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Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline.

Patricia Sue Heil

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**Tending the Bar in Texas: Alcoholism as a Mitigating Factor in
Attorney Discipline**

Patricia Sue Hell

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I. INTRODUCTION

One of five attorneys in the United States has a problem with substance abuse.¹ Additionally, one of every eight graduating law-school students exhibits characteristics of drug or alcohol dependency.² While a conservative estimate indicates that 10% of the general population are alcoholics and substance abusers,³ attorneys are at a higher risk for addictive diseases and chemical dependency.⁴ Addictive illnesses such as alcoholism manifest

1. Interview with Thomas g. Keyser, attorney (Oct. 18, 1992) (summary on file with *St. Mary's Law Journal*); see John Rogers Carroll, *When Your Colleague Is Hooked*, 55 TEX. B.J. 268, 268 (1992) (reporting that 10% of lawyers drink alcoholically and another 2% to 3% are addicted to other substances); John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992) (estimating that alcoholism in legal profession ranges from 10% to 20%); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 16 (asserting 11% to 15% of legal professionals are alcoholic); Donna L. Spilis, *Lawyer Substance Abuse*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (stating Washington Bar Association reported over 18% of its attorneys dependent on alcohol). The actual number of addicted attorneys may be much higher than estimated. See, e.g., G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 113-14 (1992) (reporting one-third of practicing attorneys suffer from depression, alcohol, or cocaine abuse); Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988) (stating alcoholism 3 to 30 times higher in professional groups than the 10% to 13% rate of general population); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 16 (asserting number of afflicted attorneys may be much greater than 15%).

2. See J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 266 (1992) (stating 13 of 100 graduating law students display chemical-dependency characteristics); Timothy W. Sorenson, *Status Report: ABA International Workshop on Lawyer Substance Abuse*, HEADNOTES, (Dallas Bar Ass'n, Dallas, Tex.), Dec. 15, 1991, at 1, 1 (reporting most conservative statistics indicate 13 of 100 graduating law students exhibit drug/alcohol dependency characteristics).

3. See J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 266 (1992) (reporting 10 out of every 100 individuals 18 years or older have experienced problems resulting from substance abuse). Additional statistics indicate that 10% of all employed persons have alcohol related problems. *Id.*; see Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988) (reporting 10 to 13% of general population alcoholic); Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1660 (1981) (estimating ten million of ninety-five million Americans who drink are alcoholics).

4. J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 266 (1992); see Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988) (comparing alcoholism in 10 to 13% rate of general population with increased rates of 3 to 30 times higher in professional segment); cf. Donna L. Spilis, *Lawyer Substance Abuse*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (reporting Washington Bar Association found over 18% of its attorneys dependent on alcohol). Personal characteristics of a goal-oriented, achievement-focused person, which encourage success in a professional capacity, are the very

themselves in ways that leave afflicted attorneys unable to practice law in accordance with professional rules of conduct.⁵ As a result, the majority of attorney-discipline cases involve alcoholism or chemical dependency,⁶ and an attorney whose illness remains untreated will likely become the subject of grievance-committee investigations.⁷ Inconsistent decisions by grievance committees and courts throughout the country reflect their struggles to determine the appropriate approach for the discipline and disposition of im-

characteristics that make an individual more vulnerable to the progression of the disease. J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 266-67 (1992). Because many incentives work to keep the disease of chemical dependency and alcoholism hidden, the number of afflicted attorneys may be far higher than indicated by the estimates. Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 16.

5. John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992); see Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1409 (1988) (noting deterioration of alcoholic's job performance); John Rogers Carroll, *When Your Colleague Is Hooked*, 55 TEX. B.J. 268, 268-69 (1992) (describing impact of addictions on professional life); cf. Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 16 (stating typical lawyer before disciplinary board has problem with alcohol or drugs). An alcoholic's mind, body, and behavior are dramatically altered as the disease progresses. See, e.g., *In re Kersey*, 520 A.2d 321, 325 (D.C. 1987) (noting disease of alcoholism results in interference with afflicted individual's career); *A Progressive Disease*, 55 TEX. B.J. 250, 250-51 (1992) (relating deterioration of all aspects of alcoholic's life); J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 267 (1992) (quoting World Health Organization definition of drug dependence as "behavioral pattern in which use of a drug [activity] is given a sharply higher priority over other behaviors which once had a significantly higher value").

6. See Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988) (noting states' findings that 50 to 70% disciplinary cases involve alcoholism). Chemical dependency and/or psychological distress is involved in 60% of attorney-discipline cases in California. Donna L. Spilis, *Lawyer Substance Abuse*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*). In Georgia, addiction is involved in over 80% of attorney-discipline cases related to client-security funds. *Id.* In Oregon, over half of lawyer malpractice suits stem from substance abuse. See Letter from Don Muccigrosso, Loss Prevention Attorney, *Alcohol and Chemical Dependency Program, Professional Liability Fund, Oregon State Bar*, to Celene Greene, Executive Director, *Oregon State Bar* (Apr. 1, 1988) (on file with *St. Mary's Law Journal*) (reporting Oregon survey found 62% of attorneys with discipline complaints filed against them had chemical dependency problems).

7. See, e.g., G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 118 (1992) (reporting untreated impaired attorneys most likely to be subject of disciplinary actions); Michael L. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1409 (1988) (noting typical attorney before disciplinary board has problem with alcohol or drugs); John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992) (stating likelihood attorney with substance-abuse problem will face disciplinary actions); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16 (describing typical attorney before disciplinary board).

paired attorneys.⁸ To protect the public, unethical behavior of attorneys must be punished and deterred.⁹ But what sanctions should grievance committees impose upon attorneys whose misconduct is a direct result of an illness over which they have no control?¹⁰ Sanctions imposed upon such

8. See *In re Driscoll*, 423 N.E.2d 873, 875 (Ill. 1981) (balancing need to protect public with desire to restore respondent to profession); John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992) (noting struggles by grievance committee to appropriately discipline impaired attorneys). No single method or plan exists nationally to deal with discipline and disposition of attorneys impaired by alcoholism or chemical dependency. See Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1421 (1988) (noting inconsistency of jurisdictions in attorney-discipline cases); Telephone Interview with Donna L. Spilis, ABA Commission on Impaired Attorneys (Jan. 19, 1993) (summary on file with *St. Mary's Law Journal*) (stating jurisdictions differ in treatment of impaired attorneys); Telephone Interview with Casie Dalla Santa, ABA Center for Professional Responsibility (Jan. 19, 1993) (summary on file with *St. Mary's Law Journal*) (stressing inconsistency of jurisdictions' disposition of addicted attorneys); see, e.g., *People v. Luxford*, 626 P.2d 675, 677 (Colo. 1981) (considering rehabilitation from alcoholism as mitigating factor when such rehabilitation has occurred between time of misconduct and disciplinary hearing); *Kersey*, 520 A.2d at 327 (acknowledging nexus between alcoholism and attorney misconduct); *Office of Disciplinary Counsel v. Silva*, 633 P.2d 538, 545 (Haw. 1981) (giving consideration to past suffering endured by alcoholic); Roger W. Nelson et al., *Monitoring and Diversion: Getting on Track Without Discipline*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 17, 1992, at 10-14 (on file with *St. Mary's Law Journal*) (describing Arizona's diversion program for attorney education and treatment). Compare *In re Konopka*, 596 A.2d 733, 735 (N.J. 1991) (calling for disbarment in cases where funds knowingly misappropriated regardless of attorney's impairment) with *In re Willis*, 552 A.2d 979, 984 (N.J. 1989) (imposing six-month rather than one-year suspension, mitigating sanction without excusing misconduct).

9. One purpose of attorney disciplinary proceedings is the protection of the public. *In re Kunz*, 524 N.E.2d 544, 547 (Ill. 1988); see, e.g., *Harford v. State Bar of Cal.*, 801 P.2d 317, 321 (Cal. 1990) (noting one goal of attorney discipline is to protect public); *Howard v. State Bar of Cal.*, 793 P.2d 62, 65 (Cal. 1990) (stressing protection of public, courts, and integrity of legal profession in discipline cases); *In re Walker*, 254 N.W.2d 452, 455 (S.D. 1977) (recognizing purpose of disciplinary proceedings is to protect public from attorney misconduct); cf. *In re Rivikind*, 791 P.2d 1037, 1042 (Ariz. 1990) (distinguishing between goal of criminal proceedings and goal of disciplinary proceedings); Roger W. Nelson et al., *Monitoring and Diversion: Getting Lawyers on Track Without Discipline*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 17, 1992, at 1 (on file with *St. Mary's Law Journal*) (clarifying objectives of attorney discipline).

10. John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B. J. 273, 273 (1992); see also *Rivikind*, 791 P.2d at 1042 (asserting goal of disciplinary proceedings is to protect public and deter similar misconduct by other lawyers, rather than to punish particular lawyer). The Illinois Supreme Court acknowledges alcoholism as a mitigating factor and has further stated that, in some circumstances, it may excuse the misconduct altogether. *Driscoll*, 423 N.E.2d at 874. Recognizing that the effects of alcoholism undermine judgment, the court described the misconduct in question as typical of an alcoholic, but not typical of the respondent. *Id.* In determining suspension, the court reasoned that the financial hardship, social embarrassment, and despair caused by a long suspension would be counterproductive and not conducive to sobriety. *Id.* at 875. New Jersey will not consider mitigation at all when the

impaired attorneys reflect the jurisdictions' views of the goal of the disciplinary process as well as their comprehension of the disease of chemical dependency.¹¹

Over the past decade, a workable definition of alcoholism as a mitigating factor emerged through a series of court decisions.¹² In 1987, the District of Columbia Court of Appeals, in *In re Kersey*,¹³ established a "but for" causation test for the consideration of alcoholism as a mitigating factor in attorney discipline cases: "[B]ut for the alcoholism, the misconduct would not have occurred."¹⁴ The court clarified this test in subsequent cases, requiring a showing that the lawyer's conduct was "substantially affected" by the alco-

attorney misconduct includes misappropriation of client funds. Compare *Konopka*, 596 A.2d at 735 (holding knowing misappropriation mandates disbarment) with *In re Sheppard*, 594 A.2d 1333, 1333 (N.J. 1991) (considering substance abuse as mitigating factor in discipline case when client funds were not converted).

11. Some courts hold that the addiction itself is a mitigating factor. See, e.g., *Florida Bar v. Farbstein*, 570 So. 2d 933, 936 (Fla. 1990) (stating effect of drug addiction is mitigating factor); *Driscoll*, 423 N.E.2d at 874 (allowing in rare cases alcoholism as complete excuse to misconduct); *Toledo Bar Ass'n v. DeMars*, 564 N.E.2d 431, 431 (Ohio 1990) (holding that alcoholism itself is mitigating factor in determining lawyer's sanctions). At least four state supreme courts have adopted clear and convincing evidence standards to rebut the position that the alcoholism or drug addiction should not be considered as a mitigating factor. See *Harford*, 801 P.2d at 321 (listing facts that must be proven to assign recovery from alcoholism or drug abuse any weight as mitigating factor); *Attorney Grievance Comm'n of Md. v. Burka*, 438 A.2d 514, 517 (Md. 1981) (establishing clear-and-convincing evidence-standard); *In re Johnson*, 322 N.W.2d 616, 618 (Minn. 1982) (delineating criteria to prove alcoholism as mitigating factor); see also *Kersey*, 520 A.2d at 326 (requiring proof of causal connection between alcoholism and misconduct for acceptance as mitigating factor). Courts balance the need to protect the public interest with the desire to encourage alcoholic lawyers to seek help and rehabilitation at the earliest possible moment. See *Willis*, 552 A.2d at 984 (recognizing alcoholism as disease and not excusing misconduct). In a recent holding, the New Jersey Supreme Court acknowledged the respondent attorney's remarkable recovery and community support, concluding that to disbar the attorney would be "more vindictive than just." *In re Gillespie*, 590 A.2d 216, 221-22 (N.J. 1991).

12. See, e.g., *In re Clyne*, 581 A.2d 1118, 1123-25 (Del. 1990) (requiring showing of sincere recovery efforts in addition to "but for" test); *Kersey*, 520 A.2d at 327 (establishing "but for" causation test); *In re Bambury*, 571 N.Y.S.2d 480, 481 (N.Y. 1991) (allowing addiction to mitigate sanctions while not excusing misconduct). The Supreme Court of Minnesota adopted a four-part test to determine if alcoholism was a valid defense to professional misconduct. *Johnson*, 322 N.W.2d at 618. The court held that the relevant criteria were:

1. That the accused attorney is affected by alcoholism.
2. That the alcoholism caused the misconduct.
3. That the accused attorney is recovering from alcoholism and from any other disorders which caused or contributed to the misconduct.
4. That the recovery has arrested the misconduct and the misconduct is not likely to reoccur.

Id. The accused attorney must establish these criteria by clear and convincing evidence. *Id.*

13. 520 A.2d 321 (D.C. 1987).

14. The court held that "but for" *Kersey's* alcoholism, the misconduct would not have

holism or chemical dependency in order for the affliction to serve as a mitigating factor.¹⁵ Following the *Kersey* decision, the "but for" standard gained acceptance in other jurisdictions as they developed and specified their own criteria for the determination and application of alcoholism and chemical dependency as mitigating factors of sanctions for attorney misconduct.¹⁶ For disciplinary cases involving alcoholism, a suggested analysis includes establishing not only a nexus between the illness and the misconduct, but also a causal connection between recovery from the illness and cessation of the misconduct.¹⁷

occurred. *Id.* at 327. The court stated that failure to recognize alcoholism as a mitigating factor would "defy both scientific information and common sense." *Id.* at 326.

15. *In re Temple*, 596 A.2d 585, 590 (D.C. 1991); see *In re Peek*, 565 A.2d 627, 631 (D.C. 1989) (applying "substantially affected" analysis to alcoholism as mitigating factor); *In re Miller*, 553 A.2d 201, 203 (D.C. 1989) (requiring showing of emotional condition of attorney as substantial factor to mitigate).

16. See, e.g., *Hawes v. State Bar of Cal.*, 797 P.2d 1180, 1184 (Cal. 1990) (explaining elements needed for significant weight to be given to recovery from alcoholism as a mitigating factor); *Attorney Grievance Comm'n of Md. v. Winters*, 526 A.2d 55, 57 (Md. 1987) (reaffirming alcoholism mitigates disciplinary sanctions); *Johnson*, 322 N.W.2d at 618 (defining relevant criteria for alcoholism to serve as mitigating factor); *Bambury*, 571 N.Y.S.2d at 481 (allowing addition as mitigating factor without excusing misconduct); see also Michael L. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1418-23 (1988) (comparing nonmitigating-factor and mitigating-factor approaches of jurisdictions). See generally Carol J. Miller, Annotation, *Bar Admission or Reinstatement of Attorney as Affected By Alcoholism or Alcohol Abuse*, 39 A.L.R.4th 567, 568-76 (1985) (discussing mitigation of sanctions and reinstatement based on alcoholism and recovery); Danny R. Veilleux, Annotation, *Misconduct Involving Intoxication as Ground for Disciplinary Action Against Attorney*, 1 A.L.R.5th 874, 887-90 (1992) (discussing various disciplinary sanctions imposed upon attorneys for alcohol related misconduct).

17. ABA *Manual on Professional Conduct*, § 131:3202; see ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.32 (i) (Feb. 1992), which provides:

Standard 9.3 Mitigation. Factors which may be considered in mitigation.

- (i) Mental disability or chemical dependency including alcoholism or drug abuse when:
- (1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;
 - (2) the chemical dependency or mental disability caused the misconduct;
 - (3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and
 - (4) the recovery arrested the misconduct and recurrence of that misconduct unlikely.

Id. The February 1992 amendments included the following additional commentary to Standard 9.32:

Issues of physical and mental disability or chemical dependency offered as mitigating factors in disciplinary proceedings require careful analysis. Direct causation between the disability or chemical dependency and the offense must be established. If the offense is proven to be attributable solely to a disability or chemical dependency, it should be given the greatest weight. If it is principally responsible for the offense, it should be given very great weight; and if it is a substantial contributing cause of the offense, it should be given great weight. In all other cases in which the disability or chemical dependency is consid-

Acknowledging the scope and reality of the problem of lawyer substance abuse, virtually all jurisdictions have taken measures to help with the identification, treatment, and disposition of impaired attorneys.¹⁸ Although disability suspension is provided for in the Texas Rules of Disciplinary Procedure,¹⁹ to date, no Texas cases have been reported regarding the mitigation issue.²⁰ Relevant questions concerning the issue of chemical dependency and mitigation remain unanswered in Texas and are ripe for judicial and legislative review.

This Comment describes the nature and scope of alcoholism and chemical dependency in the legal profession and reviews the current state of the law regarding alcoholism as a mitigating factor in attorney discipline. Following an examination of the state of the law in Texas, including implications and issues raised by the Texas Rules of Disciplinary Procedure effective in May 1992, this Comment proposes a direction for the development and application of attorney-disciplinary policies in Texas when alcoholism is a mitigating factor, specifically addressing the need for rule changes and program development.

ered as mitigating, it should be given little weight. A showing of rehabilitation from chemical dependency may be considered but should not, in and of itself, be a justification for a recommendation for discipline less than that which would have been imposed upon an attorney in similar circumstances where a chemical dependency was not present.

Id.

18. See, e.g., *Driscoll*, 423 N.E.2d at 875 (requiring respondent attorney to participate in Lawyers Assistance Program established by Illinois State Bar); *Johnson*, 322 N.W.2d at 617-18 (conditioning stay of respondent-attorney's suspension in part on attendance at Lawyers Concerned for Lawyers meetings); *Mississippi State Bar v. Gautier*, 538 So. 2d 772, 775-76 (Miss. 1989) (recognizing problem of chemical dependency among members, and noting establishment of Lawyer and Judges Assistance Program); see also Roger W. Nelson et al., *Monitoring and Diversion: Getting on Track Without Discipline*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 17, 1992, at 10-14 (on file with *St. Mary's Law Journal*) (explaining Arizona's diversion program for attorney education and treatment). See generally Cassie Dalla Santa & William X. Haase, *ABA Discipline Services and Review of Recent Case Law*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (reporting on existence of Lawyers Assistance Programs and their relationships with state disciplinary agencies).

19. See TEX. R. DISCIPLINARY P. 12.01-13 (1992), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1992) (detailing grounds for disability suspension, terms and conditions of disability probation, and procedures for reinstatement).

20. See Telephone Interview with Don Jones, Director, Texas Lawyers Assistance Program (Jan. 19, 1993) (summary on file with *St. Mary's Law Journal*) (confirming absence of Texas case law on point). But see *Smith v. O'Neill*, 813 S.W.2d 501, 502-03 (Tex. 1991) (holding recovery from cocaine addiction sufficiently changed circumstances to warrant hearing on revocation of probation).

II. SANCTIONING ALCOHOLIC ATTORNEYS

A. *Attorney Discipline*

Alcoholism is a chronic problem in the legal community.²¹ As a result, impaired lawyers are often the subject of attorney-disciplinary proceedings.²² Acknowledging that the goal of attorney discipline is to protect the public and maintain the integrity of the profession,²³ rather than to punish the individual attorneys,²⁴ grievance committees and courts determine sanc-

21. See, e.g., John Rogers Carroll, *When Your Colleague Is Hooked*, 55 TEX. B.J. 268, 268 (1992) (reporting 13% attorney alcoholism and addiction rate); John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992) (estimating alcoholism in legal profession between 10 and 20%); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 16 (estimating 15% of legal professionals are alcoholic); see also G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 114-15 (1992) (reporting high percentage of attorneys dependent upon alcohol); Donna L. Spilis, *Lawyer Substance Abuse*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (stating Washington Bar Association reported over 18% of its attorneys are alcohol dependent).

22. See, e.g., Michael L. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1409 (1988) (noting attorney before disciplinary board typically has substance-abuse problem); John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992) (stating attorney with substance-abuse problem likely to face disciplinary actions); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 16 (asserting likelihood of chemically addicted attorney to convert client funds).

23. See, e.g., *Harford v. State Bar of Cal.*, 801 P.2d 317, 321 (Cal. 1990) (noting goal of attorney discipline is to protect public); *Howard v. State Bar of Cal.*, 793 P.2d 62, 65 (Cal. 1990) (stressing need to protect public, courts, and integrity of legal profession); *In re Walker*, 254 N.W.2d 452, 455 (S.D. 1977) (noting purpose of disciplinary proceedings is to protect public from attorney misconduct); see also John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992) (noting grievance-committee duty to protect public); Caroll J. Miller, Annotation, *Bar Admission or Reinstatement of Attorney as Affected By Alcoholism or Alcohol Abuse*, 39 A.L.R.4th 567, 569 (1985) (stating goal of attorney discipline to protect public and maintain integrity of profession); Roger W. Nelson et al., *Monitoring and Diversion: Getting Lawyers on Track Without Discipline*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Attorney Discipline, Chic., Ill.), Sept. 17, 1992, at 1 (on file with *St. Mary's Law Journal*) (noting purposes of attorney discipline).

24. See, e.g., *In re Rivikind*, 791 P.2d 1037, 1042 (Ariz. 1990) (explaining goal of disciplinary proceeding different than goal of criminal proceeding; to protect public, not to punish offender); *In re Kersey*, 520 A.2d 321, 327 (D.C. 1987) (discussing goal of attorney discipline is not to impose punishment on attorney); *Walker*, 254 N.W.2d at 455 (acknowledging purpose of disciplinary proceeding is to remove, not punish errant attorney); see also Caroll J. Miller, Annotation, *Bar Admission or Reinstatement of Attorney as Affected by Alcoholism or Alcohol Abuse*, 39 A.L.R.4th 567, 569 (1985) (asserting purpose of disciplinary proceedings not to punish individual); Roger W. Nelson et al., *Monitoring and Diversion: Getting on Track Without Discipline*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 17, 1992, at 1 (on file with *St. Mary's Law Journal*) (explaining purpose of attorney discipline not to punish lawyer).

tions for errant lawyers.²⁵ In determining proper discipline for the misconduct, courts consider the nature and degree of the misconduct,²⁶ maintenance of respect for the legal profession,²⁷ and relevant aggravating and mitigating factors.²⁸ When compelling, extenuating circumstances exist, sanctions that normally would be imposed for a particular act of professional misconduct may be reduced or suspended.²⁹ Alcoholism and the recovery

25. The Supreme Court of Texas exercises disciplinary jurisdiction over attorneys licensed to practice in the state. *Scott v. State*, 86 Tex. 321, 322, 24 S.W. 789, 790 (1894). The Texas Supreme Court is charged with the duty of making rules and regulations for disciplining, suspending, disbarring, and accepting resignations of attorneys after appropriate investigation and trial. TEX. GOV'T CODE ANN. § 81.072(c) (Vernon Supp. 1993). The supreme court, in furtherance of its inherent powers to supervise the conduct of attorneys, established disciplinary and disability procedures. *Id.* at § 81.072(a). Additionally, the supreme court prepares, proposes, and adopts rules it considers necessary for disciplining, suspending, disbarring, and accepting the resignations of attorneys. *Id.* at § 81.024. *See generally* TEX. CONST. art V, § 3-b (granting inherent judicial powers to the supreme court). Disciplinary rules are treated like statutes and constitutional challenges are treated as questions of law. *See Cochran v. Cochran*, 333 S.W.2d 635, 640 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.) (holding rules governing state bar similar in force to statutes).

26. *See, e.g., In re Clyne*, 581 A.2d 1118, 1126 (Del. 1990) (applying disbarment when attorney's conduct poses continuing threat to public); *In re Driscoll*, 423 N.E.2d 873, 875 (Ill. 1981) (considering attorney's culpability); *Attorney Grievance Comm'n of Md. v. Burka*, 438 A.2d 514, 517 (Md. 1981) (holding certain attorney misconduct warrants disbarment). *Compare In re Konopka*, 596 A.2d 733, 735 (N.J. 1991) (stating that knowingly misappropriating client's funds mandates disbarment) with *In re Sheppard*, 594 A.2d 1333, 1333 (N.J. 1991) (considering substance abuse as mitigating factor in discipline case when client funds not converted).

27. *See, e.g., Harford*, 801 P.2d at 321 (stressing need to preserve public confidence in legal profession); *Driscoll*, 423 N.E.2d at 875 (holding integrity of legal profession must be protected); *Burka*, 438 A.2d at 517 (reasoning strict application of sanctions ensures public confidence in legal profession); *see also* Carol J. Miller, Annotation, *Bar Admission or Reinstatement of Attorney as Affected By Alcoholism or Alcohol Abuse*, 39 A.L.R.4th 567, 569 (1985) (stating that goal of attorney discipline is preservation of legal profession's integrity).

28. *See, e.g., Hawes v. State Bar of Cal.*, 797 P.2d 1180, 1185 (Cal. 1990) (noting absence of prior disciplinary record); *People v. Richtsmeir*, 802 P.2d 471, 472-73 (Colo. 1990) (listing factors considered in mitigation including lack of prior disciplinary history, cooperation with grievance committee, and voluntary effort to rectify consequences of misconduct); *Kersey*, 520 A.2d at 326 (establishing alcoholism as mitigating factor); *Driscoll*, 423 N.E.2d at 875 (holding impairment from alcoholism mitigating factor in attorney discipline); *see also* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS Standards 9.2, 9.3 (Feb. 1992) (listing factors that may be considered aggravating or mitigating).

29. *See, e.g., Kersey*, 520 A.2d at 326 (recognizing alcoholism as mitigating factor in attorney-discipline sanctions); *Burka*, 438 A.2d at 517 (allowing less severe sanction if compelling and extenuating circumstance found); *In re Johnson*, 322 N.W.2d 616, 618-19 (Minn. 1982) (adopting criteria for mitigation based on causation); *see also* ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.32 (Feb. 1992) (listing factors considered in mitigation); Carol J. Miller, Annotation, *Bar Admission or Reinstatement of Attorney as Affected By Alcoholism or Alcohol Abuse*, 39 A.L.R.4th 567, 568-76 (1985) (describing alcoholism as mitigating factor of attorney sanctions).

from alcoholism have been defined through case law to be two such mitigating circumstances.³⁰

B. *Alcoholism and Institutional Denial in the Legal Profession*

1. The Disease Model of Alcoholism

Unrestrained by social, economic, or cultural barriers, alcoholism infects attorneys in all areas of the legal community.³¹ Alcoholism is a primary, chronic, and progressive illness³² which, if left untreated, is

30. See, e.g., *Hawes*, 797 P.2d at 1184 (giving significant weight to rehabilitation from alcoholism or substance abuse if abuse was addictive, abuse contributed causally to misconduct, and attorney has meaningful and sustained period of rehabilitation); *Kersey*, 520 A.2d at 327 (establishing "but for" causation test for alcoholism as mitigating factor); *Driscoll*, 423 N.E.2d at 875 (stressing respondent's successful efforts in overcoming alcoholism); see also Attorney Grievance Comm'n of Md. v. *Winters*, 526 A.2d 55, 57 (Md. 1987) (allowing alcoholism as mitigating factor for misconduct that otherwise warrants disbarment); Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1418-23 (1988) (describing mitigating and nonmitigating factors). See generally Carol J. Miller, Annotation, *Bar Admission or Reinstatement of Attorney as Affected by Alcoholism or Alcohol Abuse*, 39 A.L.R.4th 567, 568-76 (discussing alcoholism and recovery in mitigation of attorney sanctions and reinstatement). Some courts clearly stress that it is the recovery, not the illness, that is the mitigating factor. See *Walker*, 254 N.W.2d at 457 (giving consideration to respondent's legitimate recovery, not to alcoholism itself).

31. See, e.g., *A Woman Lawyer's Story*, 55 TEX. B.J. 257, 257-59 (1992) (describing female attorney's illness and recovery); *From Joker to Justice*, 55 TEX. B.J. 252, 252-53 (1992) (relating personal story of alcoholic judge); Donald Muccigrosso & Donna L. Spilis, *Salvation for Solos: Help for Recovery from Addiction*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.) Sept. 15, 1992, at 1 (on file with *St. Mary's Law Journal*) (stating alcoholism has no social or economic barriers, and does not discriminate between lawyers); *Where to Go For Help*, OR. ST. B. BULL., Aug.-Sept. 1991, at 18, 18 (adapting information from policies and procedures of Oregon Attorney Assistance Program, stating alcoholism and chemical dependency know no social or economic barriers, they afflict all areas of legal community).

32. See Don Muccigrosso & Michael Sweeney, *How Much Do You Know About Alcohol?*, OR. ST. B. BULL., Aug.-Sept. 1991, at 9, 10 (stating new definition of alcoholism). The authors explained:

Alcoholism is a primary, chronic disease with genetic, psychosocial and environmental factors influencing its development and manifestations. The disease is often progressive and fatal. It is characterized by continuous or periodic impaired control over drinking, preoccupation with the drug alcohol despite adverse consequences and distortions in thinking, most notably denial.

Id.; see, e.g., *In re Clyne*, 581 A.2d 1118, 1119 (Del. 1990) (recognizing addiction to alcohol as disease); *In re Kersey*, 520 A.2d 321, 325 n.7 (D.C. 1987) (noting that alcoholism is disease characterized by "repetitive and compulsive ingestion of any sedative drug . . . in such a way as to result in interference with some aspect of the patient's life, be it health, marital status, career, interpersonal relationships or other required societal adaptations"); 85 ANNALS OF INTERNAL MEDICINE, No. 6, at 764 (1976) (defining alcoholism and related terms); G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 114 (1992) (quoting AMERICAN MEDICAL ASSOCIATION

fatal.³³ An afflicted individual experiences a series of increasingly severe stages of the disease, causing problems that affect physical and mental health, employment, and relationships.³⁴ By deteriorating the mind and body, the illness itself causes the impaired person to behave in completely unacceptable ways.³⁵ In the final stages of the disease, virtually no area of

MANUAL ON ALCOHOLISM (1957)) (defining alcoholism as chronic, progressive, primary disease); Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1662 (1981) (discussing acceptance of "disease model" of alcoholism). Symptoms of alcoholism include denial, blackouts, increased tolerance, and changes in personality. See Don Muccigrosso & Michael Sweeney, *How Much Do You Know About Alcohol?*, OR. ST. B. BULL., Aug.-Sept. 1991, at 9, 10 (listing symptoms of alcoholism). The disease may be brought on by genetic, psychosocial, or environmental factors. *Id.*; accord J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 266 (1992).

33. See, e.g., G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 114 (1992) (quoting AMERICAN MEDICAL ASSOCIATION MANUAL ON ALCOHOLISM (1957)) (describing alcoholism as chronic, progressive, and fatal); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233, 234 (1990) (describing progressive and fatal nature of alcoholism); John Rogers Carroll, *When Your Colleague Is Hooked*, 55 TEX. B.J. 268, 268 (1992) (reporting alcoholism eventually causes death); Donald Muccigrosso & Donna L. Spilis, *Salvation for Solos: Help for Recovery from Addiction*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992, at 1 (on file with *St. Mary's Law Journal*) (acknowledging alcoholism as primary, chronic, and fatal).

34. See, e.g., *Kersey*, 520 A.2d at 325-26 (noting disease of alcoholism characteristically interferes with health, employment, and relationships); John Rogers Carroll, *When Your Colleague Is Hooked*, 55 TEX. B.J. 268, 268-69 (1992) (describing stages of alcoholism); Don Muccigrosso & Michael Sweeney, *How Much Do You Know About Alcohol?*, OR. ST. B. BULL., Aug.-Sept. 1991, at 9, 10 (including problems with relationships and employment as symptoms of alcoholism); cf. G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 114 (1992) (reporting negative consequences of untreated illness); G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233, 233-34 (1990) (listing areas of alcoholic's life that suffer consequences of disease); J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 267, 267 (1992) (quoting World Health Organization definition of drug dependence as "a behavioral pattern in which use of a drug [activity] is given a sharply higher priority over other behaviors which once had significantly higher value").

35. See, e.g., *Kersey*, 520 A.2d at 326 (describing effects of alcoholism on brain); *In re Driscoll*, 423 N.E.2d 873, 874 (Ill. 1981) (holding prior behavior was typical of alcoholic, not typical of respondent); John Rogers Carroll, *When Your Colleague Is Hooked*, 55 TEX. B.J. 268, 268-69 (1992) (describing deterioration of alcoholic); J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 266 (1992) (reporting effects of alcohol on brain's control of judgment and cognition); Timothy W. Sorenson, *Status Report: ABA International Workshop on Lawyer Substance Abuse*, HEADNOTES, (Dallas Bar Ass'n, Dallas, Tex.), Dec. 15, 1991, at 1, 9 (noting misconduct caused by symptomatic impaired judgment). Alcohol affects the mind and body of an alcoholic differently than that of a non-alcoholic. See AMA MANUAL ON ALCOHOLISM 35 (3d ed. 1977) (distinguishing between alcoholic and nonalcoholic emotional and physical responses to alcohol); Michael Distelhort,

the alcoholic's life escapes the devastation of the illness.³⁶

Although chronic and progressive, alcoholism may be successfully arrested and treated.³⁷ The successful recovery rate for professionals is much higher than that of the general population, especially for participants in professional monitoring groups.³⁸ The most successful ongoing treatment for alcoholism is the Alcoholics Anonymous program,³⁹ which teaches participants how to regain progressively their physical, mental, and spiritual health.⁴⁰ Through the process of recovery, seemingly hopeless chronic substance abusers return to the community as ethical, productive members of

Chemical Dependency Issues, ABA Conference, "Making the Competent Lawyer: Models for Law School Action", Nov. 1-3, 1990, at 6 (on file with *St. Mary's Law Journal*) (analogizing chemical reactions of alcohol in body of alcoholic to sugar in body of diabetic).

36. See, e.g., *Kersey*, 520 A.2d at 324 (finding alcohol totally dominated respondent's life); *AMA MANUAL ON ALCOHOLISM* 35-37 (3d ed. 1977) (describing symptomatic behaviors of alcoholic); *A Progressive Disease*, 55 TEX. B.J. 250, 250-51 (1992) (describing deterioration of professional life as result of chemical addiction); Donald Muccigrosso & Donna L. Spilis, *Salvation for Solos: Help for Recovery from Addiction*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992, at 2-8 (on file with *St. Mary's Law Journal*) (describing personal stories of deterioration of all areas of life and profession brought on by alcoholism).

37. See, e.g., *Florida Bar v. Farbstein*, 570 So. 2d 933, 935 (Fla. 1990) (noting recovery and rehabilitation of respondent); *In re Willis*, 552 A.2d 979, 984 (N.J. 1989) (citing respondent attorney's remarkable recovery); *In re Walker*, 254 N.W.2d 452, 457 (S.D. 1977) (holding respondent is recovering alcoholic); *AMA MANUAL ON ALCOHOLISM* 7-8 (3d ed. 1977) (describing treatment of alcoholism); Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1416-17 (1988) (noting alcoholism as treatable disease); Donald Muccigrosso & Donna L. Spilis, *Salvation for Solos: Help for Recovery from Addiction*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992, at 2 (on file with *St. Mary's Law Journal*) (reporting that although no cure exists, recovery is possible). Because of the symptom of denial, although recovery is possible, 85% of alcoholics never receive treatment. Don Muccigrosso & Michael Sweeney, *How Much Do You Know About Alcohol?*, OR. ST. B. BULL., Aug.-Sept. 1991, at 9, 10.

38. See John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 273 (1992) (noting high recovery success rate of monitoring groups). Recovery rate of the general population is estimated between 40 to 60%; recovery among some professional groups is estimated as high as 90%. *Id.*; see Michael Distelhorst, *Chemical Dependency Issues*, ABA Conference, "Making the Competent Lawyer: Models for Law School Action", Nov. 1-3, 1990, at 6 (on file with *St. Mary's Law Journal*) (reporting recovery rate of professional groups as high as 90%).

39. See Susi Willis, *What We Won't See, Women and Addiction*, 55 TEX. B.J. 271, 271 (1992) (reporting recovery through Alcoholics Anonymous most successful); cf. *Willis*, 552 A.2d at 984 (commending respondent attorney's "remarkable" recovery).

40. See generally *ALCOHOLICS ANONYMOUS* 58-103 (3d ed. 1976) (describing how program of recovery works). The program of recovery involves twelve steps, the first of which is an admission of powerlessness over alcohol. *Id.* at 59. The remaining steps involve a process of spiritual faith, personal inventory, and making amends to those harmed by the alcoholic's drinking. *Id.* at 59-60.

society, and as honest, effective, professional practitioners.⁴¹

2. The Symptom and Problem of Denial

The hallmark characteristic of alcoholism is denial.⁴² Even in the face of grave and disastrous personal and professional consequences, an alcoholic may fervently deny that alcohol has anything to do with these problems.⁴³ Possessing exceptional intellectual and rationalizing abilities, attorneys seem to have heightened difficulty acknowledging that personal problems with alcohol exist.⁴⁴ The characteristics that encourage the professional success of a goal-oriented, achievement-focused person are the very characteristics that make the person more vulnerable to the cunning progression of addiction,

41. See, e.g., *Farbstein*, 570 So. 2d at 935 (noting recovery and rehabilitation of respondent); *Willis*, 552 A.2d at 984 (citing respondent attorney's remarkable recovery); *Walker*, 254 N.W.2d at 457 (holding respondent recovered alcoholic and fit to continue to practice law); see also *A Progressive Disease*, 55 TEX. B.J. 250, 250-51 (1992) (describing successful personal and professional rehabilitation); John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 274 (1992) (reporting recovered alcoholics may still be effective legal practitioners); cf. Susi Willis, *What We Won't See, Women and Addiction*, 55 TEX. B.J. 271, 271 (1992) (reporting recovery successful with change in alcoholic's thinking).

42. See, e.g., *In re Kersey*, 520 A.2d 321, 327 (D.C. 1987) (noting pretreatment alcoholic's denial of disease); *In re Pendergrast*, 776 P.2d 1202, 1203 (Kan. 1989) (citing panel's findings that alcoholism causes avoidance and lack of cooperation); G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 114 (1992) (stating symptom of alcoholism is denial of disease itself despite clear evidence to contrary); see also ALCOHOLICS ANONYMOUS 39-40 (3d. ed. 1976) (noting denial is part of illness); J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 267 (1992) (noting denial as element of dependency); Susi Willis, *What We Won't See, Women and Addiction*, 55 TEX. B.J. 271, 271 (1992) (reporting alcoholism known as disease of denial).

43. See Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, 70 MICH. B.J. 152, 152 (reporting few attorneys acknowledge substance abuse problem to disciplinary board); Susi Willis, *What We Won't See, Women and Addiction*, 55 TEX. B.J. 271, 271 (1992) (noting attorney arrogance and intellect contributes to denial). An attorney before the Maryland grievance committee denied that his \$500 to \$1,000 per week substance abuse habit affected his ability to practice law. *Attorney Grievance Committee v. Keister*, 607 A.2d 909, 912 (Md. 1992).

44. See, e.g., *Keister*, 607 A.2d at 912-13 (describing attorney's denial at grievance hearing that substance abuse affected competency); G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 116 (1992) (noting lawyers' skill at intellectualism and denial); Michelle Goff, *The Oregon State Bar Professional Liability Fund Attorney Assistance Program*, in DRUG FREE WORKPLACE 143, 143-44 (Dr. Dale A. Masi ed., 1987) (describing difficulties in breaking through attorney's denial); J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 267 (1992) (reporting professionals' difficulty in acknowledging existence of problem); Susi Willis, *What We Won't See, Women and Addiction*, 55 TEX. B.J. 271, 271 (1992) (stating attorneys' intellectual arrogance contributes to denial).

and susceptible to the fatal grip of denial.⁴⁵ Because both personal and professional denial are strong and pervasive, alcoholism may never be mentioned in attorney-disciplinary proceedings.⁴⁶ Symptomatic denial precludes the undiagnosed alcoholic attorney from presenting mitigation defenses, entering diversion programs, or requesting disability suspension.⁴⁷

3. The Disincentives Within the Legal Community

Although alcoholism has been long accepted by the medical⁴⁸ and legal

45. See, e.g., G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 116 (1992) (noting alcoholic lawyers' ability to elude diagnosis); *From Joker to Justice*, 55 TEX. B.J. 252, 252-53 (1992) (noting tools leading to professional success make one powerless over illness); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 16 (reporting characteristics lawyers bring to profession increase susceptibility to addiction); J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 267 (1992) (noting positive characteristics for professional success increase vulnerability to addiction); Susi Willis, *What We Won't See, Women and Addiction*, 55 TEX. B. J. 271, 271 (1992) (describing attorneys' intellectual arrogance as factor in denial).

46. See, e.g., *Smith v. O'Neill*, 813 S.W.2d 501, 501-02 (Tex. 1991) (describing addicted attorney before grievance committee); Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1426 (1988) (noting denial prevents impaired attorneys from getting help); Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, 70 MICH. B.J. 152, 152 (reporting few disciplinary cases in which attorney acknowledges substance abuse).

47. To offer alcoholism as a mitigating factor, the attorney must be aware of his disease and in many jurisdictions must be in recovery from the disease. See, e.g., *Hawes v. State Bar of Cal.*, 797 P.2d 1180, 1184 (Cal. 1990) (allowing mitigation upon showing of sustained and meaningful period of rehabilitation); *In re Driscoll*, 423 N.E.2d 873, 875 (Ill. 1981) (emphasizing respondent's successful recovery); *In re Winters*, 526 A.2d 55, 57 (Md. 1987) (allowing mitigation by alcoholism for misconduct that warrants disbarment); see also Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1416 (1988) (noting impaired attorneys deny they are out of control); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 18 (noting mitigation in Minnesota possible if recovery is underway).

48. The American Psychiatric Association has recognized alcoholism as a diagnosable and treatable illness for nearly forty years. AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, (DSM-III-R) 166-67 (3d ed. rev. 1987). The manual states:

The following are the characteristic symptoms of dependence. It should be noted that not all nine symptoms must be present for the diagnosis of dependence . . .

1. The person finds that when he or she actually takes the psychoactive substance, it is often in larger amounts or over a longer period than originally intended. . . .
2. The person recognizes that the substance use is excessive, and has attempted to reduce or control it, but has been unable to do so. . . .
3. A great deal of time is spent in activities necessary to procure the substance (including theft), taking it, or recovering from its effects. . . .
4. The person may suffer intoxication or withdrawal symptoms when he or she is expected to fulfill major role obligations (work, school, homemaking). . . .

professions as a disease, and not a moral failing,⁴⁹ the legal community remains fraught with disincentives to recovery.⁵⁰ Lingering misconceptions that alcoholism is a voluntary illness cause impaired attorneys to remain hidden.⁵¹ The moral stigma attached to the misconception that the disease of alcoholism is in any way voluntary results in the routine preclusion of affected individuals from the practice of law.⁵² Law students are often pro-

5. Important social, occupational, or recreational activities are given up or reduced because of substance abuse. . . .

6. With heavy and prolonged substance use, a variety of social, psychological, and physical problems occur, and are exacerbated by continued use of the substance. Despite having one or more of these problems (and recognizing that use of the substance causes or exacerbates them), the person continues to use the substance.

7. Significant tolerance, a markedly diminished effect with continued use of the same amount of the substance, occurs. . . .

8. With continued use, characteristic withdrawal symptoms develop when the person stops or reduces intake of the substance. . . .

9. After developing unpleasant withdrawal symptoms, the person begins taking the substance in order to relieve or avoid those symptoms. . . .

Id.

49. See, e.g., *In re Clyne*, 581 A.2d 1118, 1119 (Del. 1990) (recognizing addiction to alcohol as disease); *In re Kersey*, 520 A.2d 321, 325 (D.C. 1987) (noting that alcoholism is disease characterized by "repetitive and compulsive ingestion of any sedative drug . . . in such a way as to result in interference with some aspect of the patient's life, be it health, marital status, career, interpersonal relationships or other required societal adaptations"); *In re Kunz*, 524 N.E.2d 544, 546 (Ill. 1988) (characterizing alcoholism as disease, not moral failing); see also J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J., 266, 267 (1992) (quoting definition of drug dependence as "a behavioral pattern in which use of a drug [activity] is given a sharply higher priority over other behaviors which once had significantly higher value"). Alcoholism, which is separate and distinct from the sociological problem of alcohol abuse, is a disease over which an individual has no control. See Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1662 (1981) (discussing acceptance of disease model of alcoholism).

50. See, e.g., Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1416 (1988) (noting strong forces dissuading impaired attorneys from getting help); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 17 (noting existence of few discouragements from alcohol use); Timothy W. Sorenson, *Status Report: ABA International Workshop on Lawyer Substance Abuse*, HEADNOTES, (Dallas Bar Ass'n, Dallas, Tex.), Dec. 15, 1991, at 1, 9 (discussing problems impeding recovery); cf. Michelle Goff, *The Oregon State Bar Professional Liability Fund Attorney Assistance Program*, in DRUG FREE WORKPLACE 143, 144 (Dr. Dale A. Masi ed., 1987) (describing "covering-up" of incompetence of attorney by staff).

51. See Michael Distelhorst, *Chemical Dependency Issues*, ABA Conference, "Making the Competent Lawyer: Models for Law School Action," Nov. 2, 1990, at 5 (on file with *St. Mary's Law Journal*) (noting view of alcoholism as lack of willpower is uninformed approach); Timothy W. Sorenson, *Status Report: ABA International Workshop on Lawyer Substance Abuse*, HEADNOTES, (Dallas Bar Ass'n, Dallas, Tex.), Dec. 15, 1991, at 1, 9 (reporting misconceptions jeopardize impaired attorneys); see also Note, *Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1662 (1981) (discussing concept of alcoholism as disease).

52. See Timothy W. Sorenson, *Status Report: ABA International Workshop on Lawyer*

hibited from taking the bar exam if they disclose treatment for the disease, and lawyers are suspended or disbarred for misconduct resulting from impaired judgment symptomatic of the disease.⁵³ Uninformed attitudes encourage afflicted attorneys to keep their disease hidden, thereby creating a significant impediment to the identification and treatment of impaired lawyers.⁵⁴

Institutional denial of the existence of a problem with substance and alcohol abuse further propagates the "conspiracy of silence"⁵⁵ within the legal community.⁵⁶ This denial not only acts as a grave disservice to afflicted attorneys and as a threat to the integrity of the profession as a whole, but also fails to protect the public from impaired attorneys.⁵⁷ Although the professional responsibility of the legal community requires members to participate in self-regulation of the profession,⁵⁸ most lawyers are reluctant to report

Substance Abuse, HEADNOTES, (Dallas Bar Ass'n, Dallas, Tex.), Dec. 15, 1991, at 1, 9 (describing negative consequences of misconceptions on applicants to the bar and on practicing attorneys).

53. See, e.g., *In re Scott*, 802 P.2d 985, 992 (Cal. 1991) (ordering disbarment in spite of rehabilitation); *In re Konopka*, 596 A.2d 733, 734 (N.J. 1991) (noting that disbarment almost invariably results, in spite of attorney impairment, when client funds knowingly misappropriated); *In re Eads*, 734 P.2d 340, 348 (Or. 1987) (holding that attorney acted with knowledge of impropriety, but finding no mitigation of sanction by attorney's chemical dependency).

54. See Gary A. Jacobsen, M.D., *Puzzled By Addiction?*, OR. ST. B. BULL., Aug.-Sept. 1991, at 21, 22 (reporting lack of knowledge and negative attitudes inhibit identification of alcoholic). Early detection is critical in successfully treating addictive diseases. See Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1426 (1988) (stating early detection of alcoholism aids recovery and protects clients); John V. McShane, *Disability Probation and Monitoring Programs*, 55 TEX. B.J. 273, 274 (1992) (noting importance of early identification for successful rehabilitation).

55. Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1415 (1988).

56. "Denial, ignorance and fear are three powerful forces that prevent impaired lawyers from obtaining help." Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1426 (1988).

57. Impaired attorneys are more likely to commit acts of professional misconduct. See, e.g., Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1413 (1988) (noting 50 to 70% of disciplinary cases involve alcoholism); Donna L. Spilis, *Lawyer Substance Abuse*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (reporting survey findings of attorney-discipline cases related to substance abuse as high as 80%); Letter from Don Muccigrosso, Loss-Prevention Attorney, concerning Alcohol and Chemical Dependency Program, Professional Liability Fund, and Oregon State Bar, to Celene Greene, Executive Director, Oregon State Bar, (Apr. 1, 1988) (on file with *St. Mary's Law Journal*) (concluding that Oregon survey found 62% of attorneys with discipline complaints filed against them had chemical-dependency problems).

58. See Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1415 (1988) (noting obligation of attorneys to report incompetent or impaired work); see also MODEL CODE OF PROFESSIONAL RESPONSIB-

incompetent or impaired work.⁵⁹ Instead, impaired attorneys are frequently protected or enabled by their colleagues and staff, which in turn fosters opportunities for misconduct and unethical behavior.⁶⁰ Furthermore, judges who witness the impaired behavior of lawyers before the bench may be unsure of what to do.⁶¹

The typical disciplinary proceeding is entrenched with disincentives to attorney recovery.⁶² During disciplinary hearings, even if the respondent attorney fits the classic pattern of a substance abuser, grievance committees do not inquire about alcoholism.⁶³ Instead, the afflicted attorney is required to offer his or her illness as a mitigating factor, disability, or grounds for diversion.⁶⁴ However, the symptom of denial renders the impaired attorney un-

BILITY DR 1-103(A) (1980) (requiring attorney reporting of code violations); MODEL RULES OF PROFESSIONAL CONDUCT, Rule 8.3(a) (1983) (requiring lawyer with knowledge of attorney's rule violation to inform proper authority).

59. See Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1415 (1988) (noting reluctance of lawyers to report incompetent work).

60. See, e.g., *id.* at 1416 (discussing cover-up of behavior by others in legal community); Michelle Goff, *The Oregon State Bar Professional Liability Fund Attorney Assistance Program*, in DRUG FREE WORKPLACE 143, 144 (Dr. Dale A. Masi ed., 1987) (illustrating enabling behavior of staff); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 17 (detailing firms' efforts to hide partners' alcoholism). One firm moved an alcoholic senior partner to a distant, separate office. *Id.*

61. See, e.g., Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1416 (1988) (reporting that even judges participate in cover-up of impaired behavior); Michelle Goff, *The Oregon State Bar Professional Liability Fund Attorney Assistance Program*, in DRUG FREE WORKPLACE 143, 144 (Dr. Dale A. Masi ed., 1987) (describing courtroom performance as signal of addiction); Timothy W. Sorenson, *Status Report: ABA International Workshop on Lawyer Substance Abuse*, HEADNOTES, (Dallas Bar Ass'n, Dallas, Tex.), Dec. 15, 1991, at 1, 9 (noting judges aware of but unsure how to handle problem).

62. See, e.g., Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1416 (1988) (noting that attorneys are generally not good resources for each other); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 17 (citing existence of few disincentives to alcohol or drug use); Timothy W. Sorenson, *Status Report: ABA International Workshop on Lawyer Substance Abuse*, HEADNOTES, (Dallas Bar Ass'n, Dallas Tex.), Dec. 15, 1991, at 1, 9 (discussing problems impeding recovery); see also Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, 70 MICH. B.J. 152, 156 (1991) (reporting attorney disciplinary process sustains addictive silence).

63. See Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, 70 MICH. B.J. 152, 156 (1991) (reporting grievance commission does not raise substance abuse issue during disciplinary investigations); Telephone Interview with Don Jones, Director, Texas Lawyers Assistance Program (Mar. 25, 1993) (summary on file with *St. Mary's Law Journal*) (noting grievance committees do not generally raise substance-abuse issue at disciplinary hearing); Telephone Interview with Bobby Myers, Member, District 10 Grievance Committee (Mar. 25, 1993) (summary on file with *St. Mary's Law Journal*) (reporting that unless substance-abuse problem is obvious, grievance committees do not inquire about it).

64. See, e.g., *In re Kelly*, 801 P.2d 1126, 1132 (Cal. 1990) (holding failure of respondent

able to recognize his or her illness and, therefore, unable to present the true and complete circumstances surrounding the misconduct.⁶⁵ The attorney is not able to recognize his or her disease, peers are reluctant to acknowledge it, and the disciplinary board is unwilling to inquire about it.⁶⁶

III. STANDARDS FOR ALCOHOLISM AS A MITIGATING FACTOR DEVELOPED THROUGH CASE LAW

A. *The "But For" Causation Test of In re Kersey*

A majority of jurisdictions have considered the issue of whether chemical dependency and recovery should be considered mitigating factors in attorney discipline.⁶⁷ Acknowledging the nexus between alcoholism and attorney

to recognize her addiction aggravating factor in imposing sanctions); Attorney Grievance Comm'n v. Keister, 607 A.2d 909, 912 (Md. 1992) (noting addicted attorney before disciplinary authority denied addiction impaired work); Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, 70 MICH. B.J. 152, 156 (1991) (noting errant attorney must volunteer substance-abuse or disability information). However, an attorney need not be before a disciplinary committee to request or receive a disability suspension. See TEX. R. DISCIPLINARY P. 12.01 (1992) reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1993) (stating attorney with disability may be suspended indefinitely).

65. See, e.g., *Keister*, 607 A.2d at 912 (describing attorney's denial that substance abuse affected competency); Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, 70 MICH. B.J. 152, 156 (1991) (noting attorney in denial will not acknowledge addiction); Michelle Goff, *The Oregon State Bar Professional Liability Fund Attorney Assistance Program*, in DRUG FREE WORKPLACE 143, 143-44 (Dr. Dale A. Masi ed., 1987) (describing difficulties in breaking through attorney's denial); J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 267 (1992) (reporting difficulty of professionals' acknowledging existence of problem).

66. See, e.g., *Keister*, 607 A.2d at 912 (describing addicted attorney's denial of problem); Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1415 (1988) (citing reluctance of lawyers to report misconduct of peers); Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, 70 MICH. B.J. 152, 156 (1991) (reporting grievance committees do not inquire into substance abuse); Telephone Interview with Bobby Myers, Member, District 10 Grievance Committee (Mar. 25, 1993) (summary on file with *St. Mary's Law Journal*) (reporting that attorney before grievance committee generally are not asked about substance abuse).

67. See, e.g., *Hawes v. State Bar of Cal.*, 797 P.2d 1180, 1184 (Cal. 1990) (holding rehabilitation from substance abuse or alcoholism due significant weight if abuse addictive, causally contributed to misconduct, and attorney has meaningful, sustained period of rehabilitation); *In re Kersey*, 520 A.2d 321, 327 (D.C. 1987) (establishing proximate-causation test for alcoholism as mitigating factor); *In re Driscoll*, 423 N.E.2d 873, 875 (Ill. 1981) (emphasizing respondent's successful recovery efforts); Attorney Grievance Comm'n of Md. v. Burka, 438 A.2d 514, 517 (Md. 1981) (establishing clear-and-convincing-evidence standard for mitigation); *In re Johnson*, 322 N.W.2d 616, 618 (Minn. 1982) (delineating necessary criteria to demonstrate alcoholism mitigating factor); see also Attorney Grievance Comm'n v. Winters, 526 A.2d 55, 57 (Md. 1987) (holding alcoholism mitigates misconduct that otherwise warrants disbarment); Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1418-23 (1988) (reporting differing approaches to mitiga-

misconduct, the District of Columbia Court of Appeals in *In re Kersey*⁶⁸ held that alcoholism is a mitigating factor in determining discipline.⁶⁹ Kersey was charged with numerous violations of the Code of Professional Responsibility, including charges of misappropriation of client funds.⁷⁰ Recognizing alcoholism as a disease affecting judgment and higher brain functions,⁷¹ the court created a “but for” standard to establish alcoholism as the proximate cause of the misconduct.⁷² The court further held that, if a causal connection between the illness and the misconduct exists, rehabilitation from alcoholism becomes a significant factor in determining discipline.⁷³ Finding that a nexus between Kersey’s alcoholism and his misconduct had been established, the court held that when there is evidence of rehabilitation, a period of actual suspension is not always necessary.⁷⁴ Ordering the execution of Kersey’s disbarment to be stayed, the court placed him on probation for five years.⁷⁵ The conditions of probation included monitoring of Kersey’s professional and financial conduct, as well as requiring total abstinence from alcohol, with supervision by a sobriety monitor charged with taking any steps necessary to ensure Kersey’s continued recovery.⁷⁶

The court of appeals further clarified the “but for” test, established in *Kersey*, to require a showing that the lawyer’s conduct was “substantially affected” by the alcoholism.⁷⁷ In *In re Temple*,⁷⁸ the court did not require the respondent attorney to show that alcoholism or addiction was the sole cause of his misconduct, but rather that it was a substantial factor of causa-

tion). See generally Caroll J. Miller, Annotation, *Bar Admission or Reinstatement of Attorney as Affected by Alcoholism or Alcohol Abuse*, 39 A.L.R.4th 567, 568-76 (1985) (discussing alcoholism and recovery as mitigating factors in attorney reinstatement).

68. 520 A.2d 321 (D.C. 1987).

69. *Id.* at 326.

70. *Id.* at 322.

71. See *id.* at 326 (discussing symptoms and effects of alcoholism on brain).

72. See *Kersey*, 520 A.2d at 327 (holding “but for” Kersey’s alcoholism, misconduct would not have occurred). But see *In re Cooper*, 591 A.2d 1292, 1297 (D.C. 1991) (applying “but for” test and finding no causal connection between addiction and misconduct).

73. See *Kersey*, 520 A.2d at 327 (holding when alcoholism is causal factor to misconduct, rehabilitation is significant factor in determining discipline).

74. See *id.* at 328 (rejecting board’s recommendation for suspension).

75. *Id.*

76. *Id.* The sobriety monitor was given the right to require Kersey to attend AA lawyers’ group meetings. *Id.*

77. *In re Temple*, 596 A.2d 585, 590 (D.C. 1991); see also *In re Miller*, 553 A.2d 201, 203 (D.C. 1989) (requiring showing of emotional condition of attorney as substantial factor to mitigate); *In re Peek*, 565 A.2d 627, 631 (D.C. 1989) (applying “substantially affected” analysis to alcoholism as mitigating factor).

78. 596 A.2d 585 (D.C. 1991).

tion.⁷⁹ In determining whether alcoholism or drug addiction could serve as a mitigating factor of sanctions, the court focused on whether "removal of the substantial contributing factor will end the misconduct."⁸⁰

B. *Analysis of Alcoholism as a Mitigating Factor in Other Jurisdictions*

Although jurisdictions differ on the recognition and application of alcohol and drug addiction as mitigating factors in attorney discipline,⁸¹ the *Kersey* "but for" standard is generally accepted.⁸² Holdings in some jurisdictions accepting alcoholism or addiction as mitigating factors⁸³ contrast with decisions of other courts that some kinds of misconduct are so egregious as to preclude any mitigation of sanctions, regardless of impairment or rehabilitation of the errant attorney.⁸⁴ More commonly, however, courts require proof of a causal relationship between the addiction and the misconduct⁸⁵ and consider the recovery from the illness, not the illness itself, as mitiga-

79. *See id.* at 590 (holding "but for" language of prior decision not "sole cause" test).

80. *Id.* at 590.

81. *See, e.g.,* *People v. Luxford*, 626 P.2d 675, 677 (Colo. 1981) (allowing alcoholism and recovery as mitigating factors); *Louisiana State Bar Ass'n v. Longenecker*, 538 So. 2d 156, 163 (La. 1989) (holding probation appropriate sanction for attorney unlikely to harm public during period of rehabilitation); *In re Bambury*, 571 N.Y.S.2d 480, 480 (N.Y. App. Div. 1991) (questioning predication of misconduct on alcoholism).

82. *See, e.g., In re Kunz*, 524 N.E.2d 544, 547 (Ill. 1988) (holding causal connection between alcoholism and misconduct mitigating factor); *Attorney Grievance Comm'n v. Kolodner*, 557 A.2d 1332, 1333 (Md. 1989) (finding respondent attorney met evidentiary standard showing impairment substantially responsible for misconduct); *In re Willis*, 552 A.2d 979, 984 (N.J. 1989) (imposing shorter suspension due to mitigation by alcoholism).

83. *See, e.g., Florida Bar v. Farbstein*, 570 So. 2d 933, 935 (Fla. 1990) (finding effect of addiction to be mitigating factor); *In re Driscoll*, 423 N.E.2d 873, 874 (Ill. 1981) (determining that in rare cases alcoholism is complete excuse for misconduct); *Attorney Grievance Comm'n of Md. v. Burka*, 438 A.2d 514, 517 (Md. 1981) (establishing clear-and-convincing-evidence standard).

84. *See In re Scott*, 802 P.2d 985, 993 (Cal. 1992) (holding severity of offenses outweighed mitigation by recovery); *Burka*, 438 A.2d at 517 (finding misconduct egregious and warranting disbarment). *Compare In re Konopka*, 596 A.2d 733, 735 (N.J. 1991) (finding disbarment mandatory sanction for misappropriation of client funds) and *Florida State Bar v. Shuminer*, 567 So. 2d 430, 433 (Fla. 1990) (finding respondent's failure to establish impairment outweighed seriousness of offenses) with *In re Sheppard*, 594 A.2d 1333, 1333 (N.J. 1991) (allowing substance abuse to mitigate sanctions for misconduct not involving conversion of client funds) and *Farbstein*, 570 So. 2d at 936 (holding presumption that disbarment is appropriate sanction for misappropriation of clients funds to be rebuttable).

85. *See In re Clyne*, 581 A.2d 1118, 1125 (Del. 1990) (requiring showing of causal connection between alcoholism and misconduct); *Kolodner*, 557 A.2d at 1334 (mitigating sanctions upon finding alcoholism responsible for substantial degree of misconduct). *Compare In re Kersey*, 520 A.2d 321, 327 (D.C. 1987) (holding "but for" respondent's alcoholism, misconduct would not have occurred) with *Cooper*, 591 A.2d at 1297 (finding respondent did not satisfy "but for" causation test).

tion.⁸⁶ Several jurisdictions have established specific criteria that must be met to allow alcoholism or addiction to mitigate disciplinary sanctions.⁸⁷ For example, to admit alcoholism as a valid defense to professional misconduct, the Minnesota Supreme Court, in *In re Johnson*, requires the respondent to satisfy a four-part test establishing, by clear and convincing evidence, that (1) the attorney is affected by alcoholism, (2) there is a causal connection between the alcoholism and the misconduct, (3) the attorney is recovering from the alcoholism, and (4) recovery has arrested the misconduct.⁸⁸ The Minnesota standard has been adopted substantively by the American Bar Association as the proper analysis for considering alcoholism as a mitigating factor in attorney-discipline cases.⁸⁹

IV. ACKNOWLEDGING AND ADDRESSING THE PROBLEM OF CHEMICAL DEPENDENCY IN THE LEGAL COMMUNITY

A. *Lawyers Assistance Programs*

Acknowledging that the conduct of every attorney reflects upon the legal

86. See, e.g., *Luxford*, 626 P.2d at 677 (considering rehabilitation from alcoholism as mitigating factor when rehabilitation occurs between time of misconduct and disciplinary hearing); *In re Pendergrast*, 776 P.2d 1202, 1203-04 (Kan. 1989) (imposing probationary sanction upon diagnosed alcoholic who voluntarily received treatment); *In re Walker*, 254 N.W.2d 452, 455 (S.D. 1977) (stressing respondent's lengthy and continued abstention from alcohol use).

87. See *Harford v. State Bar of Cal.*, 801 P.2d 317, 320-21 (Cal. 1990) (outlining necessary criteria for rehabilitation from alcohol abuse to be considered mitigating factor); *Kersey*, 520 A.2d at 327 (establishing "but for" test for proximate causation); cf. *Attorney Grievance Comm'n of Md. v. Mandell*, 557 A.2d 1329, 1330 (Md. 1989) (applying clear-and-convincing-evidence standard to mitigation by addiction to lawfully prescribed drugs). But see *Clyne*, 581 A.2d 1118, 1125 (Del. 1990) (declining to adopt formal standard for determining to what extent alcoholism could mitigate sanctions).

88. See *In re Johnson*, 322 N.W.2d 616, 618 (Minn. 1982) (listing four relevant criteria and standard of proof for alcoholism defense).

The relevant criteria for the defense of alcoholism are:

1. that the accused attorney is affected by alcoholism.
2. that the alcoholism caused the misconduct.
3. that the accused attorney is recovering from alcoholism and from any other disorders which caused or contributed to the misconduct.
4. that the recovery has arrested the misconduct and the misconduct is not apt to reoccur.

Id. at 618. The four criteria must be established by clear and convincing evidence. *Id.* The court found that Johnson's misconduct warranted suspension, and stayed the suspension conditioned in part upon his regular attendance at meetings of Lawyers Concerned for Lawyers. *Id.* at 619.

89. See ABA MANUAL ON PROFESSIONAL CONDUCT, § 131:202 (stating four-factor analysis and standard of proof to be applied to alcoholism in disciplinary cases); ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.32(i) (1992) (delineating four criteria for considering mental disability or chemical dependency as mitigating factors).

profession as a whole, and that alcoholism is a treatable disease, virtually every jurisdiction has developed programs for helping impaired attorneys.⁹⁰ When a respondent attorney establishes chemical dependency or recovery as a mitigating factor in disciplinary proceedings, courts often order continued rehabilitation as a condition to staying the more onerous sanctions.⁹¹ Impaired attorneys who must demonstrate their fitness to practice law through ongoing recovery are aided in their efforts by Lawyers Assistance Programs.⁹²

Encouraging identification and rehabilitation of alcoholism-impaired attorneys, an effective Lawyers Assistance Program helps protect the public from attorney misconduct.⁹³ Separate from disciplinary authorities, Law-

90. See *Mississippi State Bar v. Gautier*, 538 So. 2d 772, 775-76 (Miss. 1989) (acknowledging problem of chemical dependency in bar and noting Lawyer and Judges Assistance Program established); Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1426 (1988) (describing rationale for implementing programs to help impaired attorneys); Roger W. Nelson et al., *Monitoring and Diversion: Getting on Track Without Discipline*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 17, 1992, at 10-14 (on file with *St. Mary's Law Journal*) (describing Arizona's diversion program for attorney education and treatment); see also Telephone Interview with Donald Muccigrosso, Director, Oregon State Bar Professional Liability Fund Attorney Assistance Program (Jan. 19, 1993) (summary on file with *St. Mary's Law Journal*) (discussing Oregon's policies and program relating to impaired attorneys). See generally Cassie Dalla Santa & William X. Haase, *ABA Discipline Services and Review of Recent Case Law*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (reporting on existence of Lawyers Assistance Programs and their relationships with state disciplinary agencies).

91. See, e.g., *In re Kersey*, 520 A.2d 321, 328 (D.C. 1987) (assigning sobriety monitor to respondent); *In re Driscoll*, 423 N.E.2d 873, 875 (Ill. 1981) (requiring respondent attorney to participate in Lawyers Assistance Program); *In re Johnson*, 322 N.W.2d 616, 619 (Minn. 1982) (staying respondent's suspension in part on attendance at Lawyers Concerned for Lawyers meetings).

92. See, e.g., *Kersey*, 520 A.2d at 327 (charging sobriety monitor with taking whatever means necessary to ensure respondent's continued rehabilitation, including required attendance at local LAP); *Driscoll*, 423 N.E.2d at 875 (requiring respondent attorney to participate in Lawyers Assistance Program as condition of mitigation); *Johnson*, 322 N.W.2d at 619 (partially conditioning staying of respondent's suspension on attendance at Lawyers Concerned for Lawyers meetings). See generally G. Andrew H. Benjamin, *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 119-36 (1992) (describing model Lawyers Assistance Program); Cassie Dalla Santa & William X. Haase, *ABA Discipline Services and Review of Recent Case Law*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (summarizing status and function of Lawyer Assistance Programs).

93. See Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1436 (1988) (reporting most important factor in successful treatment of alcoholism is early detection); Cassie Dalla Santa & William X. Haase, *ABA Discipline Services and Review of Recent Case Law*, INTERNATIONAL WORKSHOP ON

yers Assistance Programs exist in every state⁹⁴ as confidential referral, prevention, intervention, and education resources.⁹⁵ Successful Lawyers Assistance Programs stress both confidentiality and maintenance as a distinct and separate entity from the attorney discipline system.⁹⁶ Incorporating trained professionals and volunteers, Lawyers Assistance Programs are designed to encourage the earliest possible detection of impaired attorneys and, thereby, facilitate intervention before clients' interests are jeopardized.⁹⁷

LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (reporting on function of Lawyer Assistance Programs). See generally G. Andrew H. Benjamin, *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 119-36 (1992) (describing elements of model Lawyer Assistance Program).

94. See Cassie Dalla Santa & William X. Haase, *ABA Discipline Services and Review of Recent Case Law*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (summarizing status and function of Lawyers Assistance Programs). As of 1989, Colorado had no formal Lawyers Assistance Program, but does have a Concerned Lawyers group, consisting of lawyers in Alcoholics Anonymous. *Id.* Although they differ in organization, every jurisdiction has an assistance program of some kind. See Telephone Interview with Cassie Dalla Santa, ABA Center for Professional Responsibility (Jan. 19, 1993) (summary on file with *St. Mary's Law Journal*) (discussing Lawyer Assistance Programs throughout country). In Oregon, the Attorney Assistance Program is funded by the Oregon State Bar Professional Liability Fund. Telephone Interview with Don Muccigrosso, Director, Oregon Attorney Assistance Program (Jan. 19, 1993) (summary on file with *St. Mary's Law Journal*).

95. See Michelle Goff, *The Oregon State Bar Professional Liability Fund Attorney Assistance Program*, in DRUG FREE WORKPLACE 143, 145-46 (Dr. Dale A. Masi ed., 1987) (describing need for Lawyers Assistance Program and its function in legal community); Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1424-26 (1988) (describing elements and purposes of Lawyer Assistance Programs). See generally G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 119-34 (1992) (discussing elements of model Lawyer Assistance Program). In addition to Supreme Court and Bar Association support of the Lawyers Assistance Program, Ohio also requires continuing legal education in the area of substance abuse and has mandatory substance-abuse education as a component of law school curriculum. Telephone Interview with William Haase, Director, Ohio Lawyers Assistance Program (Jan. 27, 1993) (summary on file with *St. Mary's Law Journal*).

96. See G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 119-21 (1992) (discussing distinct status from disciplinary authority and strict confidentiality as necessary elements of successful Lawyer Assistance Program); Cassie Dalla Santa & William X. Haase, *ABA Discipline Services and Review of Recent Case Law*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (summarizing relationships of Lawyer Assistance Programs to disciplinary authorities).

97. See Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1423 (1988) (noting importance of early detec-

B. *Monitoring, Diversion, and Education*

In addition to implementing Lawyers Assistance Programs, states have responded to the problem of chemical dependency in the legal community by initiating monitoring, diversion, and education programs.⁹⁸ In jurisdictions recognizing that the best interests of society are served by rehabilitating impaired lawyers, while still affording protection to the public, attorneys whose misconduct has been related to chemical dependency are afforded opportunities to rehabilitate themselves and continue the practice of law under the supervision of monitors.⁹⁹ Monitoring programs vary from state to state, ranging from informal organizations of volunteers to well-funded formal agencies.¹⁰⁰ In disciplinary cases when disbarment is not mandated but assurance of public protection is required, errant attorneys are assigned highly-trained probation monitors who evaluate their law practices, finances, and sobriety.¹⁰¹ Unlike disciplinary-probation monitoring, which follows serious misconduct, diversion programs seek to "divert" the impaired attorney, before the commission of serious disciplinary violations, to helpful agencies or groups that address the underlying problem of lawyer misconduct with treatment and education.¹⁰² Some jurisdictions have extended their efforts

tion of illness). *See generally* G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 *LAW & PSYCHOL. REV.* 113, 119-36 (1992) (discussing necessary components of successful Lawyer Assistance Programs).

98. *See, e.g.*, John V. McShane, *Disability Probation and Monitoring Programs*, 55 *TEX. B.J.* 273, 273-74 (1992) (discussing disability monitoring in Texas); Roger W. Nelson et al., *Monitoring and Diversion: Getting on Track Without Discipline*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 17, 1992, at 10-14 (on file with *St. Mary's Law Journal*) (describing Arizona's diversion program for attorney education and treatment); Ruth Woodruff, *Monitoring for Recovery from Substance Abuse*, *PROF. LAW.* (Standing Committee on Professionalism, ABA Center for Professional Responsibility), Nov. 1992, at 1, 1-4 (outlining monitoring programs).

99. *See* John V. McShane, *Disability Probation and Monitoring Programs*, 55 *TEX. B.J.* 273, 273-74 (1992) (describing Texas provisions for disability); Ruth Woodruff, *Monitoring for Recovery from Substance Abuse*, *PROF. LAW.* (Standing Committee on Professionalism, ABA Center for Professional Responsibility), Nov. 1992, at 1, 4-7 (outlining possible diversion and monitoring options).

100. *See* Ruth Woodruff, *Monitoring for Recovery from Substance Abuse*, *PROF. LAW.* (Standing Committee on Professionalism, ABA Center for Professional Responsibility), Nov. 1992, at 1, 4-7 (reporting types of diversion and monitoring programs used in various jurisdictions).

101. *See, e.g.*, G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 *LAW & PSYCHOL. REV.* 113, 128-33 (1992) (discussing need for training of monitors); John V. McShane, *Disability Probation and Monitoring Programs*, 55 *TEX. B.J.* 273, 274 (1992) (describing function of probation monitors); Dale C. Moss, *Out of Control*, *PA. LAW.*, Mar. 1987, at 16, 18 (noting efforts of state bars to balance sanctions).

102. *See* Roger W. Nelson et al., *Monitoring and Diversion: Getting on Track Without Discipline*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 17, 1992, at 10-14 (on file with *St. Mary's Law Jour-*

to address chemical dependency in the profession by requiring continuing legal education on substance abuse for members of the bar and substance-abuse education as part of required law school curricula.¹⁰³

V. THE RESPONSE IN TEXAS

A. *Texas Lawyers Assistance Program*

Approximately 10,000 Texas lawyers are impaired by alcoholism.¹⁰⁴ Responding to the tremendous amount of harm suffered by alcoholic attorneys and their clients, the State Bar of Texas created the Texas Lawyers Assistance Program (TLAP).¹⁰⁵ The purpose of TLAP is the identification and rehabilitation of attorneys impaired by physical or mental illnesses, including alcohol or drug abuse, so that these attorneys may return to the competent practice of law.¹⁰⁶ TLAP has no disciplinary authority, but accepts referrals from entities within the attorney-discipline and disability system to serve as a monitor for impaired attorneys.¹⁰⁷ Confidentiality is an essential element of the program and is maintained throughout all communica-

nal) (describing Arizona's diversion program for attorney education and treatment); Ruth Woodruff, *Monitoring for Recovery from Substance Abuse*, PROF. LAW. (Standing Committee on Professionalism, ABA Center for Professional Responsibility), Nov. 1992, at 1, 1 (describing types of monitoring and diversion programs).

103. See Telephone Interview with William Haase, Director, Ohio Lawyers Assistance Program (Jan 19, 1993) (summary on file with *St. Mary's Law Journal*) (discussing Ohio's mandatory CLE and law school education on substance abuse); Telephone Interview with Don Jones, Director, Texas Lawyers Assistance Program (Jan. 19, 1993) (summary on file with *St. Mary's Law Journal*) (discussing efforts to develop law school curriculum on substance abuse for use in professional responsibility classes).

104. This estimate is reached by applying the national statistics to the Texas bar. See G. Andrew H. Benjamin et al., *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J. L. & PSYCHIATRY 233, 242 (1990) (reporting statistical model verified by similar illness rates in different populations); John Rogers Carroll, *When Your Colleague Is Hooked*, 55 TEX. B.J. 268, 268 (1992) (reporting 10% of lawyers drink alcoholically and another 2 to 3% addicted to other substances); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 16 (asserting 11 to 15% of legal professionals are alcoholics); Donna L. Spilis, *Lawyer Substance Abuse*, INTERNATIONAL WORKSHOP ON LAWYER SUBSTANCE ABUSE (ABA Commission on Impaired Attorneys, Chic., Ill.), Sept. 15, 1992 (on file with *St. Mary's Law Journal*) (stating Washington Bar Association reported over 18% of its attorneys dependent on alcohol); Telephone Interview with Don Jones, Director, Texas Lawyers Assistance Program (Jan. 19, 1993) (summary on file with *St. Mary's Law Journal*) (discussing estimated number of impaired attorneys in Texas).

105. TLAP was established in 1989 pursuant to Section 467 of the Texas Health and Safety Code. See TEX. HEALTH & SAFETY CODE ANN. § 467.001-.008 (Vernon 1992) (stating provisions and definitions relating to peer-assistance programs).

106. See Letter from Don Jones, Director, Texas Lawyers Assistance Program, to author (Feb. 18, 1993) (on file with *St. Mary's Law Journal*) (stating purpose of TLAP).

107. See *id.* (describing referral-acceptance policy).

tions.¹⁰⁸ Additionally, persons reporting information to TLAP or taking action in good faith are immune from civil liability.¹⁰⁹ The efforts of TLAP are directed toward "early detection and intervention to encourage the impaired lawyer to voluntarily seek help and cooperate in treatment at the earliest possible time in order for him to regain full effectiveness in practice."¹¹⁰

Although the majority of referrals to TLAP are received from attorneys themselves, referrals also come from partners, clients, peers, associates, office staff, professors, law students, family members, or friends of impaired attorneys.¹¹¹ After a referral has been investigated, contact with the referred attorney is made by a member of Lawyers Concerned for Lawyers, or another related group of attorneys recovering from alcoholism who can offer his or her personal experience to the afflicted attorney.¹¹² In this manner, the impaired lawyer may (1) relate to an attorney who has similar experiences with the disease of alcoholism, (2) be confronted with his or her own problem, and (3) be offered hope for recovery.¹¹³ In some instances, a TLAP member will be involved in an "intervention" on an impaired attorney at which time he or she is directly and abruptly confronted with the consequences of his or her disease and is urged into treatment.¹¹⁴

B. *Rules of Disciplinary Procedure*

Recent amendments to the Texas Rules of Disciplinary Procedure (Rules) significantly affect alcoholism-impaired attorneys and reflect the Texas perspective regarding chemical dependency in the profession.¹¹⁵ Section 2.17 of the Rules lists considerations for the imposition of sanctions and states "a

108. Communications with anyone working with TLAP are statutorily confidential. TEX. HEALTH & SAFETY CODE ANN. § 467.007 (Vernon 1992). A communication to TLAP is neither a communication with the State Bar nor a shield from attorney-grievance proceedings. See Letter from Don Jones, Director, Texas Lawyers Assistance Program, to author (Feb. 18, 1993) (on file with *St. Mary's Law Journal*) (describing confidentiality policy).

109. TEX. HEALTH & SAFETY CODE ANN. § 467.008 (Vernon 1992).

110. Texas Lawyers Assistance Program Peer Intervention Manual, State Bar of Texas (1989) (on file with the Texas Lawyers Assistance Program state office). Early detection is a critical factor in treating alcoholism and decreases the likelihood of harm to clients. Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1416-17 (1988).

111. See Letter from Don Jones, Director, Texas Lawyers Assistance Program, to author (Feb. 18, 1993) (on file with *St. Mary's Law Journal*) (summarizing referrals).

112. See *id.* (describing process by which contact is made with impaired attorney).

113. See *id.* (noting the state-wide network of recovering attorneys who volunteer to help impaired peers).

114. See *id.* (referring to process of intervention).

115. See TEX. R. DISCIPLINARY P. 2.17 (1992), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1993) (including recovery from drug or alcohol use as mitigation factor); TEX. R. DISCIPLINARY P. 12.01-.13 (1992) (providing description and procedures for disability suspension and monitoring).

Respondent's Disability resulting from the use of alcohol or drugs may not be considered in mitigation, unless Respondent demonstrates that he or she is successfully pursuing in good faith a program of recovery."¹¹⁶ Part XII of the Rules addresses disability suspension, defining disability as including any physical, mental, or emotional condition that interferes with an attorney's ability to perform his or her professional duties.¹¹⁷ Upon a finding that an attorney is suffering from a disability, the Rules provide for the suspension of the attorney for an indefinite period of time.¹¹⁸ The Rules allow for an attorney to be placed on disability probation, provided that the attorney is able to practice law, harm to the public is unlikely, and the disability can be treated while the attorney is in practice.¹¹⁹ Conditions of the disability probation may include the abstinence from alcohol and drugs, substance-abuse evaluation, and participation in an Impaired Attorney Recovery and Supervision Program.¹²⁰ Procedures for reinstatement to practice law following a disability suspension include filing a petition with either the Board of Disciplinary Appeals or the district court.¹²¹

C. Admission to the Texas Bar

Recent changes in Section 82 of the Texas Government Code address the effect of chemical dependency on a bar applicant's admission to the practice of law in Texas.¹²² As a prerequisite to admission to the bar, an applicant must demonstrate moral fitness and character, evidenced in part by interrogatories regarding chemical addiction.¹²³ Section 83.030 of the Texas Government Code prohibits the Board of Law Examiners from denying an applicant the opportunity to take the Texas bar exam based on the single criterion that the applicant "suffers or appears to suffer from chemical dependency."¹²⁴ If the Board of Law Examiners determines that the applicant suffers from chemical dependency, the Board is statutorily mandated to re-

116. *See id.* at 2.17 (listing factors evidentiary panel may consider in determining sanction). Respondent may ask panel to consider recovery from drug and alcohol use as a mitigating factor, however, a good faith program of recovery is not defined in the Rules. *Id.*

117. *See id.* at 12.01-.13 (outlining procedures for disability suspension and probation). Rule 1.06(H) includes, in its definition of disability, any physical, mental, or emotional condition impairing competent rendering of legal services. *Id.*

118. *See id.* at 12.02 (describing procedure for receiving disability suspension).

119. *See* TEX. R. DISCIPLINARY P. 12.10 (1992) (listing necessary criteria for disability probation).

120. *See id.* at 12.11 (listing possible conditions of disability probation).

121. *See id.* at 12.06 (stating procedure for reinstatement after disability suspension).

122. *See* TEX. GOV'T CODE ANN. § 82.030 (Vernon Supp. 1993) (detailing Board procedures for chemically-dependent bar applicants).

123. *See id.* § 82.028 (describing process for determining moral character and fitness of bar applicant).

124. *Id.* § 82.030(e)(1).

quire the applicant to submit to a treatment facility for evaluation.¹²⁵ Once such an applicant passes the bar exam, he or she may not be denied a probationary license to practice law based solely on chemical dependency.¹²⁶ In granting the probationary license, the Board may require the attorney to follow certain conditions, including abstinence from the use of alcohol or drugs, treatment for chemical dependency, and participation in a monitoring program.¹²⁷ The probationary license expires after two years, at which time the attorney may apply for either a full license to practice law or another probationary license.¹²⁸ To receive a regular license, the applicant must demonstrate a period of sobriety of at least two years.¹²⁹

VI. THE PROPOSED DIRECTION FOR TEXAS

A. *Alcoholism as a Mitigating Factor in Attorney Discipline*

Although the Supreme Court of Texas has not ruled on an attorney-discipline case in which alcoholism was presented as a mitigating factor, related issues have been reviewed.¹³⁰ Treatment and recovery from addiction to cocaine were offered as sufficient change of circumstances to warrant trial-court review of a prior suspension order in the Texas Supreme Court case of *Smith v. O'Neill*.¹³¹ In *O'Neill*, the respondent attorney had been suspended from the practice of law for six years as a result of numerous acts of professional misconduct.¹³² The suspension was probated, based partially upon the condition of restitution.¹³³ The trial court subsequently revoked the probation, finding that Smith materially violated the terms of his probation by failing to make restitution, and ordered the entire six-year suspension be served.¹³⁴ Two years after the revocation, Smith filed a motion asking the trial court to reinstate his probation, even though he had not made full resti-

125. *Id.* § 82.030(c).

126. TEX. GOV'T CODE ANN. § 83.038(d)(1) (Vernon Supp. 1993).

127. *Id.* § 82.038(e).

128. *Id.* § 82.038(f).

129. *See id.* (prohibiting Board from recommending issuance of regular license to chemically dependent applicant unless free from alcohol and drugs at least two years).

130. *See Smith v. O'Neill*, 813 S.W.2d 501, 502 (Tex. 1991) (indicating recovery from cocaine addiction significant change in circumstances); Interview with William W. Kilgarlin, former Justice, Supreme Court of Texas, in Austin, Tex. (Feb. 16, 1993) (summary on file with *St. Mary's Law Journal*) (discussing current state of law in Texas); Telephone Interview with Don Jones, Director, Texas Lawyers Assistance Program (Jan. 19, 1993) (summary on file with *St. Mary's Law Journal*) (discussing lack of Texas case law on alcoholism as mitigating factor in attorney discipline).

131. 813 S.W.2d 501, 502 (Tex. 1991).

132. *Id.* at 501.

133. *Id.*

134. *Id.* at 501-02.

tution to injured parties.¹³⁵ Asserting that his prior misconduct was caused by his cocaine addiction, Smith offered his ongoing treatment for and recovery from the addiction as sufficient change of circumstances since the time of his probation revocation.¹³⁶ Refusing to hear evidence for or rule upon Smith's motion, the trial court held that the order revoking probation was final.¹³⁷ Determining that the trial judge abused his discretion, the supreme court held that a suspension order is injunctive in nature, and may be "reviewed, opened, vacated or modified by the trial court upon showing of changed circumstances."¹³⁸ Additionally, the supreme court indicated that recovery from chemical addiction could constitute such a changed circumstance.¹³⁹ Therefore, to further acknowledge the disease of chemical dependency in the Texas bar, and to express a sound public policy of protecting the public, when faced with a relevant case of first impression, the Supreme Court of Texas should adopt the mitigation standards established in *Kersey*,¹⁴⁰ required by the Minnesota Supreme Court,¹⁴¹ and accepted by the American Bar Association.¹⁴²

B. Proposed Rule Changes

1. Disability Suspension

Problematic omissions from the Texas Rules of Disciplinary Procedure preclude full and efficient realization of the goals of attorney discipline. Disability suspension, as provided for in Part XII of the Rules, fails to consider an entire class of impaired attorneys: those whose illnesses are undiagnosed at the time of the initial disciplinary hearing.¹⁴³ The Rules provide for the indefinite suspension of an attorney found to be suffering from a disability.¹⁴⁴

135. *O'Neill*, 813 S.W.2d at 502. Smith admitted full restitution had not been made to his former client or to the State Bar Client Security Fund. *Id.*

136. *See id.* (describing respondent's recovery efforts and freedom from "mind changing chemicals" for over two years).

137. *Id.*

138. *Id.*

139. *See O'Neill*, 813 S.W.2d at 502 (holding trial court erred in refusing to hear changed-circumstance evidence).

140. *In re Kersey*, 520 A.2d 321, 326 (D.C. 1987).

141. *In re Johnson*, 322 N.W.2d 616, 618 (Minn. 1982).

142. ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS, Standard 9.32(i) (1992).

143. *See* TEX. R. DISCIPLINARY P. 12.01-.13 (1992) reprinted in TEX. GOV'T CODE ANN. tit. 2, subtit. G app. (Vernon Supp. 1993) (listing rules and procedure for disability suspension). An attorney need not be before a grievance committee to request a disability suspension. *Id.* If an attorney's disease manifests in a way that gets the attention of members of the legal community, a request for a disability finding and suspension may be entered even if no professional misconduct resulting in a grievance being filed has occurred. *Id.*

144. *See* TEX. R. DISCIPLINARY P. 12.01 (1992) (stating grounds for indefinite suspension).

The investigatory panel of the District Grievance Committee makes the initial determination of the existence of a disability.¹⁴⁵ Upon finding that a disability exists, the panel forwards its report to the Board of Disciplinary Appeals, which in turn advances its finding of a disability to the District Disability Committee.¹⁴⁶ If the District Disability Committee determines through a de novo proceeding that the attorney suffers from a disability, the Board of Disciplinary Appeals enters the order suspending the attorney from the practice of law indefinitely.¹⁴⁷ However, individual and institutional denial preclude inquiry at the District Grievance Committee level and the attorney's disability often remains undetected.¹⁴⁸ If an impaired attorney becomes the subject of disciplinary action prior to the identification of his or her alcoholism or substance abuse, symptomatic denial of the illness prevents the disability suspension process from ever getting under way.¹⁴⁹ The undiagnosed disabled attorney, thus, departs the legal profession in ignorance and denial of his or her disease.¹⁵⁰

145. See *id.* at 12.02 (discussing procedure for disability suspension).

146. See *id.* (detailing disability suspension procedure).

147. See *id.* at 12.03-.04 (discussing duties and responsibilities of District Disability Committee and Board of Disciplinary Appeals).

148. See Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1426 (1988) (describing obstacles within legal community that prevent impaired attorneys from seeking and receiving help); Marcia E. Femrite, *Addicted Attorneys in Disciplinary Proceedings*, 70 MICH. B.J. 152, 156 (1991) (reporting grievance commission's failure to raise substance-abuse issue during disciplinary investigations); Telephone Interview with Bobby Myers, member of District 10 Grievance Committee (March 25, 1993) (summary on file with *St. Mary's Law Journal*) (noting existence of grievance committee does not inquire generally about substance abuse); cf. G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 114 (1992) (noting symptomatic denial of disease despite obvious evidence to contrary).

149. See, e.g., *In re Driscoll*, 423 N.E.2d 873, 875 (Ill. 1981) (stressing respondent's recovery); *Attorney Grievance Comm'n v. Keister*, 607 A.2d 909, 912 (Md. 1992) (describing attorney's denial at grievance hearing that substance abuse affected professional life); Michelle Goff, *The Oregon State Bar Professional Liability Fund Attorney Assistance Program*, in DRUG FREE WORKPLACE 143, 143-44 (Dr. Dale A. Masi ed., 1987) (discussing difficulties in breaking through lawyer's denial); G. Andrew H. Benjamin et al., *Comprehensive Lawyer Assistance Programs: Justification and Model*, 16 LAW & PSYCHOL. REV. 113, 116 (1992) (noting lawyers' skill at intellectualism and denial); see also J.H. Robbins, M.D. & Tim F. Branaman, Ph.D., *The Personality of Addiction*, 55 TEX. B.J. 266, 267 (1992) (reporting professionals' difficulty in acknowledging existence of problem); Susi Willis, *What We Won't See, Women and Addiction*, 55 TEX. B.J. 271, 271 (1992) (stating intellectual arrogance of lawyers contributes to denial).

150. See *Smith v. O'Neill*, 813 S.W.2d 501, 502 (Tex. 1991) (indicating that prior to treatment, respondent has no apparent awareness of addiction); see also *Keister*, 607 A.2d at 919 (commenting on respondent's contention before disciplinary authority that substance abuse affected professional competency); *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1416 (reporting that impaired attorneys deny they are out of

Although disability suspension serves as a door for impaired attorneys to exit the legal profession until they are successfully rehabilitated, it apparently does not provide access for recovered attorneys to reenter the profession if their disease was not recognized until after the disciplinary proceedings.¹⁵¹ Attorneys who have been disbarred, or who have resigned in lieu of facing disciplinary action, may apply for reinstatement under Part XI of the Rules if all requirements, including full restitution, are met.¹⁵² In contrast, the procedure for reinstatement following disability suspension does not mention restitution.¹⁵³ Restitution may be the only obstacle preventing a recovered attorney from regaining a license and rejoining the profession as a competent practitioner.¹⁵⁴ In a profession entrenched in denial that chemical-dependency illnesses exist, the key to a continued practice of law is early detection of such illnesses.¹⁵⁵

To remedy the illogical results caused by omissions in the Rules, the Texas Supreme Court should implement rule changes that allow conditional reinstatement of rehabilitated attorneys whose disbarment was causally con-

control); Dale C. Moss, *Out of Control*, PA. LAW., Mar. 1987, at 16, 18 (noting mitigation allowed in Minnesota if attorney recovering).

151. See TEX. R. DISCIPLINARY P. 11.01-.08 (1992) (stating procedures for reinstatement following disbarment or resignation).

152. See *id.* (describing procedure for reinstatement after disbarment or resignation). Rule 11.02 provides:

A petition for reinstatement shall be verified and shall set forth all the following information:

.....

(D). A statement that the petitioner has made restitution to all persons, if any, naming them and their current addresses, who may have suffered financial loss by reason of the offenses, misconduct, or Serious Crimes for which the petitioner was disbarred or resigned, and that the petitioner has paid all costs and fines assessed in connection with the Disciplinary Action that resulted in his or her disbarment.

Id.

153. See *id.* at 12.06 (listing requirements to be included in petition for reinstatement following disability suspension).

154. See *id.* at 11.02 (listing requirements of reinstatement to include in petition). Generally these requirements address an attorney's conduct, moral character, and history between the time of disbarment and the time of application. *Id.*; cf. *In re Ackerman*, 330 N.E.2d 322, 324 (Ind. 1975) (holding attorney-discipline proceeding improper forum for determining restitution); *In re Case*, 311 N.E.2d 797, 800 (Ind. 1974) (dissenting judge finding no nexus between ability to pay restitution and ability to competently practice law).

155. Professional denial of the existence of substance-abuse problems is pervasive. See, e.g., Michael A. Bloom & Carol Lynn Wallinger, *Lawyers and Alcoholism: Is It Time for a New Approach?*, 61 TEMP. L. REV. 1409, 1414-16 (1988) (describing efforts of members of legal community to hide behavior of impaired attorney); Gary A. Jacobsen, M.D., *Puzzled by Addiction?*, OR. ST. B. BULL., Aug.-Sept. 1991, at 21, 22 (stating uninformed attitudes inhibit identification of alcoholic); Timothy W. Sorenson, *Status Report: ABA International Workshop on Lawyer Substance Abuse*, HEADNOTES, (Dallas Bar Ass'n, Dallas, Tex.), Dec. 15, 1991, at 1, 9 (noting misconceptions within the legal community jeopardize impaired attorneys).

nected to alcoholism or chemical dependency.¹⁵⁶ Additionally, rather than requiring attorneys to offer voluntarily their alcoholism or chemical dependency for consideration as a mitigating factor of sanctions, grievance committees and disciplinary boards should inquire about substance abuse in every attorney-discipline proceeding.¹⁵⁷

2. Restitution

Restitution may be ordered as a condition of a probated or disability suspension and is required for reinstatement following disbarment or resignation in lieu of disciplinary action.¹⁵⁸ Because restitution is an undefined disciplinary element of the Rules, Texas must be guided by the holdings and interpretations of other courts.¹⁵⁹ The District of Columbia Court of Appeals recently determined that a broad definition of restitution blurs the distinction between restitution and consequential damages.¹⁶⁰ Rejecting, as an expanded and unsupported definition, the notion that restitution as provided

156. The Supreme Court of Texas may be reluctant to amend the Rules to address an individual case of a rehabilitated attorney. Interview with William W. Kilgarlin, former Justice, Supreme Court of Texas, in Austin, Tex. (Feb. 16, 1993) (summary on file with *St. Mary's Law Journal*) (discussing possible changes in Rules).

157. An easy and highly accurate test is available to identify alcoholics. See John A. Ewing, M.D., *Detecting Alcoholism: The CAGE Questionnaire*, 252 JAMA 1905, 1905-07 (1984) (reporting development and accuracy of test for alcoholism). The CAGE questionnaire consists of four questions:

"C": Have you ever tried to *cut down* on your drinking?

"A": Have you ever become *annoyed* when someone commented on your drinking?

"G": Have you ever felt bad or *guilty* about your drinking?

"E": Have you ever taken a drink first thing in the morning (an "*eye-opener*")?

Id.

158. See TEX. R. DISCIPLINARY P. 2.18 (1992), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. (Vernon Supp. 1992) (stating restitution prior to reinstatement required for case involving client-fund misappropriation); *id.* at 11.02(D) (1992) (requiring statement of full restitution); *id.* at 12.11(E) (1992) (listing restitution as possible condition of disability probation).

159. Although the term is not defined, restitution is required in all cases when misappropriation of client funds has occurred. See *id.* at 2.18 (requiring attorney to make restitution before reinstatement). Rule 2.18 states:

Restitution: In all cases in which the proof establishes that the Respondent's misconduct involved the misappropriation of funds and the Respondent is disbarred or suspended, the panel's judgment must require the Respondent to make restitution during the period of suspension, or before any consideration of reinstatement from disbarment, and must further provide that its judgment of suspension shall remain in effect until evidence of satisfactory restitution is made by Respondent and verified by Chief Disciplinary Counsel.

Id. "Evidence of satisfactory restitution" is not defined, leaving questions concerning what constitutes acceptable evidence of restitution; for example, promissory notes to injured clients. See *id.* (requiring, but not defining, restitution).

160. See *In re Robertson*, 612 A.2d 1236, 1239-40 (D.C. 1992) (discussing possible definitions of restitution).

for in the Bar Rule referred to “making a client whole,” the court expressly stated that restitution is “a payment by the respondent attorney reimbursing a former client for the money, interest, or thing of value that the client has paid or entrusted to the lawyer in the course of the representation.”¹⁶¹ The court further held that a disciplinary proceeding is an inappropriate forum for determining client damages resulting from attorney misconduct.¹⁶²

Similarly, recent Indiana Supreme Court decisions establish that the appropriate remedy for a client injured by attorney misconduct is a claim for damages instituted at the trial court level, thus providing the attorney with a full range of defenses.¹⁶³ In California, restitution need not equal the full amount misappropriated for the suspended attorney to be reinstated.¹⁶⁴ California considers restitution evidence of, but not determinative of, successful rehabilitation.¹⁶⁵ The weight given to restitution, whether in whole or in part, is “dependent upon the applicant’s ability to restore misappropriated funds, as well as the attitude expressed regarding the matter.”¹⁶⁶ Especially relevant to the reinstatement of impaired attorneys who have not been diagnosed at the time of disciplinary actions is the California Supreme Court’s assertion that requiring full restitution in some cases would be the “practical

161. *Robertson*, 612 A.2d at 1240.

162. *Id.* at 1241. If the meaning of restitution were expanded beyond its traditional scope, issues such as causation, mitigation, foreseeability, and burden of proof would come into play in disciplinary proceedings. *Id.* The court emphasizes that the disciplinary process is not designed to handle these issues, and that “any measure of restitution that would extend to consequential damages would cause proof problems better handled in traditional judicial forums with the right to a jury trial in appropriate cases.” *Id.*

163. *See In re Ackerman*, 330 N.E.2d 322, 324 (Ind. 1975) (determining restitution cannot be properly ordered in disciplinary matters). The *Ackerman* decision reversed the prior Indiana Supreme Court holding in *In re Case* and relied heavily on Justice DeBruler’s dissent in *Case* to support its reconsideration of the law. *In re Case*, 311 N.E.2d 797, 799-800 (Ind. 1974). Issues of damages and restitution are not essential to the main purpose of the attorney-discipline hearing, which seeks to “regulate the professional conduct of lawyers in the public interest,” and allowing judgments for damages in disciplinary proceedings would shift the focus of the proceedings from its “main purpose of determining when a violation of ethical standards has occurred to the lesser purpose of making aggrieved clients whole”. *Id.* at 799. Justice DeBruler found no nexus between the ability of the “respondent to make restitution and his ability to re-assume the fiduciary role of lawyer” following a one-year suspension. *Id.* at 800.

164. *See Hippard v. State Bar of Cal.*, 782 P.2d 1140, 1145 (Cal. 1989) (holding in specific cases, restitution need not be in the full amount misappropriated). *Hippard* involved the petition for reinstatement of an attorney who had previously resigned. *Id.* at 1142. In determining whether respondent attorney Hippard had been rehabilitated, the court considered his insufficient attempts to make restitution, even though the debts in question had been discharged in bankruptcy. *Id.* at 1145.

165. *See Resner v. State Bar of Cal.*, 433 P.2d 748, 755 (Cal. 1967) (holding restitution is evidence of but not dispositive of rehabilitation).

166. *Hippard*, 782 P.2d at 1145 (quoting *In re Gaffney*, 171 P.2d 873, 875 (Cal. 1946)).

equivalent of permanent preclusion from reinstatement."¹⁶⁷

VII. CONCLUSION

"Sober lawyers make better lawyers."¹⁶⁸ Alcoholism and chemical dependency are prevalent illnesses in the legal community. Although a higher percentage of attorneys are afflicted with addictive diseases than the general population, enabling and institutional denial remain pervasive. Because a majority of attorney-discipline cases are related to substance abuse, jurisdictions have developed standards for allowing alcoholism and chemical dependency to mitigate sanctions for the misconduct. A "but for" test is generally accepted for establishing the nexus between the illness and the misconduct, and the majority of jurisdictions stress recovery from the illness, rather than the illness itself, as the mitigating factor. State bars have responded to the problem of substance abuse in the profession by suggesting and approving relevant disciplinary-rule changes, creating Lawyers Assistance Programs and monitoring and diversion programs, and increasing education requirements.

Texas has not developed case law relating to alcoholism as a mitigating factor in attorney discipline. By acknowledging recovery from addiction to cocaine as changed circumstances warranting review of a trial court's order revoking probation, the Texas Supreme Court has laid the first brick of a foundation upon which a strong public policy may be built. The next rational and consistent step for Texas must be the adoption of the four-part test for mitigation set forth in *Johnson* and accepted by the American Bar Association.

By establishing the Texas Lawyers Assistance Program, the state bar began to recognize the problem of substance abuse among its members. The Texas Rules of Disciplinary Procedure, however, reveal a jurisdiction still confused about the disease of alcoholism. Although the provisions for disability suspension provide one avenue of relief, it is an avenue available only to those impaired attorneys aware of their illness at the time of the disciplinary action. By ignoring the characteristic of denial, the Rules overlook the key symptom of the disease they are purporting to acknowledge.

To protect the public and maintain the integrity of the profession, amendments to the Rules should facilitate the earliest possible identification of im-

167. *Id.* at 1145. In Texas, attorneys who are disbarred or who resign in lieu of disciplinary action must establish, as a condition of petitioning for reinstatement, that restitution was made to injured parties. TEX. R. DISCIPLINARY P. 11.02(D) (1992).

168. See Letter from Don Muccigrosso, Loss-Prevention Attorney, concerning Alcohol and Chemical Dependency Program, Professional Liability Fund, and the Oregon State Bar, to Celene Greene, Executive Director, Oregon State Bar, (Apr. 1, 1988) (on file with *St. Mary's Law Journal*) (referring to decrease in malpractice claims against recovering attorneys).

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paired attorneys. Additionally, those members of the legal community immune to the disease of alcoholism who reflect an uninformed perspective and must be educated so as not to perpetuate misconceptions that serve to keep the disease hidden. Substance-abuse education should be a required component of continuing legal education and law school curricula. Although Texas has acknowledged that a problem exists, ignorance and fear continue to fuel denial and enabling within the profession, endangering the lives and careers of attorneys and clients. The practice of law is a self-regulating profession. It is time for Texas attorneys to fully and competently tend the Texas bar.