clearer or easier to prove.

Costantino, furthermore, had a history of discipline, including over money, so the need for expediting the process should have been apparent:

The respondent has a prior disciplinary history consisting of a five-year suspension from the practice of law [in 1984] based upon 13 charges of professional misconduct, including, inter alia, facilitating the conversion of funds, issuing 28 personal checks in a 7-month period knowing that there were insufficient funds to cover the checks, neglect of multiple client matters, neglect to make a settlement payment for more than six months, and giving a client a fictitious telephone number and address where he could be reached, while the client remained incarcerated on pending criminal charges⁵⁰

41. *In re Costantino*, 941 N.Y.S.2d 241, 242 (App. Div. 2d Dep't 2012).

42. *Id.*

43. *Id.*

44. *Id.* at 243.

45. *Id.* at 241.

46. *Id.*

47. *Id.*

48. *Id.* at 243.

49. Although the court might have been able to suspend Costantino on an interim basis pending a hearing, *see infra* note 66, there is no indication that this happened.

50. *In re Costantino*, 941 N.Y.S.2d at 242 (citation omitted).

Thereafter, Costantino was admonished for neglect of a client matter.⁵¹ The court took note that Mr. Gashi had not received restitution as of the date of the disbarment.⁵²

Eugenie Moody was found to have neglected seven client matters in addition to other misconduct.⁵³ The neglect caused some of her clients, who were immigrants “primarily in asylum matters,” to lose a right of appeal.⁵⁴ Unfortunately, but as occurs too commonly in these opinions, the court does not tell us when this misconduct occurred, but we are told that the disciplinary committee served its Notice of Statement of Charges on August 12, 2009.⁵⁵ The court’s sanction of a six-month suspension occurred nearly two years later, on July 21, 2011.⁵⁶ So Moody, whose conduct warranted a six-month suspension to protect the public and the administration of justice, was free to continue her practice for two years while charges were pending, putting aside any delay that may have occurred before charges were filed.

Bruce Young’s neglect of a matrimonial client occurred in 2006.⁵⁷ He “did not respond to [the client’s disciplinary] complaint for nearly a year after he received it” and so he also violated the rule that requires cooperation with the disciplinary committee.⁵⁸ Formal charges were filed in January 2009, and after a hearing before a referee, a hearing panel confirmed the referee’s finding in March 2010.⁵⁹ The court censured Young in April 2011, some five years after his acts of neglect and non-cooperation.⁶⁰

Perhaps the delay in Ralph Lerner’s discipline is most unsettling. His firm discovered in January 2008 that he had over the years billed clients \$50,000 for personal car services.⁶¹ It told Lerner that if he did not report himself, it would report him.⁶² He reported himself.⁶³ Three years later, in April 2011, the disciplinary committee filed its griev-

51. *Id.*

52. *Id.* at 243.

53. *In re Moody*, 927 N.Y.S.2d 333, 335 (App. Div. 1st Dep’t 2011).

54. *Id.* at 334–35.

55. *Id.* at 334.

56. *Id.* at 333, 336.

57. *In re Young*, 923 N.Y.S.2d 8, 9–10 (App. Div. 1st Dep’t 2011).

58. *Id.* at 10.

59. *Id.* at 9.

60. *Id.* at 8, 10.

61. *In re Lerner*, 973 N.Y.S.2d 218, 219 (App. Div. 1st Dep’t 2013).

62. *Id.*

63. *Id.*

ance.⁶⁴ It took another thirty months, until October 2013, for the court to impose a suspension.⁶⁵

Delays of more than a year between discovery of misconduct and sanction should be rare. Delay defeats the goal of protecting the public because a lawyer who will eventually be suspended or disbarred is able to remain in practice, often for years, while the discipline slowly proceeds. Interim suspensions pending a hearing and decision offer a partial solution where there is an immediate danger to the public.⁶⁶ For the rest or when interim suspension is not sought or ordered, deliberate speed is the best way to protect the public.⁶⁷

B. How Easily Can the Public Learn that a Lawyer Has Been Disciplined?

With protection of the public a constantly (and often the first) stated goal of lawyer discipline, we must ask how it is fulfilled. When the sanction is suspension, the clients who might have retained the lawyer during the period of suspension are protected from that lawyer, but the lawyer may resume accepting clients following the end of the suspension. When a lawyer is censured, she may continue to take new clients without interruption. Imagine, then, a prospective client who contemplates retaining a lawyer who has been censured or has resumed practice after suspension. How is it possible for that client to learn the lawyer's disciplinary record? To the extent that there is long delay between a charge and the imposition of public discipline, we have already failed to protect clients who hire the lawyer in the in-

64. *Id.*

65. *Id.* at 218, 221.

66. Court rules provide for interim suspensions "upon a finding that the attorney is guilty of professional misconduct immediately threatening the public interest." N.Y. COMP. CODES R. & REGS. tit. 22, § 603.4(e)(1) (2013) (providing that interim suspension is available in the First Department); *see also id.* § 691.4(l)(1) (providing that interim suspension is available in the Second Department). Rules in each of the First and Second Departments restrict the availability of this provisional remedy to circumstances where a lawyer has defaulted in responding to discipline or admits the misconduct or where the misconduct is established with "uncontested" (First Department) or "uncontroverted" (Second Department) proof. *Id.* §§ 603.4(e)(1), 691.4(l)(1).

67. In discussing other cases in this Article, I will highlight additional examples of excessive delay between misconduct and sanction. Even when the sanction will be censure, delay undermines the reasons for discipline because clients in the interval will not be able to discover the misconduct. Of course, this raises a separate problem, next discussed, of the ability of the public even to learn if a lawyer has been disciplined.

terim unless we inform them of the pending charge. Most jurisdictions do so but New York does not.⁶⁸

But then what about *after* discipline is imposed? The most obvious solution would be to enable prospective clients easily to learn whether a lawyer has ever been disciplined and the reason. Beyond protecting “the public” as a general goal, the notice of discipline informs the specific people, prospective clients, who may need the protection. Of course, the fact of discipline may not dissuade them from retaining the lawyer. Or it may. But the goals of the disciplinary apparatus are stymied if it is difficult for prospective clients to learn a lawyer’s disciplinary history. One easy way to inform prospective client is to direct them to a location, like a court or disciplinary agency website, where they can discover the lawyer’s disciplinary history. And of course, that location has to report accurately. Here, the New York disciplinary machinery fails. In an age of electronically stored information, that lapse is inexcusable.

Consider again Mr. Young, who neglected a client’s matrimonial matter in 2006 and was censured in 2011.⁶⁹ If a prospective client in 2012 wished to learn Young’s disciplinary history, she might know enough to go to the website of the New York courts. There she would learn that he is a registered New York lawyer and some other information about him (year admitted, address, etc.). But she would not learn of the censure.⁷⁰ While a notorious disciplinary case may produce news stories, that is rare. So in New York, as a practical matter, it’s the court’s website or nothing, unless the client has a Lexis or Westlaw account or is prepared to search for the disciplinary opinion

68. New York does not make the discipline public unless and until a court imposes public discipline. N.Y. JUD. LAW § 90(10) (McKinney Supp. 2014). According to the ABA, forty American jurisdictions open the disciplinary process to the public on a finding of probable cause or sooner. *See* CTR. ON PROF’L RESPONSIBILITY, AM. BAR ASS’N, CHART ON ACCESS TO DISCIPLINARY PROCEEDINGS (on file with author). Likewise, Rule 16 of the ABA’s Model Rules for Lawyer Disciplinary Enforcement provides: “Upon a determination that probable cause exists to believe that misconduct occurred and the filing and service of formal charges in a discipline matter, or filing of a petition for reinstatement, the proceeding is public,” with certain exceptions. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(3) (2002). Of course, the fact that discipline becomes public on a finding of probable cause is not sufficient to ensure that the public can know of it. The state must do something to facilitate the easy discovery of this information, as the text goes on to explain. *See also* Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 GEO. J. LEGAL ETHICS 1 (2007) (suggesting more access to lawyer discipline information).

69. *See supra* text accompanying notes 57–60.

70. Attorney Search, N.Y. ST. UNIFIED CT. SYS., <http://iapps.courts.state.ny.us/attorney/AttorneySearch> (search “First Name” for “Bruce” and search “Last Name” for “Young”; then follow “Find Attorney” hyperlink). The search was conducted on August 12, 2013.

on the court's own website (and the opinion is accessible there). Of course, the client could ask Young directly if he has ever been the subject of discipline (or indeed a disciplinary charge or a malpractice claim), but many clients would find asking those questions awkward. It should not be necessary.

Ronald Salomon was censured for multiple instances of neglect⁷¹ but appears as "currently registered" on the court website with no reference to the sanction.⁷² John and Lori Petrone received one year stayed suspensions for the following activity, but no one consulting the court's website would learn of it:

Respondents admit that, over a period of 30 months, they failed to maintain a balance in their attorney trust account sufficient to satisfy their obligations to their clients and other third parties, transferred funds from their attorney trust account to their law firm operating account for purposes unrelated to client matters, failed to make contemporaneous entries in client account records regarding transactions in the attorney trust account, and transferred funds from their law firm operating account to their attorney trust account, thereby commingling personal and law firm funds with client funds.⁷³

Even where a lawyer has been actually suspended for a year or more and then permitted to resume practice, a prospective client searching the lawyer's name on the state court registry of attorneys may not learn the disciplinary history. Instead, the lawyer may appear as "currently registered."⁷⁴

71. *In re Salomon*, 913 N.Y.S.2d 9, 10 (App. Div. 1st Dep't 2009).

72. *Attorney Search*, *supra* note 70 (search "First Name" for "Ronald" and search "Last Name" for "Salomon"; then follow "Find Attorney" hyperlink). The search was conducted on August 12, 2013.

73. *In re Petrone*, 927 N.Y.S.2d 265, 266 (App. Div. 4th Dep't 2011).

74. *See, e.g., In re Tenzer*, 726 N.Y.S.2d 711, 712 (App. Div. 2d Dep't 2001); *Attorney Search*, *supra* note 70 (search "First Name" for "James" and search "Last Name" for "Tenzer"; then follow "Find Attorney" hyperlink). The search was conducted on August 12, 2013. David Alan Dorfman had a couple of run-ins with the disciplinary committee and a federal judge. He was suspended for a year in 2011. *See infra* text accompanying notes 293–308. The court website lists him as "currently registered." The website does add this caution:

The Detail Report above contains information that has been provided by the attorney listed, with the exception of REGISTRATION STATUS, which is generated from the OCA database. Every effort is made to insure the information in the database is accurate and up-to-date.

The good standing of an attorney and/or any information regarding disciplinary actions must be confirmed with the appropriate Appellate Division Department. Information on how to contact the Appellate Divisions of the Supreme Court in New York is available at www.nycourts.gov/courts.

Three easy antidotes to this problem are at hand. First, the public disciplinary history of a registered lawyer should be apparent to anyone who visits the official court website and searches the lawyer's name. A conscientious consumer has the right to expect that the state court's official website is accurate. A potential client who sees only "currently registered" for a lawyer should be able safely to assume that there is no disciplinary history. Disclaimers of accuracy are unacceptable.

Second, New York court rules today require lawyers to post in their offices a prescribed Statement of Client's Rights "in a manner visible to clients."⁷⁵ There is little benefit here. Clients may never visit a lawyer's office. Even when they do, they may not have opportunity while awaiting an appointment to read the statement or to recall its contents. The rule should mandate that the statement of rights be given to the client in hard copy or electronically before the lawyer is hired. That is true today for matrimonial clients.⁷⁶ Most important, the required statement should prominently inform the client that he or she can learn the disciplinary history of New York lawyers on the website of the New York courts, whose address should be provided. The same information ought to be required in the written letter of engagement that New York lawyers are currently required to provide to most clients.⁷⁷

Even these solutions have limited value, however, because a client may not receive the statement of rights and written fee agreement until the client has already retained the lawyer. So a third way to help ensure notice of the availability of disciplinary history to a prospective client is to require all law firm websites conspicuously to include identification of the courts' website and instructions on how to get this information.

Until these three simple steps are taken, a cynic might be forgiven for concluding that the state has chosen to make it difficult for a conscientious client to learn a lawyer's disciplinary record despite the professed goal of protecting the public.

Attorney Detail, N.Y. ST. UNIFIED CT. SYS., <http://iapps.courts.state.ny.us/attorney/AttorneyDetails?attorneyId=5475450> (last updated Mar. 8, 2014). However, clicking through to these links produces no useful information.

75. N.Y. COMP. CODES R. & REGS. tit. 22, § 1210.1 (2013). I have visited many New York City law firms. The posting requirement has little value. The Statements of Client's Rights I have seen are in small type, in a frame on a table or posted on a wall, and in either event not noticeable.

76. *Id.* § 1400.2.

77. *Id.* § 1215.1(a). The letter must be provided before commencing work "or within a reasonable time thereafter." *Id.*

C. *Inconsistency in the Appellate Divisions*

The Review Department of the California Bar Court has stressed the need for consistency in sanctions. “Our intent in following the standards is to ensure consistency in attorney disciplinary cases.”⁷⁸ So has the California Supreme Court.⁷⁹ The ABA cites the need for consistency not only “within” a jurisdiction but “among” them as well.⁸⁰ New York lacks even an approximation of consistency. A lawyer’s sanction will depend on the location of his or her office.

All New York lawyers are governed by the same Rules of Professional Conduct. And the First and Second Departments define “professional misconduct” in substantively identical language.⁸¹ But disciplinary cases—and sanctions—are adjudicated separately in the four appellate divisions. No wonder then that reading hundreds of disciplinary opinions from the four appellate divisions reveals stark differences in the seriousness with which these courts regard the same

78. *In re Spadaro*, No. 08-O-14222, 2012 WL 5511723, at *7 (Cal. Bar Ct. Nov. 1, 2012) (citation omitted).

79. “To promote consistency and reduce disparity in attorney discipline, we also give great weight to the Standards for Attorney Sanctions for Professional Misconduct” *Hartford v. State Bar of Cal.*, 801 P.2d 317, 321 (Cal. 1990).

80. ABA STANDARDS, *supra* note 4, §1.3.

81. The First Department’s defines “professional misconduct,” among other things, as:

Any attorney who fails to conduct himself both professionally and personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or with respect to conduct on or after April 1, 2009, the Rules of Professional Conduct (Part 1200 of this Title), or with respect to conduct on or before March 31, 2009, any disciplinary rules of the former Code of Professional Responsibility, as adopted by the New York State Bar Association, effective January 1, 1970, as amended, or any of the special rules concerning court decorum shall be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law.

N.Y. COMP. CODES R. & REGS. tit. 22, § 603.2(a). The Second Department’s definition is:

Any attorney who fails to conduct himself, either professionally or personally, in conformity with the standards of conduct imposed upon members of the bar as conditions for the privilege to practice law, and any attorney who violates any provision of the rules of this court governing the conduct of attorneys, or any of the Rules of Professional Conduct set forth in Part 1200 of this Title, or any other rule or announced standard of this court governing the conduct of attorneys, shall be deemed to be guilty of professional misconduct within the meaning of subdivision 2 of section 90 of the Judiciary Law.

Id. § 691.2

misconduct, at least when measured by the sanctions they impose.⁸² The courts are closed universes whose opinions rarely if ever cite, let alone conform to, the sanctions imposed in the other departments. Opinions outside the First Department often do not even bother to harmonize a sanction with those in the same court's own precedent. I will focus here on the twelve downstate counties within the First and Second Departments. Although they represent fewer than one fifth of the state's sixty-three counties, they have about two thirds of the state's population.⁸³

A word of caution is in order. Because each situation can appear unique—each errant lawyer errs in his or her own way with varying mitigating and aggravating facts—a quest for consistency can seem hopeless. But that is not so. Differences are mostly inconsequential. Distinguish between the act and the actor. The acts (e.g., conversion, lying, neglect) are easy to compare. Often they are identical or nearly so. Other times they may vary, at least by degree. Neglect of ten matters is different from neglect of one. Lying under oath to a court is different from lying to an opposing lawyer. Was the conversion for self-gain and intentional or merely sloppy bookkeeping? In any event, the differences of kind and degree within each category are few and do not inhibit sensible comparison.

Variation may also be found in the circumstances of the actor. Putting aside what should count as an aggravating or mitigating factor, and the weight we give it when measured against the purposes of discipline, a small number of variables remain. Is there prior discipline or is the lawyer's professional life "unblemished?"⁸⁴ Is the lawyer re-

82. A lawyer brought before the First Department, where he had an office, even argued that more lenient Second Department cases should determine his sanction because he was admitted in the Second Department. *In re Pomerantz*, 908 N.Y.S.2d 175, 176–77 (App. Div. 1st Dep't 2010). The First Department was "not persuaded . . . that Second Department case law is controlling." *Id.* at 177. It did not say that the result would be the same in any event.

83. *Population by County in New York State, 2010 Census*, NEWSDAY, <http://longisland.newsday.com/templates/simpleDB/?pid=197> (last visited Mar. 8, 2014). See *Appellate Divisions*, NYCOURTS.GOV, <http://www.nycourts.gov/courts/appelatedivisions.shtml> (last visited Mar. 8, 2014) for the allocation of counties among the four Appellate Division Departments.

84. "Unblemished" is a word commonly found in disciplinary cases as a mitigating factor that may reduce the sanction the court would otherwise impose. See, e.g., *In re Fassberg*, 641 N.Y.S.2d 126, 127 (App. Div. 2d Dep't 1996); *In re Petrone*, 927 N.Y.S.2d 265, 266 (App. Div. 4th Dep't 2011). Additional examples appear throughout this Article.

morseful?⁸⁵ Do events in the lawyer's personal or professional life reveal extenuating explanations? We expect courts to identify aggravating and mitigating factors that have influenced their decision (and those that the parties advance but do not impress the court) and may infer that any not mentioned or not offered, did not count, or do not exist.

1. *Conversion of Client Money*

The terms "conversion" and "convert" are used to describe several distinct ethical violations. The common denominator is the misuse of money that belongs to another person, usually a client, and which the lawyer is holding in trust in a special or escrow account. But misuse can take several forms. A lawyer may mistakenly or knowingly use John's money to pay Mary and later use Sue's money to pay John. The lawyer may pay herself thinking, wrongly, that she is entitled to the money. Or she may know that she is not entitled to it. The owner of the money may suffer a loss or eventually get it back.

Take the most culpable conduct. A lawyer takes trust money for her own use, knowing that she has no right to it. In *In re Katz*, the court wrote:

We begin by observing that all six charges against respondent are amply supported both by the documentary evidence and his own admissions. Standing alone, the commingling, misappropriation, and inadequate record keeping charges warrant a lengthy suspension. However, it is well settled within this Department that, absent "exceptional mitigating circumstances" the intentional conversion of escrow funds *mandates* disbarment The "venal intent" necessary to support intentional conversion is established where, as here, the evidence shows that the attorney knowingly withdrew client funds without permission or authority and used said funds for his own personal purposes The intent to restore or the actual restoration of the converted funds is not a sufficient mitigating factor to avoid the sanction of disbarment Neither are the lack of financial loss to clients, the absence of any prior disciplinary action or full cooperation with the Committee, all of which were cited by the Referee in mitigation, sufficient to avoid disbarment in the case of intentional conversion⁸⁶

85. A finding that a lawyer is "remorseful" is also frequently cited as a basis to mitigate sanction. *See, e.g., In re Petrone*, 927 N.Y.S.2d at 266. Additional examples appear throughout this Article.

86. *In re Katz*, 969 N.Y.S.2d 8, 10 (App. Div. 1st Dep't 2013) (emphasis added) (citations omitted). Two and a half years elapsed between the filing of charges against Katz and his disbarment. *Id.* at 8–9. The court is using the term "venal intent" to distinguish those cases where conversion is unaccompanied by fraud, dishonesty, or

In the First Department, it will be quite difficult to escape disbarment for what Katz did, but not in the Second Department, which has no presumption of mandatory disbarment for the same conduct. Consider Francis Mann. He transferred more than \$5000 from his trust account to his firm account “because he needed the funds.”⁸⁷ Later, he took another \$5000 from his trust account “to repay part of a \$10,000 personal loan.”⁸⁸ Then he “transferred a total of \$45,580 from his [Interest on Lawyer Account (IOLA)] to his business account.”⁸⁹ He claimed the money “represented fees and disbursements, but he could not identify the name of the client matter to which the transfers related.”⁹⁰ In the same period, he “disbursed a total of \$25,811.67 from his IOLA [account] to himself or his law firm.”⁹¹ Again, he claimed the money represented fees and expenses but again he could not identify the client matter.⁹² In all, the court upheld ten charges against Mann, nine of which concerned trust money.⁹³ Mann had no disciplinary history and was remorseful.⁹⁴ He had taken “measures to avoid future escrow violations.”⁹⁵ No client was harmed.⁹⁶ These mitigating facts would not have prevented disbarment in the First Department. In the Second Department, Mann was suspended for two years.⁹⁷

Among other escrow account violations, Ingrid Barclay twice took escrowed money to which she was not then entitled, amounting

deceit or an intent to gain personally. *See, e.g., In re Pelsinger*, 598 N.Y.S.2d 218, 220 (App. Div. 1st Dep’t 1993). In other words, sloppy bookkeeping or a mistake.

87. *In re Mann*, 923 N.Y.S.2d 552, 553 (App. Div. 2d Dep’t 2011).

88. *Id.* at 554.

89. *Id.* An IOLA account is a lawyer’s trust account in which the lawyer deposits funds belonging to clients. The interest from the IOLA account is used to fund legal services for persons who are unable to afford a lawyer. State law in all American jurisdictions authorizes these accounts either through legislation or court rule. The practice has been upheld against a charge that this use of the interest represented a taking without just compensation. *See Brown v. Legal Found. of Wash.*, 538 U.S. 216, 220 (2003); STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 125 (9th ed. 2012).

90. *In re Mann*, 923 N.Y.S.2d at 554.

91. *Id.* at 554–55.

92. *Id.* at 555. It appears that each of these withdrawals was independent of the others.

93. *See id.* at 552–55.

94. *Id.* at 555.

95. *Id.* This is a strange observation. It would be germane if Mann’s conduct had been the result of poor recordkeeping. But the only “measure” that Mann needed to take to avoid repetition of his conduct was the exercise of self-control.

96. *Id.*

97. *Id.* More than four years elapsed between the time of Mann’s first conversion and his suspension and two and half to three years elapsed between the remaining defalcations and suspension. *Id.* at 552–54.

to tens of thousands of dollars.⁹⁸ In one instance she did so in violation of a court order.⁹⁹ The Second Department suspended her for three years.¹⁰⁰ In the First Department, she would have been disbarred.

Although discipline for conversion is comparatively sparse in the Third and Fourth Departments, each is more lenient than the two downstate courts.¹⁰¹

2. *Dishonesty in Court Matters*

Along with competence and diligence, honesty is a quality we most expect from lawyers. Indeed, a dishonest lawyer can cause more harm to more people than a lawyer who takes on one matter she is not competent to handle or is tardy in her work. The New York rules

98. *In re Barclay*, 978 N.Y.S.2d 69, 70–71 (App. Div. 2d Dep’t 2013).

99. *Id.*

100. *Id.* at 72. Barclay’s first offense occurred in 2006. *Id.* at 70. Her second offense occurred in 2010. *Id.* at 71. She was served with a petition seeking discipline in June 2012. *Id.* at 70. The suspension occurred eighteen months later. *Id.* at 69. At some point in this period, she was suspended on an interim basis. *See id.* at 72 (issuing a suspension order on December 26, 2013 with application for reinstatement allowed as early as June 27, 2016).

101. *In re Koplovitz*, two attorneys who had converted client money and engaged in conflicts of interest, among other misconduct, were suspended for one year but the suspension was stayed. 880 N.Y.S.2d 214, 215–16 (App. Div. 3d Dep’t 2009). The court cited the attorneys’ “exemplary careers and reputations.” *Id.* at 216. In another Third Department disciplinary case, Richard Di Stefano committed several disciplinary offenses, including conversion and attempting to mislead the disciplinary committee and his clients. *In re Di Stefano*, 802 N.Y.S.2d 760, 761 (App. Div. 3d Dep’t 2005). He had a disciplinary history. *Id.* But he returned all the money, expressed remorse, and had unspecified “personal issues during the relevant period.” *Id.* He was suspended for two years. *Id.* According to the Fourth Department, Andrew Cohen “misappropriated estate funds in the approximate amount of \$65,000, using the funds for personal purposes,” and then “attempted to conceal that conversion.” *In re Cohen*, 931 N.Y.S.2d 816, 817 (App. Div. 4th Dep’t 2011). For this “willful misconduct for personal gain that resulted in harm to his clients,” comingling client money with his own, and other violations, the court suspended Cohen, who had eight letters of caution, for two years. *Id.* at 818. All of these lawyers would have been disbarred in the First Department.

The Fourth Department showed even greater leniency toward a husband and wife who were law partners and who:

over a period of 30 months . . . failed to maintain a balance in their attorney trust account sufficient to satisfy their obligations to their clients and other third parties, transferred funds from their attorney trust account to their law firm operating account for purposes unrelated to client matters, failed to make contemporaneous entries in client account records regarding transactions in the attorney trust account, and transferred funds from their law firm operating account to their attorney trust account, thereby commingling personal and law firm funds with client funds.

In re Petrone, 927 N.Y.S.2d 265, 265–66 (App. Div. 4th Dep’t 2011). Citing an “unblemished” record and “remorse,” the court suspended the Petrones for one year, but the suspension was stayed subject to oversight conditions. *Id.* at 266.

underscore the need for honesty time and again. They prohibit dishonesty, misrepresentation, deceit, and fraud.¹⁰² They impose a duty to correct materially false (not merely fraudulent) statements that a lawyer or the lawyer's client or the lawyer's witnesses have made to a tribunal, even if doing so reveals client confidences.¹⁰³ And they forbid knowingly making false statements of law or fact to a third person in the course of representing a client.¹⁰⁴ A lie under oath is more culpable than a lie because it is the crime of perjury.¹⁰⁵ Given the high value of truth, we might expect that lawyers who lie in court matters will face harsh sanctions, especially if those lies are under oath.

Indeed, lawyers have often been disciplined for lies, whether to tribunals or third persons, but a review of decisions across more than five years reveals that sanctions are far more lenient in the Second Department than in the First Department—even when the lies are in connection with litigation. The Second Department imposes public censure for conduct that, judging by precedent, would lead to suspension across the East River. Here are two representative cases.

Eliot Bloom represented Angela Bristol on various criminal matters between 1999 and 2003.¹⁰⁶ Winston Bristol put up her bail money.¹⁰⁷ Angela's criminal charges were settled with a plea bargain in 2003.¹⁰⁸ Bloom then prepared two documents, which he notarized.¹⁰⁹ One document authorized Bloom to endorse Winston's name on the checks returning the bail money.¹¹⁰ Winston purportedly signed it in Bloom's presence.¹¹¹ A second document, also notarized by Bloom and purportedly signed by Winston in Bloom's presence, instructed the court clerk to send the checks to Bloom.¹¹² Bloom thereafter received two checks totaling more than \$12,000.¹¹³ Bloom "or another individual acting on his behalf" endorsed the larger of the two checks (for \$7,275) "by signing Winston Bristol's name" and the check was deposited in Bloom's business account.¹¹⁴

102. N.Y. RULES OF PROF'L CONDUCT R. 8.4(c) (2013).

103. N.Y. RULES OF PROF'L CONDUCT R. 3.3(a)–(c) (2013).

104. N.Y. RULES OF PROF'L CONDUCT R. 4.1 (2013).

105. N.Y. PENAL LAW § 210.00 (McKinney Supp. 2014).

106. *In re Bloom*, 949 N.Y.S.2d 136, 136–37 (App. Div. 2d Dep't 2012).

107. *Id.* at 137.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* The court does not say what happened to the other check.

At the time of these events, Winston Bristol was in federal custody and did not sign the two documents prepared in Bloom's presence, nor did he endorse the check that Bloom cashed.¹¹⁵ Bloom was charged with five counts of misconduct based on his "falsely" notarizing documents and submitting "falsely" notarized documents.¹¹⁶ The charges were upheld.¹¹⁷ The court found the following aggravating and mitigating factors:

In determining an appropriate measure of discipline to impose, we note the respondent's prior disciplinary history, which consists of two Admonitions and three Letters of Caution for, inter alia, engaging in conduct prejudicial to the administration of justice, law office failure, failure to fully account for funds on deposit in his attorney trust account, and failure to effectively withdraw from a matter by not taking all steps reasonably practicable to avoid foreseeable prejudice to the client. However, the respondent has recently completed, and earned a certificate for, a course entitled "Business Skills for Attorneys" and has presented numerous letters reflecting on his good works in the community.¹¹⁸

Despite the prior admonitions and letters of caution, the Second Department, in 2012, imposed merely a public censure.¹¹⁹ Its reasons for leniency are bewildering. We are told that Bloom has since earned a "certificate" in "Business Skills for Attorneys." But Bloom's violations do not appear to be a product of poor business skills. Also, the court said, Bloom had letters attesting to his good works, which are not described and which nearly all lawyers can generate. His conduct was not "venal."¹²⁰ But "venality," as used in the closely related area of escrow violations, would seem to be exactly what Bloom is guilty of. In fact, Bloom's conduct should be viewed as worse than the conduct of lawyers disciplined for escrow violations. In order to get the money, Bloom had to falsify a document and forge (or cause another to forge) Winston Bristol's name.

Contrast the sanction the First Department imposed a few months earlier on David Shearer. He engaged in "subterfuge," filed numerous false documents and made false statements (including in a deposition to the disciplinary committee investigating him), and improperly nota-

115. *Id.* at 137–38.

116. *Id.* at 138.

117. *Id.*

118. *Id.* at 138–39.

119. *Id.* at 139. Nine years passed between the misconduct and the sanction. *Id.* at 136, 139. The opinion does not explain the delay.

120. *Id.* at 139.

rized a client's signature.¹²¹ He did these things in an ultimately unsuccessful effort to avoid an agreement to share fees with a lawyer who had referred a case to him.¹²² The court imposed a suspension of two and half years, citing Shearer's "unblemished career," the fact that the misconduct was "in pursuit of legal fees" in only one matter, and the fact that it was not directed against his client.¹²³

Shearer's conduct was more culpable than Bloom's conduct. There were more sustained charges against him and his subterfuge, intended to cheat another lawyer out of a fee, continued for two years. He lied to the court and the disciplinary committee. So Bloom's discipline could plausibly have been less than Shearer's discipline. But the discrepancy between the two sanctions was disproportionate to the differences in culpability. Bloom was treated too leniently, as was Shearer.

Leniency runs deep in Second Department cases that discipline lawyers for dishonesty in court matters. It has imposed public censure even when lawyers have lied directly to the courts. In *In re Cacioppo*, a lawyer made "false or misleading statements" to the Surrogate's Court in connection with her applications for fees in three estate matters.¹²⁴ This conduct nonetheless led to a public censure because she "had shown sincere regret" and "remorse" and had "submitted evidence of her otherwise good character."¹²⁵ Remarkably, the court credited, but did not explain the basis for, the referee's conclusion that the lawyer did not "obtain a monetary advantage" through her submissions,¹²⁶ notwithstanding that she had redacted documents in each of the three matters to create the false impression that she had performed

121. *In re Shearer*, 940 N.Y.S.2d 570, 572–73 (App. Div. 1st Dep't 2012).

122. *Id.* The effort to deprive the referring lawyer of his fee also resulted in monetary sanctions against Shearer and his firm. *Id.* at 573.

123. *Id.* at 576. Why the fact that the conduct was "in pursuit of legal fees" should be a mitigating factor is simply perplexing. I think the sanction is much too lenient. The court in the civil case described Shearer's conduct as a "subterfuge." *Id.* at 572. The referee hearing the matter recommended disbarment. *Id.* at 573. A majority of the hearing panel recommended a five-year suspension with one member recommending disbarment. *Id.* Seven years elapsed between Shearer's unsuccessful effort to keep the money for himself and the suspension. *Id.* at 570, 576. It took more than five years to suspend Shearer after the trial judge on remand of the civil case imposed monetary sanctions against Shearer and his firm. *Id.* at 570, 573.

124. 900 N.Y.S.2d 75, 76 (App. Div. 2d Dep't 2010).

125. *Id.* at 79.

126. *Id.* The court also wrote that the referee "found the respondent's testimony credible with respect to her motivation in submitting the affirmations in this manner." *Id.* But the court does not tell us what those motivations were or why they served to mitigate the sanction. Six years elapsed between the first act of misconduct and the sanction.

work, for which she was seeking compensation at her hourly rate, where the work was actually performed by her associate.¹²⁷

3. *Cheating on Taxes*

The failure to file tax returns and pay taxes is a frequent basis for discipline. Sometimes the lawyer will have been convicted of a tax crime, other times not. Lawyers who are prosecuted for failure to pay state taxes are routinely allowed to plead to a state tax misdemeanor, which means they will not be automatically disbarred but will face discipline because a tax misdemeanor is considered a “serious crime”¹²⁸ warranting some discipline after a hearing. A lawyer convicted of a federal tax felony will not suffer automatic disbarment either, unless the federal felony has a state felony equivalent, which it rarely does.¹²⁹ Instead, the federal felony is also labeled a “serious crime,” warranting a hearing and discipline. Following conviction of a “serious crime,” state law requires that the lawyer “shall be suspended” until a hearing and final order, but the courts may “set aside such suspension” on their own motion or motion by the lawyer “when it appears consistent with the maintenance of the integrity and honor of the profession, the protection of the public, and the interest of justice.”¹³⁰ In the tax opinions I read, interim suspensions are sometimes imposed following conviction and sometimes they are not. I could not discern a standard to explain the discrepancy.¹³¹

Bearing on sanction is the number of years during which the lawyer failed to file or pay taxes. Opinions do not always provide this information. They may simply identify the year or years for which the lawyer has been convicted. But the conviction may be the product of a plea bargain that also satisfies failure to pay taxes in other years. Frequently, the courts do not say whether the failure to pay extended to

127. *Id.* at 76.

128. A “serious crime” is any crime of which a lawyer is convicted and which is defined as a felony under the law of another American jurisdiction, if the crime does not have a felony equivalent under New York law. The term also includes “any other crime a necessary element of which . . . includes interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitations of another to commit a serious crime.” N.Y. JUD. LAW § 90(4)(d) (McKinney Supp. 2014).

129. *Id.* § 90(4)(e).

130. *Id.* § 90(4)(f).

131. The First Department has held that interim suspension will be ordered if the attorney is “serving a term of probation or imprisonment.” *In re Shapiro*, 915 N.Y.S.2d 538, 540 (App. Div. 1st Dep’t 2011). This test is not offered as exclusive.

both state and federal taxes. They may not know or have bothered to inquire.

Another variable here is the reason for the failure. Lawyers sometimes claim that they lacked funds to pay their taxes.¹³² They may add that, lacking funds, they believed that they were not required to file a return, a claim that is impossible to take seriously.¹³³ Other lawyers can easily pay their taxes but do not and may even, during the relevant period, spend generously on luxuries or other discretionary pursuits.¹³⁴ Or the excuse may be that events in the lawyer's personal or business life so occupied his or her time and attention that filing a tax return had to be put off. The events may be illness¹³⁵ of the lawyer or others or the demands of practice.¹³⁶ This excuse, if it can mitigate the conduct at all, would seem to be limited to a failure timely to file and pay in a single year. The excuse should not be available for multi-year defaults or for failure to file and pay once the circumstances have ended.

A review of cases across four decades that discipline lawyers for failure to pay taxes reveals the Second Department is consistently more lenient than the First Department.¹³⁷ Reconciling the cases is a challenge because the First Department, here as elsewhere, offers much more detail to explain its decision and because, in doing so, it routinely compares its own precedent to those in the case before it.¹³⁸ But this challenge does not prevent comparison.

Among other differences, the First Department will presumptively suspend a lawyer who has been convicted of a tax crime and is on probation until the probation ends.¹³⁹ The Second Department has not explicitly taken this position. Probationary status aside, the First

132. See, e.g., *In re Eppner*, 874 N.Y.S.2d 435, 436 (App. Div. 1st Dep't 2009).

133. See, e.g., *In re Burns*, 672 N.Y.S.2d 321, 322 (App. Div. 1st Dep't 1998).

134. See, e.g., *In re Goldman*, 892 N.Y.S.2d 324, 326 (App. Div. 1st Dep't 2009); *In re Roisman*, 931 N.Y.S.2d 571, 575 (App. Div. 1st Dep't 2011); *In re Howley*, 893 N.Y.S.2d 1, 3 (App. Div. 1st Dep't 2009).

135. See, e.g., *In re Levitt*, 675 N.Y.S.2d 339, 340 (App. Div. 1st Dep't 1998) (obsessive-compulsive disorder and obsessive-compulsive personality disorder).

136. See, e.g., *In re Wechsler*, 886 N.Y.S.2d 35, 36 (App. Div. 2d Dep't 2009) (demands of protracted litigation).

137. I read all tax cases from 2003 through July 2013 and read a sample of tax cases for the twenty years prior to 2003.

138. Compare *In re Roisman*, 931 N.Y.S.2d at 575, with *In re Wechsler*, 886 N.Y.S.2d at 36, and *In re Dornbush*, 672 N.Y.S.2d 366 (App. Div. 2d Dep't 1998).

139. See, e.g., *In re Rakov*, 679 N.Y.S.2d 117, 118 (App. Div. 1st Dep't 1998); *In re Cohen*, 602 N.Y.S.2d 844, 845 (App. Div. 1st Dep't 1993). But see *In re Minkel*, 641 N.Y.S.2d 844, 845-46 (App. Div. 1st Dep't 1996) (imposing public censure despite the fact that the lawyer was on probation due to a conviction of a tax crime).

Department, but not the Second, will suspend a lawyer who has failed to pay taxes absent “substantial mitigating factors.”

Explaining its position, the First Department has written:

An attorney’s failure to comply with the law’s basic obligation to file tax returns is a serious offense warranting public discipline. This is because “[o]ne of the basic obligations of a citizen in a free society is to declare and pay taxes . . . [and a] lawyer—least of all, a benefactor and role model for the community—cannot purposely avoid that civic responsibility without appropriate sanction” The sanctions for an attorney’s failure to pay taxes vary, from private reprimand to suspension. While public censure is warranted when the failure to pay taxes is aberrational, suspension may be warranted when the failure to pay taxes is protracted, spanning several years, in the absence of substantial mitigating factors or when there exist substantial aggravating factors.¹⁴⁰

The court has explained what it means by “substantial mitigating factors.”

Although this Court has imposed the penalty of a public censure on other attorneys convicted of a misdemeanor for failing to file and pay state taxes, there have been substantial mitigating factors in those cases [including] “significant unforeseen family expenses coupled with a significant drop in income and extensive service” and a “dire financial situation incurred as a result of caring for parents for 20 years and compliance with a payment plan for federal tax arrearages”.¹⁴¹

Consider these representative examples. In the First Department, Joel Cohen pled guilty to a federal tax felony, which was a “serious crime” in New York because the New York equivalent was a misdemeanor.¹⁴² He was suspended for one year “or the length of his term of probation . . . whichever is longer.”¹⁴³ Richard Rehbock also pled guilty to a federal tax felony.¹⁴⁴ He was suspended for the longer of

140. *In re Roisman*, 931 N.Y.S.2d at 574–75 (citations omitted) (brackets omitted).

141. *In re Howley*, 893 N.Y.S.2d 1, 2 (App. Div. 1st Dep’t 2009) (citation omitted). *Howley* cites *In re Clark*, 870 N.Y.S.2d 353, 355 (App. Div. 1st Dep’t 2009), where the lawyer, in addition to taking care of her parents for twenty years, “was not motivated by dishonesty, a lavish lifestyle or the desire for a personal accumulation of wealth.” She also “voluntarily disclosed her failure to file federal incomes taxes to the IRS.” *Id.*

142. *In re Cohen*, 602 N.Y.S.2d at 845.

143. *Id.* Nearly three years elapsed between Cohen’s guilty plea and his suspension. *Id.* Because the court did not impose an interim suspension on conviction, he was practicing law while on federal probation for those three years.

144. *In re Rehbock*, 696 N.Y.S.2d 144, 144 (App. Div. 1st Dep’t 1999).

six months or until the conclusion of his probation.¹⁴⁵ Alexander Rosenberg did not file state returns, did not make estimated state tax payments, and did not pay federal taxes for the period of 2002–2006.¹⁴⁶ He pled guilty to a state tax misdemeanor.¹⁴⁷ He was suspended for one year.¹⁴⁸

By contrast, in the Second Department, Joseph Dornbush did not pay federal taxes for the years 1988–1991 despite income totaling more than \$800,000 for the period.¹⁴⁹ He pled guilty to a federal tax crime.¹⁵⁰ Three years later, the Second Department issued a public censure citing Dornbush's "remorse," "the period of time that has elapsed since his guilty plea," and "particularly" the "written waiver of objections to the court's imposition of a final sanction."¹⁵¹ It is not clear why this last circumstance is germane. The court is empowered to impose a sanction so there was no apparent objection Dornbush could have interposed. Characteristic of the Second Department's unfortunate practice, the opinion is very brief. It does not disclose the lawyer's federal sentence or whether he was on probation.¹⁵²

Lawrence Wechsler pled guilty to two state tax misdemeanors for failure to file state returns for 2003 and 2004.¹⁵³ He admitted a failure to file returns for five years.¹⁵⁴ He was publicly censured.¹⁵⁵ In mitigation, the court cited his "remorse," the fact that "he called attention to himself" before being notified of an investigation, and the fact that during the five year period he was involved "in a protracted patent infringement litigation [that] completely overwhelmed his financial resources."¹⁵⁶

Melvyn Kreines pled guilty to a state tax misdemeanor.¹⁵⁷ He admitted that "with intent to evade paying taxes, [he] failed to file a New York State tax return for the tax years 1986 and 1987."¹⁵⁸ In

145. *Id.* at 146. Rehbock pled guilty in May 1997. *Id.* at 145. He was not temporarily suspended and practiced law while on probation for nearly two and a half years.

146. *In re Rosenberg*, 918 N.Y.S.2d 20, 21 (App. Div. 1st Dep't 2011).

147. *Id.*

148. *Id.* at 22.

149. *In re Dornbush*, 672 N.Y.S.2d 366, 367 (App. Div. 2d Dep't 1998).

150. *Id.*

151. *Id.*

152. *Id.* We can infer from the opinion that Dornbush was suspended on an interim basis following his conviction since the court "reinstated" Dornbush to practice, but we do not know the period of suspension. *Id.*

153. *In re Wechsler*, 886 N.Y.S.2d 35, 35 (App. Div. 2d Dep't 2009).

154. *Id.* at 36.

155. *Id.*

156. *Id.*

157. *In re Kreines*, 583 N.Y.S.2d 20, 21 (App. Div. 2d Dep't 1992).

158. *Id.*

mitigation, the court cited the fact that Kreines “subsequently filed and paid all New York State taxes due and that his misconduct did not involve misuse of client’s funds or any other betrayal of a client’s trust.”¹⁵⁹ In other words, the fact that Kreines did not do something else, wholly unrelated to his misconduct, was cited to mitigate his sanction for the crime he did commit. The court imposed a public censure.¹⁶⁰

Robert Fassberg filed a “false New York State and City Resident Income Tax Return” for 1992 and was convicted of a state misdemeanor.¹⁶¹ The court cited his “character references,” his “remorse,” and his “unblemished record” and censured him.¹⁶²

From these cases and others,¹⁶³ the inference is compelling, in fact inescapable, that the Second Department’s presumptive sanction for non-payment of taxes, whether or not resulting in a conviction and apparently without regard to the amount of the unpaid taxes, is censure, while the First Department’s presumed sanction, as it has held, is suspension. The Second Department will impose suspension for non-payment of taxes if the circumstances are especially aggravating.¹⁶⁴

159. *Id.*

160. *Id.* Nearly two years elapsed between Kreines’s guilty plea and his sanction even though the plea conclusively established the misconduct. *Id.*

161. *In re Fassberg*, 641 N.Y.S.2d 126, 127 (App. Div. 2d Dep’t 1996).

162. *Id.*

163. Other cases include, for example, a lawyer who knowingly assisted his client in seeking to evade taxes. When representing his client on the sale of realty, attorney Rosales “knew that the purpose of paying part of the actual purchase price in cash [i.e., \$30,000] was to assist his client in evading payment of required taxes.” *In re Rosales*, 598 N.Y.S.2d 302, 303 (App. Div. 2d Dep’t 1993). In issuing a public censure, the court wrote that Rosales had an “unblemished” career and did not personally profit. *Id.* at 304. Also, his client was difficult. *Id.* at 303–04. The mitigating importance of this last observation is hard to fathom. Ten years elapsed between the underlying misconduct and the censure. *Id.* at 302–03. The court does not say when the charges were filed.

164. *See, e.g., In re Pirro*, 759 N.Y.S.2d 527, 528–29 (App. Div. 2d Dep’t 2003) (three-year suspension on top of two-year interim suspension where lawyer was convicted after a federal trial of conspiracy, four counts of tax evasion, and twenty-nine counts of tax fraud, and sentenced to twenty-nine months incarceration); *In re Tartaglia*, 883 N.Y.S.2d 561, 562–63 (App. Div. 2d Dep’t 2009) (one-year suspension following state tax misdemeanor conviction where aggravating factors included prior admonition and three letters of caution).

III.

SANCTIONS IN THE FIRST DEPARTMENT ARE
UNPREDICTABLE AND OFTEN DO NOT
PROTECT THE PUBLIC

A study of disciplinary sanctions must ask at least three overlapping questions. First, does the sanction imposed in a particular case fulfill the goals of discipline, neither too lenient nor too harsh? Second, why do lawyers suffer a greater or lesser sanction for conduct that is substantially the same? Do aggravating and mitigating circumstances persuasively explain the disparities? Third, to what extent is the discrepancy in sanction for different categories of misconduct defensible? For example, should nonpayment of taxes be treated more leniently than conversion of client funds and if so, how much more? In both instances, the lawyer is in effect taking or keeping money that does not belong to him and in the former instance but not the latter, the lawyer may have been convicted of a crime.

I argued above¹⁶⁵ for reforms that would increase the likelihood that prospective clients can learn a lawyer's disciplinary history, recounted the unacceptable delay between misconduct and discipline, and described inconsistencies in sanctioning decisions between the First and Second Departments. Here, I look at disciplinary cases in the Appellate Division, First Department, and conclude that there are unacceptable disparities in sanctions even within a single New York Department. That situation is in part a consequence of efforts to make fine distinctions among periods of suspension. These distinctions do not further the goals of discipline, can be counterproductive, and create a misleading impression of precision. While the focus here is on New York cases, the lessons are equally applicable to all jurisdictions. Based on the disparities in periods of suspension in the First Department, I will argue in my Conclusions for a further reform. The Department should eliminate the different periods of suspension, when suspension is called for, in favor of suspension (when suspension is called for) of six months, after which a lawyer can seek readmission, with the same burden of proof that character committees demand of new bar applicants. To ensure consistency, the readmitting body should have statewide jurisdiction.

I set out the facts and sanctions in First Department decisions, divided among the several types of wrongdoing that account for nearly all lawyer discipline. I believe these decisions are representative. Because the First and Second Departments operate independently and

165. See *supra* Part II.B.

because the Second Department is more lenient than the First Department for substantially similar conduct, I have chosen to focus on the First Department.

A. *Misconduct Outside Law Practice*

Conduct unrelated to law practice may or may not be criminal and if criminal may or may not have led to prosecution. The conduct may or may not reveal a specific character trait, like honesty, that the public and the courts expect of lawyers. On the other hand, criminal conduct of any kind shows disrespect for the law, which the public may view as contrary to the office of attorney.

I. *Violence*

Michael Paul Zulantt was admitted to the New York bar in 2006.¹⁶⁶ In 2007, he and his former girlfriend argued.¹⁶⁷ She was seeing another man.¹⁶⁸ They were in her apartment.¹⁶⁹ Zulantt “repeatedly” threw her to the ground and slapped her about the face.¹⁷⁰ She required medical attention.¹⁷¹ He called her a “slut” and a “whore.”¹⁷² He smashed her Cartier watch, filled a purse with water, punctured a painting, and damaged a couch with water and oil.¹⁷³ Zulantt eventually pled guilty to third-degree assault, a misdemeanor.¹⁷⁴ He was sentenced to ten months in jail and served six.¹⁷⁵

In mitigation, Zulantt tendered a psychological explanation. His psychotherapist, first consulted after his arrest, said the conduct was “a result of an ‘intermittent explosive disorder.’”¹⁷⁶ As with psychological defenses generally, the label “disorder” might be seen to imply that Zulantt’s behavior was not a manifestation of his true self and

166. *In re Zulantt*, 939 N.Y.S.2d 338, 339 (App. Div. 1st Dep’t 2012).

167. *Id.*

168. *Id.* at 340.

169. *Id.* at 339.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* Rare for a disciplinary case, the event and discipline garnered media attention. The press reported that Zulantt, a graduate of the University of Michigan Law School, was 27 or 28 at the time of the incident and a Cravath, Swaine & Moore associate. See Barbara Ross, *Thug Lawyer Who Beat up Gal Pal Will Be Outta Practice When He Gets License Back — in 3 Years*, N.Y. DAILY NEWS, Feb. 9, 2012, <http://www.nydailynews.com/news/thug-lawyer-beat-gal-pal-outta-practice-license-back-3-years-article-1.1020182>.

176. *In re Zulantt*, 939 N.Y.S.2d at 340.

therefore he was less culpable. Zulantd suffered from faulty wiring, not bad character.

The court treated this diagnosis respectfully, but rejected it as a mitigating factor because “respondent engaged in a *calculated* pattern of cruelty” that continued for more than forty-five minutes.¹⁷⁷ “Calculated” and “explosive” can’t both be right in this view. The court assumed without explanation that the length of Zulantd’s tirade necessarily contradicted the expert’s explanation. The court also cited an earlier explosive episode with the same victim,¹⁷⁸ but that could as well be seen to confirm, not contradict, the diagnosis.

Why should it even matter whether Zulantd suffered from “intermittent explosive disorder,” assuming the diagnosis is correct and not merely a way to couch the incident in therapeutic language? The court was deciding a disciplinary sanction, not a jail sentence. If this were a criminal case, a court might see Zulantd as morally less culpable. But the purpose of professional discipline, the court wrote, is “not to punish the respondent attorney, but rather to determine the fitness of an officer of the court and to protect the courts and public from attorneys that are unfit for practice.”¹⁷⁹ Zulantd’s “disorder,” even if credited, should then be viewed as an aggravating, not a mitigating, factor, or at least a neutral factor, because it implies that Zulantd’s inability to control himself can lead to prolonged violence.

The referee and the reviewing panel recommended a sixty-day suspension after finding that Zulantd’s conduct reflected adversely on his “fitness” as a lawyer.¹⁸⁰ The prosecuting agency asked the court to suspend Zulantd for one year.¹⁸¹ More than three years after Zulantd pled guilty, the court suspended him for three years.¹⁸² Each sanction seems to reflect different views of the “seriousness” of Zulantd’s conduct.¹⁸³ In the court’s view, the conduct rendered him “unfit” to be a lawyer for not less than three years.¹⁸⁴ The court did not explain why

177. *Id.* at 340–41 (emphasis added).

178. *Id.* at 341.

179. *Id.* at 340 (citation omitted).

180. *Id.* at 340. The New York Rules of Professional Conduct have since replaced the Code of Professional Responsibility under which Zulantd was disciplined but the two provisions cited in his case are not changed. See N.Y. RULES OF PROF’L CONDUCT R. 8.4(b), (h) (2013).

181. *In re Zulantd*, 939 N.Y.S.2d at 340.

182. *Id.* at 341.

183. The court used the word “seriousness.” *Id.*

184. The First Department’s rules provide that a lawyer suspended more than six months may petition for readmission through a more demanding process than is imposed on lawyers suspended for six months or less. See N.Y. COMP. CODES R. & REGS. tit. 22, § 603.14 (2013).

the conduct meant he was unfit. It offered no reason to conclude that Zulandt's behavior would spill over into law practice and probably it could not do so. The court also did not attempt to reconcile its choice of a three-year suspension with a prediction of when Zulandt might again be fit to practice. Why three years and not one or five?

The sanction is better read as a statement to the public that there is some conduct the court will not tolerate in members of the bar, at least not without a three-year timeout. As such, the term of suspension, calibrated to the "seriousness" of the conduct as it was and coming three years after the guilty plea, makes most sense if viewed as the amount of punishment the court believes the public will expect, notwithstanding the court's disclaimer of a punitive purpose.

Oddly, the *Zulandt* court did not cite its own decision six weeks earlier in *In re Leonov*, which also involved an act of violence.¹⁸⁵ The sanction in *Leonov* cannot be reconciled with Zulandt's sanction.

On June 1, 2009, in New York County, Criminal Court, [Leonov] pleaded guilty to assault in the third degree in violation of [a section of the Penal Law constituting] a class A misdemeanor.

That same day he was sentenced to a one-year conditional discharge, one day of an anger management program, and ten days of community service. Respondent did not appeal and has satisfied all the terms of his sentence.

Respondent's criminal conviction arose from an altercation with a taxi cab driver who refused to take respondent and his fiancée (now wife) from lower Manhattan to Brooklyn on Halloween night 2008. The disagreement ended when respondent kicked the driver in the head, knocking him to the ground causing injuries to his mouth, nose, head, face and body, which required medical treatment and surgery to the driver's face and mouth. Respondent was arrested at the scene.¹⁸⁶

The court imposed a public censure, reasoning as follows: The assault committed by respondent was disturbing and violent. However, weighing the aberrational nature of the incident with the evidence in mitigation, which includes respondent's youth (he was 26-years-old at the time of the incident and had only been admitted to the bar for less than six months), his genuine remorse and acceptance of responsibility, the attestations as to his good character, his full cooperation with the Committee, and the fact that the mis-

185. 936 N.Y.S.2d 137 (App. Div. 1st Dep't 2011).

186. *Id.* at 137–38.

conduct did not occur in the practice of law, the sanction of censure is appropriate.¹⁸⁷

Both Zulandt and Leonov were young lawyers. The conduct of neither occurred in law practice, nor does the conduct reveal a character trait, like honesty, expected in the actual performance of legal work. The conduct of both required medical attention for the victim. Zulandt appeared at his hearing and introduced mitigating evidence. Leonov did not appear and offered no evidence.¹⁸⁸ Both pled guilty to a misdemeanor. In *Zulandt*, the court rejected recommendation of a lower sanction. In *Leonov*, the hearing panel recommended a public censure, which the court accepted.¹⁸⁹ The court's description of Leonov's assault is uncharacteristically brief for the First Department. The record of the criminal prosecution was available, so greater detail was possible. But greater detail might have made it difficult to defend a public censure. While a more lenient sanction for Leonov than for Zulandt is defensible,¹⁹⁰ the discrepancy—censure compared to a three-year suspension—is not. Or, at the very least, the discrepancy required explanation. The failure to cite *Leonov* made it possible for the court to ignore the different treatment. If put side by side, the brevity of the *Leonov* opinion compared with *Zulandt's* lengthy description of the lawyer's violent behavior allowed the court to make the different results seem less discrepant on a casual reading.

It will be useful to contrast the sanction in *Zulandt* with sanctions in the cases that follow, especially those evincing dishonest conduct, or conduct in law practice, or both.

187. *Id.* at 138. Although *Zulandt* did not cite *Leonov*, it did cite *In re Jacoby*, 926 N.Y.S.2d 480 (App. Div. 1st Dep't 2011). See *In re Zulandt*, 939 N.Y.S.2d at 341. The lawyer in *Jacoby* served a year in jail following a plea to a Virginia felony of "unlawful wounding." 926 N.Y.S.2d at 481–82. The respondent had assaulted his wife. *Id.* at 481. She required medical attention. *Id.* He had assaulted her twice before. *Id.* at 482. On one of those occasions, he pled guilty to simple assault and was publicly censured. *Id.* Notwithstanding that the "physical aggression" did not occur in the respondent's "professional life, it cannot be overemphasized that his abuse of his spouse reflects adversely on his fitness to practice law." *Id.* at 483. The court imposed a three-year suspension. *Id.* Given *Jacoby's* prior discipline for the same conduct and a Virginia felony conviction, it is hard to see why his sanction is equal to, not greater than, *Zulandt's*.

188. *In re Leonov*, 936 N.Y.S.2d at 138.

189. *Id.*

190. *Zulandt* assaulted his girlfriend on a prior occasion. This time he also destroyed property. His assault lasted longer than *Leonov's* assault.

2. Dishonesty

Fitness certainly demands honesty. Yet when a lawyer's conduct though unrelated to law practice reveals dishonesty, including a willingness to lie to or deceive another for self-gain, the sanction has been far more lenient than in *Zulandt*, where the basis for a finding of unfitness was assaultive conduct. This is true even if the dishonest conduct is criminal, has led to a misdemeanor conviction, and harms others. Measured against the goals of protecting the public and the administration of justice, and of encouraging public confidence in the bar, this discrepancy makes no sense.¹⁹¹

Charla Bikman's sister Minda died in 1997.¹⁹² For the next two years Bikman lived in Minda's rent-controlled apartment and paid the rent with a check containing Minda's name and "purportedly signed by Minda Bikman."¹⁹³ She did not inform the owner of her sister's death.¹⁹⁴ When a rent-controlled tenant dies, the owner may be able to raise the rent to the market rate, which is usually much higher. The hearing panel found that Bikman "orchestrated a scheme to deceive the owner to believe that her sister was alive and residing in the loft."¹⁹⁵ In 1999, the landlord learned of Minda's death.¹⁹⁶ He began eviction proceedings, which took some time. Bikman moved out in 2001.¹⁹⁷

The court held that Bikman's conduct, although unrelated to law practice, could be the basis for discipline because it "tends to reflect adversely on the legal profession as a whole."¹⁹⁸ The legal profession, it wrote, "needs the respect and confidence of society if it is to play its critical role in sustaining the rule of law and the concept of justice upon which our free and democratic society depends."¹⁹⁹

Bikman's mitigating evidence consisted of her "unblemished" twenty-two years at the bar "for the most part representing the poor and unprotected as [appointed] counsel and otherwise."²⁰⁰ On the other hand, she showed no remorse and the hearing panel found these additional aggravating facts:

191. The failure to pay taxes falls within the category of dishonest conduct unrelated to law practice, but is treated separately below. See discussion *infra* Part III.A.3.

192. *In re Bikman*, 760 N.Y.S.2d 5, 7 (App. Div. 1st Dep't 2003).

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 8.

199. *Id.*

200. *Id.* at 7.

[Bikman] refused to admit that she did anything legally, morally or ethically wrong. Moreover, respondent refused to cooperate with the Committee and in fact hindered the Committee's investigation, by giving evasive answers to the charges, refusing to comply with and indeed moving to quash one of the subpoenas issued by the Committee, invoking her Fifth Amendment rights during a deposition, commencing a libel action against the Housing Court judge who had ruled against her, filing a written complaint against the judge with his supervising judge, and making repeated ad hominem attacks against the owner of the loft, thus demonstrating her "total disdain" for the proceeding.²⁰¹

How should Bikman's sanction compare with Zulandt's sanction? Who poses a greater threat to clients, public confidence in the bar, and the administration of justice?

The court suspended Bikman for eighteen months, half of Zulandt's suspension.²⁰² The court seemed to believe that Bikman's suspension was severe. In justification, it emphasized that Bikman "does not admit to doing anything legally, morally or ethically wrong" and that her "misconduct was aggravated by her failure to cooperate with and her efforts to impede the Committee's investigation."²⁰³ It contrasted her response to that of a lawyer who had written worthless checks and who received a public censure after the lawyer admitted "that he conducted himself 'lamentably,' threw himself upon the leniency of the Court, and made good on the worthless checks."²⁰⁴

Others who have acted dishonestly outside law practice have won even greater leniency compared to Zulandt, although they, unlike Bikman, were convicted of misdemeanors. A lawyer was convicted of "giving unlawful gratuities" to a police officer who had arrested him for DUI.²⁰⁵ He was sentenced to eight weekends of imprisonment and three years of probation.²⁰⁶ In mitigation, he introduced the testimony of "his treating psychologist" among other evidence.²⁰⁷ He received a public censure.²⁰⁸

Impossible to understand, whether or not contrasted with *Zulandt*, was the court's sanction in *In re Dear*.²⁰⁹ Dear was stopped for

201. *Id.*

202. *Id.* at 9.

203. *Id.* at 8-9.

204. *Id.* at 8.

205. *In re Krishnan*, 950 N.Y.S.2d 135, 136 & n.1 (App. Div. 1st Dep't 2012).

206. *Id.* at 136.

207. *Id.*

208. *Id.* at 137.

209. 934 N.Y.S.2d 141 (App. Div. 1st Dep't 2011).

speeding in New Jersey.²¹⁰ Six days later he wrote a letter to the traffic court in which he said he was a New York lawyer and falsely accused the trooper who stopped him of calling him a “jew kike.”²¹¹ The stop was audio-and-video-recorded but Dear did not know this.²¹² His letter led to an investigation of the trooper and a hearing.²¹³ The officer conducting the investigation of the trooper phoned Dear, who ignored the call for two months.²¹⁴ When a partner at Dear’s firm directed him to respond, Dear adhered to his accusation against the trooper and accused him of “a demeaning attitude,” which was also belied by the recording.²¹⁵ The trooper was exonerated.²¹⁶

After learning of the taping, Dear admitted that the officer did not use the religious slur but continued to criticize the trooper’s “demeanor.”²¹⁷ Still later, he withdrew that claim, too.²¹⁸ Dear’s treating psychiatrist testified that Dear was “suffering from ‘borderline personality disorder’” and related maladies.²¹⁹ These were meant to mitigate Dear’s culpability. But since the purpose of discipline is not punishment, but the protection of the public and the administration of justice, we might ask whether borderline personality disorder and “related maladies” should rather be seen as aggravating factors. The court’s opinion does not conclude that Dear’s psychological problems had ended.

The court wrote:

Here, respondent cavalierly attributed anti-Semitic slurs to an innocent person in a manner which could have had devastating consequences to that person’s career. This act alone warrants a harsh sanction, not to mention that it was done to gain an advantage in an administrative proceeding. Notwithstanding the mitigating evidence and respondent’s apparently sincere remorse, his behavior was reckless and reflects poorly on the bar.²²⁰

If Bikman’s suspension was eighteen months and Zulandt’s suspension was three years, what is the proper sanction for a lawyer who makes (and for months adheres to) a false allegation of a religious slur to beat a traffic ticket, thereby causing a ten-month investigation of

210. *Id.* at 142.

211. *Id.*

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 142–43.

216. *Id.* at 143.

217. *Id.*

218. *Id.*

219. *Id.* at 143–44.

220. *Id.* at 145.

the innocent trooper who stopped him, and only retracts his accusations in the face of incontrovertible proof? The court suspended Dear for six months.²²¹ Surely the lack of probity that Dear exhibited offers greater reason for concern about his fitness as a lawyer than does Zulandt's conduct. Zulandt's conduct may have justified the length of his suspension, but Dear's and (Bikman's) behavior required suspension at least as long if not longer. It is not possible persuasively to reconcile these results.

The court website shows no discipline for either Bikman or Dear.

3. *Cheating on Taxes*

Zulandt's misconduct did not occur in law practice. He was violent, not dishonest. He pled to a misdemeanor, bargained down from a felony. His conduct was not continuous but sporadic, or as his expert described it, "intermittent." The record contains two such events. The court rejected his claimed "disorder" as a mitigating fact.²²²

Now let us alter the variable. Imagine conduct that is also not related to law practice, that is also criminal (and may have led to conviction), but which *does* reveal dishonesty for personal gain, and which is not intermittent but continuous, perhaps across many years. A tax cheat, for example. The lawyer who cheats on taxes may also cite a psychological disorder. Should her sanction be more or less severe than Zulandt's considering the goals of lawyer discipline? Should cheating the government of tax money, perhaps tens or hundreds of thousands of dollars of tax money, be treated differently from converting trust funds? In the First Department, it is treated more leniently, even when the cheating goes on for years, the lawyer was able to pay the taxes, and substantial sums went unpaid. The First Department, which will almost always disbar a lawyer who converts client money, has said that the "typical sanction for an attorney convicted in a felony tax case is a suspension ranging from six month to one year."²²³ Yet some lawyers escape with a public censure.

A year before Zulandt's case, the same court disciplined Alexander Peter Rosenberg, who had paid no state or federal taxes for five years (2002–2006).²²⁴ Rosenberg pled guilty to a state misde-

221. *Id.* It took nearly three and a half years between the filing of the complaint in July 2008 and the imposition of discipline in December 2011. *Id.*

222. *See In re Zulandt*, 939 N.Y.S.2d 338, 341 (App. Div. 1st Dep't 2012).

223. *In re Rehbock*, 696 N.Y.S.2d 144, 145 (App. Div. 1st Dep't 1999) (citation omitted). There were two and a half years between the guilty plea and the suspension. *Id.* at 145–46.

224. *In re Rosenberg*, 918 N.Y.S.2d 20, 21 (App. Div. 1st Dep't 2011).

meanor.²²⁵ He then paid his back taxes, interest and penalties of about \$1.35 million.²²⁶ Rosenberg had the means to pay his taxes. In the years he failed to file he earned between \$363,992 and \$597,989.²²⁷ Rosenberg had received IRS notices “but he just didn’t do anything further with them.”²²⁸ A hearing panel noted in aggravation that Rosenberg “did nothing to rectify his tax situation until he was caught red-handed and without a glimmer of a defense to felony charges.”²²⁹ The panel recommended an eighteen-month suspension.²³⁰ The court suspended Rosenberg for one year citing in mitigation the fact that he eventually did pay his taxes (of course he did), his thirty-six-year legal career “without blemish,” his charitable contributions during the years he did not pay his taxes, and his cooperation and remorse.²³¹

There are many cases like *Rosenberg*. Ronald Goldman pled guilty to failure to file a state return for one tax year.²³² He did not “dispute that he failed to file both federal and state tax returns” from 2000–2007.²³³ There were federal tax issues as well, but the court does not explain them.²³⁴ However, it cites the following aggravating facts:

Specifically, respondent, while receiving annual compensation in excess of \$300,000 a year, spent substantial sums on his restaurant investment and engaged in a pattern of gambling on horses for over ten years. Particularly disturbing is respondent’s failure to comply with the order of the sentencing court to establish a payment plan for about a year. He was unable to explain his noncompliance, attributing it to his memory failure due to his [brain] aneurism. In any event, the picture that emerges is that respondent, without any justification, disregarded his obligation to pay taxes.²³⁵

Goldman was suspended for one year.²³⁶ Another lawyer whose failures to file and pay taxes spanned *twelve* years and who pled guilty to a state misdemeanor was suspended for just six months.²³⁷ In mitigation the court could cite only the lawyer’s “complete candor” and

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 22.

232. *In re Goldman*, 892 N.Y.S.2d 324, 325 (App. Div. 1st Dep’t 2009).

233. *Id.*

234. *Id.* at 326.

235. *Id.*

236. *Id.* at 327. There was a two-and-a-half year delay between guilty plea and suspension. *Id.* at 325, 327.

237. *In re Burns*, 672 N.Y.S.2d 321, 322 (App. Div. 1st Dep’t 1998).

his “acknowledgment of needful corrective action.”²³⁸ It trivializes the seriousness of the conduct and the goals of discipline to mitigate the sanction because the lawyer conceded a point that was irrefutable.

Elsewhere, the court has been even more lenient. In *In re Levitt*,²³⁹ the lawyer had been convicted of a state tax misdemeanor for 1992 and federal tax crimes for 1989–1991. He claimed that his failures were the result of “two mental disorders, obsessive-compulsive disorder and obsessive-compulsive personality disorder.”²⁴⁰ The court accepted that the crimes were a consequence of these disorders and censured Levitt.²⁴¹

The lawyer in *In re Everett* failed to pay federal taxes of \$244,000 and state taxes of almost \$40,000.²⁴² He also relied on his obsessive-compulsive disorder.²⁴³ He had been convicted of a federal misdemeanor for two tax years but in disciplinary proceedings it emerged that he had failed to file tax returns for nine years.²⁴⁴ Although he had “substantial gross income,” he took no steps to rectify the situation until an IRS investigator visited him.²⁴⁵ Everett was publicly censured.²⁴⁶ While it seems plausible that failure to file a return and pay taxes for one year may be traced to a psychological problem in the same year, as was true in *Levitt*, it is simply hard to accept that an obsessive-compulsive disorder can explain a failure to pay taxes for nine years, as in *Everett*, during which time the lawyer suffered from no other apparent legal or professional lapses.

It is perplexing that theft from the government—often of large sums—warrants such leniency when the essential element of a tax crime is also an essential character requirement for lawyers—honesty and compliance with legal obligations. And it bears repeating that, unlike Zulandt’s “explosive disorder,” these crimes often continued

238. *Id.*

239. 675 N.Y.S.2d 339, 340 (App. Div. 1st Dep’t 1998).

240. *Id.*

241. *Id.*

242. 674 N.Y.S.2d 45, 46 (App. Div. 1st Dep’t 1998).

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* Nearly two years elapsed between Everett’s federal sentence and state guilty plea and the imposition of sanction. *Id.* The court held that the obsessive-compulsive disorder could not justify a private reprimand, which was what Everett requested. *Id.* Public censure was also the sanction for a lawyer who had failed to pay federal and state taxes for five years and pled guilty to a state misdemeanor for two of these years. *In re Eppner*, 874 N.Y.S.2d 435, 436, 439 (App. Div. 1st Dep’t 2009). More than two years passed between the guilty plea and the censure. *Id.* For none of the lawyers whose tax crimes led to discipline and who are still in practice does the fact of that discipline appear on the court website.

for many years and required far more calculation than the court found in Zulandt's case. Often the lawyers have the money to pay. Some lawyers took (or began to take) corrective action only after being caught, and they then expressed remorse. Perhaps the explanation lies in the fact that the lawyers' dishonesty did not seep into their law practices, but neither did Zulandt's violent temper taint his law practice. Or perhaps the explanation is different: while the courts don't condone tax cheating, they may be able to understand it, and so are more inclined toward leniency. Violence, however, as in *Zulandt*, is alien to most of us.

B. *Misconduct in Law Practice*

1. *Conversion of Client Money*

As stated,²⁴⁷ the First Department has taken the position that a lawyer who takes money belonging to clients or others should be presumptively disbarred absent "exceptional mitigating circumstances." Jeffrey Paul Squitieri converted client money to his own use.²⁴⁸ The opinion does not tell us how much. But it does lay down a rather strict rule:

Respondent's protestations that he lacked venal intent because he did not intend to permanently deprive his clients of their funds were properly rejected. This Court has repeatedly held that all that is necessary to sustain a violation of [the relevant disciplinary rule], and the necessary "venal intent," is evidence that the attorney knowingly withdrew IOLA or escrow funds, without permission or authority, and that he used said funds for his own purposes. Whether an attorney intended to repay, or actually repays, converted funds does not negate a finding of venal intent.²⁴⁹

Squitieri had a medical excuse. He "argued that his judgment and thought processes were so negatively impacted by his psychiatric disorders and alcoholism triggered by a divorce that he could not have formed the venal intent necessary to sustain the disputed charges."²⁵⁰ The court was not impressed. Although it had "no doubt" that Squitieri's "alcoholism and his impaired mental health contributed to his behavior," it rejected the testimony of his expert witnesses "that he was incapable of making reasoned intelligent decisions."²⁵¹ On sanction, the court wrote that "intentional conversion of escrow funds re-

247. See *supra* text accompanying note 86.

248. *In re Squitieri*, 929 N.Y.S.2d 238, 239 (App. Div. 1st Dep't 2011).

249. *Id.* (citations omitted).

250. *Id.*

251. *Id.* at 239–40.

quires disbarment absent ‘extremely unusual mitigating circumstances,’” which Squitieri could not prove.²⁵²

We might ask, given the purposes of discipline, why it should matter whether or not Squitieri’s medical proof could explain his conduct. Once again, an offer of medical evidence of some psychological malady seems to suggest that the lawyer himself did not do the bad thing. The disease did. But since the purpose of discipline includes protection of the public, clients need to be protected from whatever it is in the lawyer’s psyche that has led to the conversion. We can say at one and the same time that “we’re sorry about the condition that made it so difficult for you to control yourself, but you are no less a threat to clients and others despite (or maybe even because of) the condition.”

Presumptive disbarment for conversion, even of modest sums on a single occasion,²⁵³ is a severe sanction. It can be justified, however. Lawyers often hold large sums of other people’s money to which they have easy access. Many transactions depend on these arrangements. Client trust is essential. Presumptive disbarment is a powerful deterrent against any temptation toward knowing conversion. What is difficult to understand is the comparative leniency shown toward lawyers who cheat on taxes even for great sums, who lie in court matters, or rob from clients in other ways,²⁵⁴ or who are otherwise dishonest in practice, as next discussed.

2. Dishonesty in Court Matters

Conduct prejudicial to the administration of justice is unethical. It includes lying under oath (or facilitating the lies of others), fraud on a court, and knowingly making false statements to the court.²⁵⁵ While honesty generally is expected, honesty before courts is central to the

252. *Id.* at 240.

253. The court has repeatedly emphasized the presumption of disbarment without qualification by reference to the amount taken or the number of instances. *See, e.g., In re Katz*, 969 N.Y.S.2d 8, 10 (App. Div. 1st Dep’t 2013). Designating an amount of money below which disbarment was not presumptive would appear to be arbitrary. Whether taking more causes more harm than taking less depends on whose money it is. It can even be seen as a tolerance for small thefts.

254. Despite its presumptive disbarment rule for lawyers who take client money from a trust account, the First Department is much more lenient toward lawyers who find other ways to take client money improperly. Over a ten year period, Ralph Lerner charged clients about \$50,000 in disbursements for car services used by himself and his family. *In re Lerner*, 973 N.Y.S.2d 218, 219 (App. Div. 1st Dep’t 2013). The court suspended him for one year. *Id.* at 221. It cited other cases in which lawyers received one year suspensions for overbilling clients or billing clients for personal expenses. *Id.* at 220. If these lawyers had taken equivalent sums from a trust account, they would have been disbarred. The different treatment is hard to understand.

255. N.Y. RULES OF PROF’L CONDUCT R. 3.3(a), 8.4(b)–(d) (2013).

office of attorney. But the First Department has often gone easy on lawyers who lie in court matters, even where the victims are not only the courts (or the administration of justice), but others as well.

The federal court in Manhattan disciplined Richard Pu after a district judge found that Pu “[had] intentionally made numerous false statements to the Magistrate Judge in open court, as well as to this Court and to opposing counsel”²⁵⁶ The federal discipline was a mild six-month suspension.²⁵⁷ In reciprocal discipline, the First Department cited its own precedent “involving attorneys who . . . made misrepresentations to a court,” and suspended Pu for (an almost as mild) one year for “his admitted actions of making false representations to the court and knowingly pursuing a frivolous” case.²⁵⁸ In mitigation, Pu argued that he was “very sorry for what he did,” and had an “unblemished record.”²⁵⁹

The New Jersey disciplinary authority found that William Stahl had violated that state’s rules by “falsely testifying before the trial judge [and] by presenting false testimony” of a client and suspended him for one year.²⁶⁰ The First Department also suspended him for a year.²⁶¹

Leniency is apparent as well outside reciprocal discipline. A hearing panel found that Richard Caro “intentionally lied under oath” in a document and “destroyed important evidence.”²⁶² The court distinguished cases in which lawyers have been suspended for one year for lying under oath and fabricating documents. What is the difference? The court explained that Caro lied in a sworn *document* and he *destroyed* evidence.²⁶³ He did not lie in *testimony* or *fabricate* evidence.²⁶⁴ Caro was suspended six months.²⁶⁵ So was Robert Walters,

256. *In re* Pu, 826 N.Y.S.2d 43, 45 (App. Div. 1st Dep’t 2006).

257. *Id.* at 47.

258. *Id.* at 47–49.

259. *Id.* at 48.

260. *In re* Stahl, 895 N.Y.S.2d 338, 343 (App. Div. 1st Dep’t 2010).

261. *Id.* at 345.

262. *In re* Caro, 945 N.Y.S.2d 285, 286 (App. Div. 1st Dep’t 2012).

263. *Id.*

264. *Id.*

265. *Id.* at 287. Where the court has imposed harsh discipline for fraud or lying before the courts, especially aggravating circumstances are present. In *In re Christo*, the respondent and his wife were convicted in a jury trial of conspiracy to commit immigration fraud. 924 N.Y.S.2d 44, 45 (App. Div. 1st Dep’t 2011). They had assisted an FBI officer, posing as an applicant, “to manufacture false and fraudulent facts to be submitted as part of his political asylum application.” *Id.* They “coached” the officer “in creating false stories of persecution.” *Id.* Respondent was placed on probation for five years and the court suspended him for the longer of four years or the balance of the period of probation. *Id.* at 47.

who lied to a judge about his fee in a criminal matter and failed to repay the unearned portion of a retainer.²⁶⁶ Walters had two prior admonitions, one for failure to refund a retainer.²⁶⁷ He was suspended for six months.²⁶⁸ The court wrote that it was Walters' "dedication" to his indigent clients "which, in a misguided attempt to help his client, apparently influenced [his] decision to lie to the Judge about the retainer amount"²⁶⁹

It is hard to square these lenient sanctions with presumptive disbarment of lawyers who convert client money or the three-year suspension for Zulandt. One would think that knowing creation of false documents, knowing destruction of evidence, and lying to a court should all be at least as seriously punished.²⁷⁰

3. *Dishonesty in Practice*

We also see leniency in the First Department when a lawyer's dishonesty is in practice but not before the court, including when the conduct is meant to benefit the lawyer and harm third persons, who may have relied on the lawyer's integrity. Then the lawyer may lie to the disciplinary committee about his lies.

Sanford Solny was co-executor of the will of his uncle Henry Isaacson, who was also his law partner.²⁷¹ Lee Snow was the other executor.²⁷² Solny had a limited power of attorney (POA) from Isaacson, which was to be effective only if a physician attested to Isaacson's incapacity.²⁷³ Snow held the POA.²⁷⁴ Solny asked Snow to send him the original POA, giving as a reason a need to reactivate dormant HSBC bank accounts.²⁷⁵ Snow did so, stating "it was only to be used to reactivate the dormant HSBC accounts."²⁷⁶

266. *In re Walters*, 906 N.Y.S.2d 545, 546 (App. Div. 1st Dep't 2010).

267. *Id.* at 547 & n.2.

268. *Id.* at 547.

269. *Id.* By the time of the disciplinary hearing, Walters had repaid half of the unearned retainer and thereafter repaid the balance. *Id.* From the opinion, it appears that repayment occurred only after the client complained. *See id.* It took two and a half years from the filing of the complaint to the suspension. *Id.* at 546–47.

270. As shown above, the Second Department is even more lenient toward this behavior. *See supra* text accompanying notes 106–120; *see also, e.g., In re Sokoloff*, 944 N.Y.S.2d 562, 564 (App. Div. 2d Dep't 2012) (public censure of lawyer who caused "affidavits of service to be filed with the [court] containing false, misleading, or inconsistent information or signatures").

271. *In re Solny*, 943 N.Y.S.2d 455, 457 (App. Div. 1st Dep't 2012).

272. *Id.*

273. *Id.*

274. *Id.* at 458.

275. *Id.*

276. *Id.*

Instead, in February and March 2007, Solny used the POA to move approximately \$600,000 from accounts in his uncle's name to joint accounts with Solny with a right of survivorship.²⁷⁷ He tried to transfer two brokerage accounts to joint names as well, but the brokerage firms refused.²⁷⁸ Solny did not seek a doctor's attestation of Isaacson's incapacity until March 9, 2007, two days before Isaacson died and after making all or most of the transfers.²⁷⁹ Even with a doctor's attestation, the POA did not allow Solny to put his uncle's assets in their joint names.²⁸⁰ Called to account by Snow, Solny returned the money with interest.²⁸¹

Isaacson's will gave Solny a one-twelfth interest in his estate.²⁸² The transfers, if successful, would have made Solny the sole owner of the funds on Isaacson's death. Solny claimed, backed by testimony of his nephew (Steinberg), that Isaacson, while on a respirator and unable to speak, had "expressed his wish to give [Solny] 20% of his estate in gratitude for the care and attention he had provided."²⁸³ Isaacson allegedly conveyed this wish by writing on a legal pad, but Solny "did not preserve the note."²⁸⁴

The court characterized these events as follows:

Here, in furtherance of his plan to change title to Isaacson's accounts for his own benefit, respondent falsely told Snow that he needed the POA to reinstate dormant HSBC accounts. He then misused the POA, without first obtaining a medical certification as to Isaacson's incapacity, to transfer approximately \$600,000 of Isaacson's money to himself during the weeks before Isaacson's death. Respondent returned the funds to Isaacson's estate only after he was removed as co-executor by the Surrogate's Court, conceivably to avoid a potential charge of intentional conversion in violation [of rules against conversion that could have led to disbarment] . . . Respondent then compounded this misconduct by testifying falsely that he had permission to make the transfers, which gives rise to the inference that he likely suborned false testimony by Steinberg. This aggravating factor is not outweighed by respondent's testimony as to the pressures he was under caring for his uncle, raising four young children and attending to his practice, all while his wife was away for extended periods in Canada caring for her critically ill

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 459.

281. *Id.* at 458.

282. *Id.* at 457.

283. *Id.* at 458.

284. *Id.*

mother, or by his religious and charitable activities within the Orthodox Jewish community.

. . . .

Here, the accounts at issue were in Isaacson's name and respondent misused the POA to transfer them to his name or to joint accounts with the right of survivorship. Respondent is not contrite, and he has not shown that he has already paid a heavy price for his wrongdoing.²⁸⁵

Five years after his conduct and two years after charges were filed, Solny was suspended for just two years notwithstanding the court's finding that Solny "likely" suborned perjury and had testified falsely in the disciplinary proceeding itself.²⁸⁶

Or consider Alexander Gurevich, who came before the same court two months earlier.²⁸⁷ In securing an \$8.2 million loan from UBS on a business transaction, Gurevich "executed a number of documents required by UBS which contained representations that respondent knew to be false."²⁸⁸ Thereafter, Gurevich "also testified falsely about [a loan from an entity called Castle] at his deposition before the Committee."²⁸⁹ Only three months later, after the existence of the Castle loan was proved through the promissory note, did Gurevich correct his testimony and admit that "mistakes were made."²⁹⁰ As the court characterized the conduct:

While this matter involves a single transaction, respondent made repeated, intentional misrepresentations in several legal documents. He then compounded this misconduct by giving false testimony at his sworn deposition before the Committee. His attempt to portray himself as an inexperienced real estate practitioner, along with his failure to acknowledge his misconduct and his lack of remorse, are aggravating factors²⁹¹

Nearly three years after charges were filed, and at least five years after the misconduct, Gurevich was suspended for eighteen months.²⁹²

Perhaps Exhibit A for the court's leniency toward dishonest lawyers is the remarkable set of facts of *In re Dorfman*. David Dorfman

285. *Id.* at 460–61 (citations omitted).

286. *Id.* at 461.

287. *In re Gurevich*, 940 N.Y.S.2d 30, 30 (App. Div. 1st Dep't 2012).

288. *Id.* at 32.

289. *Id.* at 33.

290. *Id.*

291. *Id.*

292. *Id.* at 30, 34.

lied to a prospective client (Baker) about his health law experience.²⁹³ Baker hired him but Dorfman missed the statute of limitations on Baker's claim.²⁹⁴ Baker sued Dorfman.²⁹⁵ In 1998, a federal jury awarded Baker \$360,000 in compensatory damages and \$25,000 in punitive damages.²⁹⁶ The Second Circuit affirmed in 2000.²⁹⁷ Two and a half years later, the First Department publicly censured Dorfman for this conduct.²⁹⁸ In mitigation, it noted that Dorfman "had expressed remorse."²⁹⁹

But the remorse had its limits. Dorfman proceeded to try to impede Baker's effort to enforce the judgment.³⁰⁰ In response, a federal judge ordered Dorfman to pay the judgment and imposed limits on how he could conduct his law firm until he did so.³⁰¹ Dorfman disobeyed the judge's order, was prosecuted for contempt, and pled guilty.³⁰² He was placed on probation, violated probation, lied to a probation officer, and was sentenced to thirty days in jail.³⁰³ In handing down the sentence, the federal court cited Dorfman's "dishonest and deceptive maneuver to avoid paying a judgment," adding that "this is something deeply embedded in his character, not something that's going to change . . . during a period of supervision."³⁰⁴

In March 2009, a second disciplinary petition was filed.³⁰⁵ Before the hearing panel, Dorfman denied that he was aware of the probation condition he had violated (limiting his travel) although four months earlier, he had acknowledged that limitation when he pled guilty to violating probation.³⁰⁶ The hearing panel recommended a two-year suspension.³⁰⁷ Nearly two years after the second petition, the court suspended him for one year.³⁰⁸ The delay between Dorfman's second discipline and the underlying conduct is especially remarkable

293. *Baker v. Dorfman*, 239 F.3d 415, 424 (2d Cir. 2000) ("Dorfman knowingly and with intent to deceive made numerous material misrepresentations concerning his experience and expertise.").

294. *Id.* at 419.

295. *Id.*

296. *Id.* at 419–20.

297. *Id.* at 415, 427.

298. *In re Dorfman*, 760 N.Y.S.2d 413, 413 (App. Div. 1st Dep't 2003).

299. *Id.* at 414.

300. *In re Dorfman*, 917 N.Y.S.2d 126, 127 (App. Div. 1st Dep't 2011).

301. *Id.*

302. *Id.*

303. *Id.* at 127–128.

304. *Id.* at 128 (alteration in original).

305. *Id.* at 127.

306. *Id.* at 128.

307. *Id.*

308. *Id.* at 126, 129.

because the contempt conviction established the facts that were the basis for the discipline.

The mild sanctions that the court imposed on Solny, Gurevich, and Dorfman are deeply disturbing. That each was not disbarred is hard to understand. Their behavior blatantly violated the standards of conduct we purport to demand of members of the bar. Each of these lawyers acted (and lied, two of them under oath) for personal advantage, harmed others, and continued their misconduct for lengthy periods.

4. *Sexual Touching of Client*

I describe only one case in this category (and I hope there are not many) because once again its sanction seems incongruous and the delay unacceptable. As the court described the lawyer's behavior:

In March 2007, respondent met with a client he was to represent in a personal injury action and requested that she re-enact the circumstances under which her accident occurred. During the demonstration, respondent inserted his hand beneath the client's clothing and touched her breast, and moved her hand over his groin area (outside of his trousers) in a sexual manner, without the client's permission or consent. Respondent then told the client not to tell anyone.

In June 2007, respondent was charged in a misdemeanor complaint with one count of forcible touching in violation of [the Penal Law] and two counts of sexual abuse in the third degree in violation of [the Penal Law]. On September 22, 2008, he pled guilty to disorderly conduct [under the Penal Law], a violation, and was sentenced to a one-year conditional discharge.³⁰⁹

The respondent, who was a member of the court's Committee on Character and Fitness, did not resign for more than a year after charges were filed against him.³¹⁰ He cited his depression to explain his conduct, but the court saw no proof that the depression caused the misconduct.³¹¹ Nearly five years after the respondent was charged, the court suspended him for nine months.³¹²

309. *In re Greenberg*, 941 N.Y.S.2d 86, 87 (App. Div. 1st Dep't 2012).

310. *Id.*

311. *Id.* at 88.

312. *Id.* at 86, 89.

5. *Neglect*

Lawyers who neglect matters violate the rule requiring diligence.³¹³ Neglect can cause loss of a matter in litigation, but even if it does not, it can worry a client whose calls are not returned and who may have no idea of the status of her matter or how to find out. Much can be at stake for the client. A divorce and custody. Needed funds. Risk of prison. “Perhaps no professional shortcoming is more widely resented than procrastination . . . [U]nreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.”³¹⁴

We would expect then that courts would treat serious neglect seriously, but compared with sanctions in other matters, they are lenient. Indeed, the sanctions are lenient without regard to sanctions for other misconduct and measured only against the stated objectives of discipline. Unless the neglect is accompanied by other misconduct (like lying to a client about the neglected matter) or possibly if there has been prior discipline for neglect, the sanction is generally a suspension of six months or less or a public censure. Yet the misconduct here goes to the heart of the attorney-client relationship. Of course, wealthy clients need little worry much about neglect. They can fire their lawyers and hire new ones. Corporate clients may have employed lawyers to watch their retained lawyer. But individuals who have hired a lawyer may then lack funds to change lawyers if they become dissatisfied.

An immigration lawyer neglected seven client matters across four years, failed to answer the complaints of two clients, and showed “nonchalance with respect to the disciplinary proceedings.”³¹⁵ She was suspended for six months.³¹⁶ Another lawyer “neglected two unrelated client matters, failed to return an unearned fee to one of those clients, and misused his attorney escrow account”³¹⁷ He had “previously received four letters of admonition involving the neglect of client matters”³¹⁸ In light of his “pro bono work,” and the “lack of venal intent,” the court suspended him for three months.³¹⁹ A third lawyer neglected a legal matter for nine years and failed to “follow through with his repeated assurances to the Committee.”³²⁰ He

313. N.Y. RULES OF PROF’L CONDUCT R. 1.3 (2013) (requiring a lawyer to act with “reasonable diligence” and not to neglect a matter).

314. N.Y. RULES OF PROF’L CONDUCT R. 1.3 cmt. 3 (2009).

315. *In re Moody*, 927 N.Y.S.2d 333, 335–36 (App. Div. 1st Dep’t 2011).

316. *Id.* at 336. The adjudication of this complaint took two years.

317. *In re Johannes*, 883 N.Y.S.2d 471, 472 (App. Div. 1st Dep’t 2009).

318. *Id.*

319. *Id.* at 473.

320. *In re Militello*, 907 N.Y.S.2d 472, 473 (App. Div. 1st Dep’t 2010).

had previously received two letters of admonition for neglect.³²¹ He was suspended for three months.³²²

These sanctions are far too mild, especially for the recidivists, when we recognize that second to competence, and inextricably linked to it, a client's primary expectation in hiring a lawyer is that she will pursue the client's goals with dispatch. A competent lawyer who does nothing is worthless. Where the court does suspend a lawyer for a term longer than three or six months, the egregious facts should have led to disbarment.³²³

IV.

CONCLUSIONS: HOW TO REPAIR THE LAWYER DISCIPLINE SYSTEM IN NEW YORK

Gregory Olive lived in a Brooklyn home he owned.³²⁴ He was facing foreclosure and could not get credit.³²⁵ In 2003, he consulted Jennifer Ajah.³²⁶ She got an order vacating the foreclosure.³²⁷ Ajah referred Olive to Asnel Valcin.³²⁸ Valcin advised Olive to sell the property to someone who could get a mortgage.³²⁹ Olive would then make the monthly mortgage payments.³³⁰

Ajah prepared a contract for Olive to sell his property to Ama Valcin, Valcin's sister-in-law.³³¹ It was a sham transaction and Ajah "knew or should have known that the lender would rely upon the contract in issuing a mortgage."³³² Ajah told Olive to sign a false HUD-1

321. *Id.*

322. *Id.* at 474.

323. *See In re Block*, 906 N.Y.S.2d 236, 242–43 (App. Div. 1st Dep't 2010) (holding that prior six-month suspension for "almost the same exact misconduct" warrants an 18 month suspension). Two and a half years elapsed between the filing of charges and Block's suspension. *Id.* at 236, 238; *see also In re Topal*, 906 N.Y.S.2d 559, 561 (App. Div. 1st Dep't 2010) ("Respondent's long-term pattern of misconduct in neglecting five personal injury matters resulting in the loss of three clients' claims to the applicable statute of limitations, lying to clients and the Committee to conceal his neglect, and failing to fully cooperate with the Committee, combined with the absence of any mitigating factors other than the lack of prior discipline, warrants a substantial suspension [of four years] which is longer than the norm of six months to three years in cases of multiple neglect . . ."). One and a half years elapsed between the filing of charges and the suspension. *Id.* at 559–60.

324. *In re Ajah*, 969 N.Y.S.2d 543, 544 (App. Div. 2d Dep't 2013).

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

settlement statement.³³³ Ajah “knew or should have known that it is a federal crime to knowingly make false statements on an HUD-1 Statement.”³³⁴ Ajah earned \$13,560,³³⁵ apparently from the mortgage loan on the sham sale because no other money changed hands. A check for \$72,000, purporting to be for the purchase of Olive’s property, was prepared but never cashed.³³⁶ Ajah “knew that the \$72,000 check was just a ‘show check,’ intended to induce the bank to disburse the mortgage proceeds.”³³⁷

In 2005, Ajah “had an associate . . . represent Ama Valcin” in an effort to evict Olive.³³⁸ She then had an associate represent Ama Valcin in the sale of the property to Duverney and again tried to evict Olive.³³⁹ Valcin’s and Duverney’s “interests were materially adverse to Mr. Olive’s interests.”³⁴⁰ Ajah “failed to obtain Mr. Olive’s consent to” the eviction proceedings.³⁴¹

Separately, in 2007, Ajah sent a letter over the name of Peggy Collen, a lawyer she employed, which contained statements Collen knew to be untrue.³⁴² Ajah then “instructed Ms. Collen to ‘misrepresent herself’ to at least two clients in an effort to collect fees.”³⁴³

A petition to discipline Ajah was filed in February 2010.³⁴⁴ Ajah was not “candid with the Grievance Committee.”³⁴⁵ Her mitigating evidence was testimony from two character witnesses and eighteen character letters.³⁴⁶ She was remorseful.³⁴⁷ She did pro bono work that is not described.³⁴⁸ “Under the totality of the circumstance,” in July 2013, [Ajah was] suspended . . . for a period of five years.”³⁴⁹

Here in the case of Jennifer Ajah we have a microcosm of two dramatic failures of the lawyer disciplinary system in New York. A five-year suspension was far too lenient. Ajah should have been disbarred for her multiple acts of misconduct (the petition had sixteen

333. *Id.*

334. *Id.*

335. *Id.* at 545.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.* at 546.

343. *Id.*

344. *Id.* at 544.

345. *Id.* at 547.

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

charges).³⁵⁰ Aside from Ajah's troubling relationship with truth and her lack of cooperation with the disciplinary committee, she betrayed her client by seeking to evict him from the very home that, two years earlier, he had hired her to help him keep. Separately, it is unfortunate that Ajah's disciplinary matter took three and half years to complete, during which time she was free to practice. In this long interval, the secrecy that surrounds lawyer discipline in New York meant that no prospective client could learn the charges pending against her.

The delay between the date on which a charge is filed and eventual sanction must be reduced. A delay as long as a year should be rare. Delay must also be narrowed between the time that disciplinary committees learn of misconduct and the filing of charges. When the charges are based on a conviction, they should be filed within weeks. Convicted lawyers are required to notify the disciplinary authority of the conviction within thirty days and failure to do so is itself a basis for discipline.³⁵¹ The fact of conviction of a crime establishes the underlying facts.³⁵² There is no need for a hearing to determine them. When a lawyer is disciplined elsewhere, there is no or very limited need for fact finding.³⁵³

How does it make sense to suspend a lawyer years after the underlying event? The courts are allowing a lawyer who, they will later decide, must be suspended not as punishment but to protect the public and the administration of justice, to practice without restriction for an interval of one, two, three or more years until it orders the suspension.

350. *Id.* at 544.

351. Lawyers are required to notify the disciplinary agency of convictions "in a court of the United States or any state, territory or district." N.Y. JUD. LAW § 90(4)(c) (McKinney Supp. 2014). An improvement would impose the same duty on the prosecutor or the clerk of the court.

352. "We hold that under familiar principles of collateral estoppel the attorney is precluded from relitigating the issue of his guilt. As we have recently written, the doctrine of collateral estoppel is applicable to criminal proceedings . . ." *Levy v. Ass'n of the Bar of N.Y.*, 333 N.E.2d 350, 352 (N.Y. 1975) (citation omitted).

353. Lawyers in the First and Second Department are required to notify the disciplinary authority of discipline in another jurisdiction. N.Y. COMP. CODES R. & REGS. tit. 22, §§ 603.3(d), 691.3(e) (2013). The only available defenses in the First Department are:

- (1) that the procedure in the foreign jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or
- (2) that there was such an infirmity of proof establishing the misconduct as to give rise to the clear conviction that this court could not, consistent with its duties, accept as final the finding in the foreign jurisdiction as to the attorney's misconduct; or
- (3) that the misconduct for which the attorney was disciplined in the foreign jurisdiction does not constitute misconduct in this jurisdiction.

Id. § 603.3(c). The Second Department has similar defenses. *Id.* § 691.3(c).

It is unacceptable as well that a sanction will vary depending on the appellate division that imposes it. But that is currently so in New York. The California State Bar Court determines sanctions for the entire state, which largely frees the State Supreme Court of the burden. Although the Supreme Court retains authority to review decisions, it rarely does.³⁵⁴ A state bar court in New York would promote consistency. Alternatively, the New York Court of Appeals can be given discretionary jurisdiction to review sanctions on appeal by the respondent lawyer or a disciplinary committee. A few such cases yearly will help set statewide standards.

If, sadly, these sensible remedies are not politically feasible, there are other options, though less promising. First, every appellate division decision imposing discipline should explicitly reconcile the chosen sanction with sanctions imposed for like conduct in the three other appellate divisions as well as cases from the deciding court. Today, Second, Third, and Fourth Department opinions often make no attempt to reconcile sanctions even with their own precedent. Only the First Department routinely does so. That must change.

To facilitate consistency among departments, New York must adopt statewide guidelines for the Appellate Divisions to follow. The ABA has a model set of guidelines,³⁵⁵ which some state courts cite.³⁵⁶ California has developed its own guidelines.³⁵⁷ New York has nothing comparable. It can write them from scratch or it can build on the ABA Standards, but it must have statewide standards and the courts must abide by them or, if deviation is justified in a particular case, the opinion must explain why.

It is not acceptable that New York courts do not make it simple for a person who is contemplating hiring a particular lawyer quickly to discover the lawyer's disciplinary history. A prospective client should not need a Lexis subscription to learn this information. I listed above the several steps that the courts can easily take to correct this failure and alert prospective clients to a lawyer's disciplinary history.³⁵⁸ Half a dozen sentences amending just a few court rules will suffice. Of course, the website for the New York courts must accurately tell visi-

354. *In re Silverton*, 113 P.3d 556, 561 (Cal. 2005); *see also supra* note 24.

355. *See supra* text accompanying notes 28–29.

356. *See, e.g., In re Peterson*, 232 P.3d 940, 950 (Ore. 2010) (citing the ABA Standards); *In re White-Steiner*, 198 P.3d 1195, 1197 (Ariz. 2007) (same).

357. *See supra* text accompanying notes 26–27.

358. *See* discussion *supra* Part II.B.

tors sent to it the disciplinary record of all lawyers, which it does not now do.³⁵⁹

Reading hundreds of New York disciplinary opinions leaves the abiding conclusion that too often there is little relationship between the length of a suspension and the underlying offense, even when adjusted for aggravating and mitigating factors, and recognizing that this enterprise is not a science. If the goal were punishment, the conclusion might be different. But it is not punishment. Unlike censure and disbarment, suspension purports to calibrate the length of time a lawyer must be inactive in order to satisfy the goals of discipline. The choice implies a capacity for precision that is illusory. This pretense is especially dubious when the suspension comes years after the misconduct. When the suspension is in response to a lawyer's behavior outside law practice, and especially when the behavior (assault or drunk driving, for example) does not negate a particular character trait expected of lawyers, its justification rests on encouraging public respect for the bar, the rule of law, and the administration of justice. But the number of months or years chosen, whatever the underlying conduct, can seem arbitrary or else punishment in disguise.

The solution, when suspension is the appropriate sanction, is to impose it and designate a minimum period of "timeout" that must elapse before the lawyer can reapply. Perhaps six months. Thereafter, the lawyer should be judged by the same character and fitness standards that all bar applicants must satisfy. In fact, because the lawyer's misconduct occurred while a member of the bar, the fitness inquiry should ordinarily be more demanding than for a first time bar applicant. We should expect more of lawyers. To ensure consistency in applications for readmission, those decisions (and decisions to re-admit disbarred lawyers) should be made by a statewide body. That body will review the conduct that led to the suspension or disbarment, the lawyer's other discipline if any (including nonpublic discipline), aggravating and mitigating factors, and the lawyer's conduct while suspended or disbarred. For example, if in discipline or on an application to return to practice the lawyer has cited a psychological malady or substance abuse as contributing factors, she should be required to establish the causal connection (if not previously established) and that treatment has since ameliorated the condition. If the lawyer was disciplined for taking client money or failure to pay taxes, she should be required to show that all sums due have been paid.

359. See discussion *supra* Part II.B.

The deficiencies of lawyer discipline identified here must rest on a partial record—those cases that lead to public discipline. New York law hides private discipline from public view. This is why I urge the courts, which can go behind state secrecy rules,³⁶⁰ to commission their own study. The record we do have does not inspire confidence in what we might find if we were able to raise the secrecy curtain and see the decisions of disciplinary bodies in matters that do not go to court and matters before the courts but which do not result in public discipline. In addition, New York should join the forty American jurisdictions that make the process public once probable cause of a violation is found.³⁶¹

360. N.Y. JUD. LAW § 90(10) (McKinney Supp. 2014); *see* discussion *supra* Introduction.

361. *See supra* note 68.

