

PSYCHOLOGICAL PROBLEMS AND DISCIPLINE

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When should an attorney's psychological problems lessen the discipline otherwise appropriate for unprofessional conduct? In recent years, the assertion of psychological and other personal difficulties has become common in Minnesota disciplinary cases. To promote consistency, the Minnesota Supreme Court has adopted standards for considering psychological circumstances as mitigating. The Court has also found situations warranting departure from the standards. The questions of when a psychological disorder is "severe" and when it "causes" misconduct have been closely argued and considered in recent cases in Minnesota and elsewhere.

Some states have taken strict approaches. Last year the Iowa Supreme Court considered a lawyer who explained the delinquency of his tax returns by referring to the stress of a marriage dissolution and a hostile dissolution of his law partnership. The Iowa court said,

Nearly every lawyer involved in these [professional discipline] cases could cite personal problems as the cause of professional downfall. But life in general is a series of problems and it is the fundamental purpose of our profession to face and solve them. Our profession certainly cannot excuse misconduct on the basis of persons' problems.[Ftn 1](#)

New Jersey has taken a strict view of alcoholism or psychological problems as alleged mitigation in misappropriation cases. When "the evidence falls short" of showing that the attorney who took money "was unable to comprehend the nature of his act or lacked the capacity to form the requisite intent," then disbarment will be the result of misappropriation in New Jersey.[Ftn 2](#)

A more nuanced, yet firm, approach was adopted by the Minnesota Supreme Court five years ago, in rejecting a claim of depression and mental illness as an explanation for misappropriation:

Nevertheless, we hold that in a case where a respondent attorney raises psychological disability as a mitigating factor, he must prove that he indeed has a severe psychological problem, that the psychological problem was the cause of the misconduct, that he is undergoing treatment and is making progress to recover from the psychological problem which caused or contributed to the misconduct, that the recovery has arrested the misconduct, and that the misconduct is not apt to recur. Finally, the accused attorney must establish these criteria by clear and convincing evidence.[Ftn 3](#)

The Court has recently suspended, rather than disbarred, an attorney for repeated and large-scale misappropriation and other misconduct, even though the Court affirmed the referee's findings that the attorney's alleged psychological circumstances did not meet the *Weyhrich* criteria stated above.[Ftn 4](#) An

expert testified that the attorney had a “Messianic complex,” an adjustment disorder by which he hoped to help certain clients in difficult circumstances. In order to keep his law office open to help them, he took other clients’ funds even though he “knew, at the time, that what he was doing was morally and ethically wrong. . . .”

When is a psychological problem “severe”? When does it *cause* misconduct? When should psychological problems which are not severe or causal nonetheless be mitigating, if ever? Too stern an answer may be inhumane. Too indulgent an answer may endanger the public and create disrespect for the law.

The questions posed are legal and psychological in nature. The answers tendered also contain an important philosophical dimension. What is the place of psychology in understanding human actions? How do psychological explanations fit with traditional jurisprudential notions of free will and responsibility? Such difficult and fundamental questions cannot be answered definitively, but those wrestling with these problems must realize that such questions are involved in their deliberations.[Ftn 5](#)

A couple of mistakes are easily made when dealing with psychological evidence. One is to suppose that any labeling in psychological terms is equivalent to a medical diagnosis of a disease. Although some physical diseases can be correlated with freely chosen behavior, we tend to think of a disease as something that someone “gets” and for which the person should not be blamed. This is why the “disease concept of alcoholism” has come generally to be accepted. We should, however, resist the idea that psychological labeling of certain behavior *necessarily* implies a disease-like situation and freedom from blame. Although discipline proceedings are not for the purpose of punishing or assigning blame, blameworthiness is essential to the reasoning employed in most suspension and disbarment cases. This is as it should be, because the bar admission and reinstatement processes openly recognize moral character as essential to the Court’s certifying a lawyer as trustworthy and fit. It would be anomalous if moral character were relevant for licensing but irrelevant for “delicensing.” Psychological insights may help distinguish transitory disorders from fundamental character but character itself must be dealt with in serious matters.

A second error easily arises in locating the place of psychology in discipline proceedings. It is sometimes assumed that psychology always has an important role in disciplinary decision making. Psychological explanation clearly does have a place. When an attorney of good reputation and habit comes to be unable to answer the telephone or follow through on routine matters, depression may well be the explanation; when an attorney concocts extravagant false stories to please clients and a demanding senior partner, there may well be a psychological problem beneath the lying; bizarre and uncharacteristic behavior of many sorts needs explanation, including a psychological account. Indeed, if the disorder is severe, the attorney should be transferred to disability inactive status.

When an attorney takes funds, commits a crime, or lies to gain an advantage, however, the law traditionally has not looked to psychology for an explanation. The vocabularies and categories of law, literature, economics, and philosophy have been thought adequate for describing and evaluating the actions. The court’s view was simple:

[W]here an attorney’s misconduct in violation of professional ethics justifies disbarment, imposition of the penalty should not be deterred by a plea of a mental condition disqualifying the attorney from the practice of law. . . .[Ftn 6](#)

The kind of actions involved in a case should be a strong indicator of how much of a role psychology

may be expected to play in the case. If, for example, an attorney takes money it should normally be sufficient to say that the money was taken because the attorney needed it or wanted it; and that such preferring of one's own needs or wants over fiduciary duties shows a lack of character, incompatible with being certified as an attorney.^{Ftn 7} No doubt many attorneys disbarred over the years for misappropriation have had mixed motives, unusual rationalizations, abnormal childhood experiences, less-than-perfect marriages, and other circumstances that can bear psychological analysis. When the analysis yields something short of a psychosis or other clear proof that the attorney lacked the capacity to understand or choose his or her conduct, the psychological record should not normally be of much importance for discipline purposes. On the other hand, where an attorney who has practiced honorably starts to engage in bizarre behavior or be unable to carry on the ordinary tasks of life and practice, psychology may well be expected to play a role in diagnosis and response.^{Ftn 8}

Human actions and character are so rich and varied that the special insights of psychology are needed alongside the insights of the legal tradition, literature, philosophy, religion, economics, and our common experience. Psychology has a role to play in considering lawyer misconduct and discipline, a role small or large depending on the circumstances.

In recent years, respondent attorneys have more frequently called on the Director's Office, and on the Court, to take account of psychological analyses relating to violations of the Rules of Professional Conduct. Identifying the proper place of such explanations is part of the common law, as it develops in professional responsibility proceedings.

NOTES

¹ Com. On Pro. Ethics & Conduct v. Cook, 402 N.W.2d 469, 470 (Ia. 1987).

² Matter of Hein, 516 A.2d 1105, 1107-8 (N.J. 1986).

³ Matter of Disciplinary Act. Against Weyhrich, 339 N.W.2d 274 (Minn. 1983). *These criteria had previously been announced in an alcoholism-misappropriation case. In re Johnson, 322 N.W.2d 616 (Minn. 1982).*

⁴ In re Pyles, 421 N.W.2d 321 (Minn. 1988). *Pyles misappropriated \$45,000 from an estate, \$15,000 from an escrow account, and other funds over a period of years. He lied to cover up the misappropriations. He also failed to file tax returns timely for several years. In addition to his psychological evidence, he presented evidence that he had been involved in charitable endeavors and, as the referee observed, had otherwise "led an exemplary life."*

⁵ See Rule 28, Rules on Lawyers Professional Responsibility. *This rule was first adopted in 1982 so that attorneys who were truly disabled for psychological, or other reasons, could be dealt with humanely, while still protecting the public.*

⁶ In re Streater, 262 Minn. 538, 115 N.W.2d 729 (1962). See also In re Bialick, 298 Minn. 376, 215 N.W.2d 613 (1974).

⁷ "[I]t is doubtful whether an attorney's financial difficulties alone will ever constitute a mitigating circumstance to disbarment when he or she has converted client funds. . . ." In re Parks, 396 N.W.2d 560, 563 (Minn. 1986).

"Mr. Okerman argues that since the money he misappropriated was applied to his business debts as opposed to 'personal luxury or extravagance,' his 'lack of personal gain' constitutes a mitigating factor. Not only is the distinction offensive, it is unsupported by the facts." In re Okerman, 310 N.W.2d 568, 571 (Minn. 1981).

⁸ See Skoler and Klein, Mental Disability in Lawyer Discipline, 12 John Marshall Journal of Practice and Procedure (1979); Stevens, The Lawyer's Mental Health and Discipline, 48 A.B.A.J. 140 (1962); Annot., 26 A.L.R. 4th 995 (1983).