

MISAPPROPRIATION OF CLIENTS' FUNDS: IS DISBARMENT ALWAYS JUSTIFIED?

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I. INTRODUCTION

Attorneys hold money in a variety of circumstances, including possession of settlement checks, deposits for real estate transactions, and advances for attorneys' fees and costs. The funds usually are not secured, particularly because attorneys are not bonded. Only the profession's reputation and the honor of the individual attorney provide the security for client funds and the attorney's signatory power.¹ Consequently, it is important that an attorney maintain the appearance of propriety.

Canon 9 of the American Bar Association Model Code of Professional Responsibility [ABA Code] states that "A Lawyer Should Avoid Even the Appearance of Professional Impropriety."² In addition, Disciplinary Rule [DR] 9-102 of the ABA Code requires that client funds should be deposited and maintained in a separate bank account apart from funds belonging to the lawyer or law firm.³ Unlike the Canons, which

1. See Wolfram, *MODERN LEGAL ETHICS* 175 (1986).

2. Moreover, *ETHICAL CONSIDERATION* 9-5 explains that "Separation of funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds *should be avoided*." ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 9-5 (1969), (emphasis added) *reprinted in* *SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION* 51 (West rev. ed. 1984). It should be noted that

The canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. . . .

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, *Preliminary Statement*, (1969), *reprinted in* *SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION* 2 (West rev. ed. 1984).

3. ABA CODE, DR 9-102 states in pertinent part:

Preserving Identity of Funds and Property of a Client

are axiomatic norms, the Disciplinary Rules are mandatory in character. They "state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action."⁴

When an attorney violates DR 9-102, the appropriate sanction or penalty for his or her behavior is not clear. Determining the penalty in such cases is particularly important because commingling or misappropriation of funds⁵ is one of the most frequent bases for disciplinary action against attorneys.⁶

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay bank charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client,

(B) A lawyer shall:

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt

(3) Maintain complete records of all funds, . . . and render appropriate accounts to this client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, . . . which the client is entitled to receive.

In this regard, Rule 1.15 of the ABA Model Rules of Professional Conduct is substantially similar to DR 9-102. See ABA MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.15, "Model Code Comparison," *reprinted in* SELECTED STATUTES RULES AND STANDARDS ON THE LEGAL PROFESSION 115 (West rev. ed. 1984). Rule 1.15(a), however, expressly requires that client funds shall be kept in a separate account.

4. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, "Preliminary Statement," (1969), *reprinted in* SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 2 (West rev. ed. 1984).

5. "Commingling is committed when a client's money is intermingled with that of his attorney and its separate identity lost so that it may be used for the attorney's personal expenses or subjected to claims of his creditors." *Black v. State Bar of California*, 57 Cal.2d 219, 18 Cal. Rptr. 518, 368 P.2d 118 (1962). Interestingly, commingling can also occur if money is left in a trust account for an extended period after the lawyer becomes entitled to withdraw the money as fees. *In re Maran*, 80 N.J. 160, 402 A.2d 924 (1979).

6. Approximately 32% of the disciplinary cases adjudicated by New York courts between 1929 and 1962 involved commingling and conversion of clients' money. Com-

Recently, the New Jersey Supreme Court in *In re Lennan*⁷ reaffirmed the rule promulgated in 1979⁸ that misappropriation⁹ will trigger automatic disbarment.¹⁰ Moreover, the court in *Lennan* essentially stated that no mitigating circumstances would prevent disbarment where the attorney knowingly misappropriates funds. In essence, in New Jersey an attorney is strictly liable and will be disbarred when he or she commingles or misappropriates a client's funds. The decision in *Lennan* is unjust and unfair. A brief examination of additional case law will illustrate that the penalty mandated in *Lennan* is disproportionate to the penalties enforced in other misappropriation cases and in disciplinary proceedings in other states. The rule adopted, which precludes consideration of mitigating circumstances, ignores the objectives and policy concerns originally set forth to guide disciplinary boards in determining the appropriate sanctions.

II. THE CASE OF *In re Lennan*

Although the attorney in *In re Lennan*¹¹ "candidly admitted that he misappropriated \$13,000 in funds from four clients over a two-year period,"¹² he argued, in his defense, that the rule adopted in New

ment, *Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility*, 10 MICH. J.L. REF. 415, 416 n.5 (citing J. Carlin, *Lawyer's Ethics: A Survey of the New York City Bar* 154 (1966)). See also *In re Schwenn*, 373 So. 2d 1076 (Ala. 1979) ("Failure of an attorney to handle properly the funds of a client is one of the most frequent complaints made against attorneys . . .").

7. 102 N.J. 518, 509 A.2d 179 (1986). See also *In re Brown*, 102 N.J. 512, 509 A.2d 176 (1986).

8. *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979). Prior to this time, New Jersey courts held that commingling or misappropriation of funds did not necessarily mandate disbarment. In fact, the courts considered mitigating factors when determining the appropriate sanction. See, e.g., *In re Makowoki*, 73 N.J. 265, 374 A.2d 458 (1977) (Noting that since the attorney became aware of his responsibilities he had made every effort to live up to them, paying \$44,000 to the trust account, and because he was cooperative with the bar association ethics committee, the court held that the attorney's conduct warranted suspension for only 6 months.).

9. The New Jersey Supreme Court in *Wilson* defined "misappropriation" as follows: "any unauthorized use by the lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom." *Wilson*, 81 N.J. at 455 n.1, 409 A.2d at 1155 n.1.

10. *Lennan*, 102 N.J. at ____, 509 A.2d at 182-83 (1979).

11. 102 N.J. 518, 509 A.2d 179 (1986).

12. In misappropriating funds, Lennan withdrew money from his clients' account, paying it back a few months later, thus he "borrowed" a total of \$13,000.

Jersey¹³ did not mandate disbarment for all misappropriations or preclude consideration of any mitigating circumstances.¹⁴ Lennan relied upon the following statement in *In re Wilson*¹⁵ for support:

In summary: maintenance of public confidence in this Court and in the bar as a whole requires the strictest discipline in misappropriation cases. That confidence is so important that *mitigating factors will rarely override* the requirement of disbarment.¹⁶

Lennan claimed that the major factor mitigating against his disbarment was that he misappropriated the funds as a result of extreme financial pressure of providing for his family.¹⁷ Lennan was a sole practitioner who had practiced law in Tenafly, New Jersey since 1959. Practicing law was his only profession. According to the court, his income was "modest." In 1983 his gross income was \$25,000; in 1984 at the time of his suspension it was \$15,000.¹⁸ Lennan was the sole support of his wife and two daughters. Both of his daughters were enrolled in private colleges with a combined tuition of \$18,000. In the spring of 1983, his wife was diagnosed as having diabetes which led to substantial medical expenses.¹⁹ His other expenses included a monthly mortgage payment of \$548.²⁰

Lennan also cited additional mitigating factors including the fact that no client ever complained about his work, he had never had any other ethical charges brought against him, and none of his actions involved fraudulent statements or intentional misrepresentations to clients.²¹ Further, Lennan made no attempt to disguise any transaction and fully disclosed his actions to the Office of Attorney Ethics. He also expressed "severe regret" for his actions.²² Finally, three clients submitted affidavits that they were fully satisfied with Lennan's representation

13. See *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979).

14. *Lennan*, 102 N.J. at ____, 509 A.2d at 181.

15. 81 N.J. 451, 409 A.2d 1153 (1979).

16. *Lennan*, 102 N.J. at ____, 539 A.2d at 181 (quoting *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979)).

17. *Lennan*, 102 N.J. at ____, 509 A.2d at 182.

18. *Id.* at ____, 509 A.2d at 181.

19. *Id.*

20. A total balance of \$6,000 was due under the mortgage. His home was valued at \$130,000. Although he borrowed \$10,000, Lennan could not afford the interest rates to borrow any more money. *Id.*

21. *Id.* at ____, 509 A.2d at 182.

22. *Id.*

of them and that they would have authorized his actions.²³

Although the court acknowledged the "harshness and inflexibility of the *Wilson* rule," it found that Lennan's actions mandated disbarment.²⁴ According to the court,

The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney's state of mind, are irrelevant: it is the mere act of taking your client's money knowing that you have no authority to do so that requires disbarment. . . . The presence of "good character and fitness," the absence of "dishonesty, venality, or immorality" — all are irrelevant. While this Court indicated that disbarment for misappropriations shall be "almost invariable," the fact is that since *Wilson*, it has been invariable.²⁵

The court followed previous case law holding that the fact a client suffered no loss was irrelevant.²⁶ The court also was not persuaded by the fact that the funds were returned to the client, or that the attorney was of good character.²⁷ Even more damaging for Lennan was that the court in *Wilson* specifically addressed a situation in which an attorney misappropriated money to save his family, stating that "the continued confidence of the public in the integrity of the bar and the judiciary" still justified disbarment.²⁸ Finally, the court, although sympathetic with Lennan, questioned why Lennan did not obtain a second mortgage or ask his daughters and wife to borrow from their \$9,000 savings account.²⁹

III. DISCIPLINARY SANCTIONS AND THEIR OBJECTIVES

Before analyzing the decision reached in *In re Lennan*,³⁰ it is important to understand what types of sanctions are applied and the objectives these disciplinary actions try to achieve. This discussion is necessary to understand whether the decision in *Lennan* achieves any of these objectives.

23. *Id.*

24. *Id.*

25. *Id.* (quoting *In re Noonan*, 102 N.J. 157, 506 A.2d 722, 723 (1986)).

26. *Lennan*, 102 N.J. ____, 509 A.2d at 183 (citing *In re Gavel*, 22 N.J. 248, 125 A.2d 696 (1956)).

27. *Lennan*, 102 N.J. at ____, 509 A.2d at 183.

28. *Id.* (quoting *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979)).

29. *Lennan*, 102 N.J. at ____, 509 A.2d at 183.

30. 102 N.J. 518, 509 A.2d 174 (1986).

Although the ABA Code offers guidelines and minimum standards of conduct,³¹ it does not prescribe penalties for violations of a Disciplinary Rule.³² As a result, State Bar rules have determined appropriate sanctions for their particular state. Basically, three types of sanctions exist: (1) private sanction;³³ (2) public censor;³⁴ (3) suspension or disbarment.³⁵ Disbarment and suspension are employed when it is necessary to remove unworthy members of the bar.³⁶

Ideally, disciplinary proceedings should serve a number of objectives. Historically, attorney discipline served to protect the rights and independence of the bar, the dignity of the court³⁷ and respectability of the profession.³⁸ In addition, the courts recognized that public confi-

31. See *supra* text accompanying notes 2-4.

32. See C. Wolfram, *supra* note 1, at 119 ("The 1969 Code was purposefully designed to say nothing about sanctions").

33. A private sanction usually consists of a private letter to the disciplined attorney. Basically, it is a slap on the wrist.

A private letter warning or admonition "officially denotes an area of problematical conduct or perceived misconduct of a relatively minor sort and suggests ways of avoiding the problem in the future." C. Wolfram, *supra* note 1, at 126-27. See ABA DISCIPLINARY STANDARDS § 6.10 (1979) (Admonition), reprinted in SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 223 (West rev. ed. 1984).

34. Usually, public censor involves publication in a State Bar Journal stating the facts of the case. It is really a public slap on the wrist. The public exposure increases the severity of the discipline above that of a private letter. "Each successive level, beginning with a letter of caution, represents an increase in the severity of the criticism and a greater likelihood of what for a lawyer is probably worse: public exposure." Johnson, *Courts Rarely Throw the Book at Lawyers*, N.Y. Times, June 29, 1986, reprinted in Allen, *The Legal Profession: Ethics and Responsibility in the Law Firm, Civil Practice Setting—A Sourcebook of Assigned Readings 1986-87*, Assignments 11-12 (1986).

A court's purpose in ordering public rather than private reprimand "may also be to assure that the deterrent value of the discipline is maximized." C. Wolfram, *supra* note 1, at 127.

35. From a brief review of appropriate case law, it appears that the length of the term of suspension varies in each jurisdiction, along with the rules governing reinstatement. In some states, disbarment is not permanent. See, e.g., *Florida Bar v. Perri*, 435 So. 2d 827, 829-30 (Fla. 1983) (Ehrlich, J., concurring) (a lawyer who is suspended in Florida has the burden of demonstrating rehabilitation, but if he is disbarred he has the burden of proving good character and fitness, including passing the bar examination).

36. Comment, *Attorney Misappropriation of Clients' Funds: A Study in Professional Responsibility*, 10 MICH. J.L. REV. 415, 419 (1977).

37. See, e.g., *In re Davies*, 93 Pa. 116, 121 (1880); *Heindel's Case*, 15 YORK CO. L.R. 77, 81 (1901).

38. Preserving the respectability of the profession includes a desire to maintain the high standards of the profession. See, e.g., *Ex parte Burr*, 22 U.S. (9 Wheat.) 529, 531 (1824) (Marshall, C.J.) (discipline is "necessary for the preservation of decorum, and for

dence and trust was also an important objective:

The interest of the people at large should be conserved by the court, in order that those who must of necessity place their property, their liberty, and even their lives in the care of an attorney should be secure in their confidence in the integrity of their advocate. They should be assured that whatever misfortune may happen to them, they will not be despoiled by the one in whom they have placed their trust.³⁹

The objective of obtaining and preserving the public confidence is still an important concern of attorney discipline today.⁴⁰

In addition, some commentators argue that although never officially espoused by either the courts or the profession, other underlying goals exist which the profession firmly accepts. These include the desire to maintain the present system of regulation, to prevent legislative interference with the disciplining of attorneys,⁴¹ and to maintain and preserve the profession's economic interest and status in society.⁴² Fairness should certainly be an objective.⁴³ According to the ABA Code, "[t]he severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances."⁴⁴ Finally, commentators have debated whether punishment is an objective of attorney discipline. Courts, however, have asserted that punishment is not an objective of disciplinary

the respectability of the profession."); *Allgur v. Johnson*, 421 Pa. 342, 345, 219 A.2d 593, 595 (1966) (disbarment is sometimes necessary to maintain high moral standards of the profession and the integrity and honor of the profession).

39. Comment, *The Objectives of Attorney Discipline: A Pennsylvania View*, 79 DICK. L. REV. 558, 560 (1975) (quoting in *In re Maires*, 21 Pa. C.C. Rep. 68, 70 (C.P. Phila. 1898), *aff'd*, 189 Pa. 99, 41 A. 988 (1899)).

40. According to the ABA Code, "the possible loss of [public] respect and confidence is the ultimate sanction." ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, "Preamble," (1969), *reprinted in* SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 1 (West rev. ed. 1984).

41. See, e.g., Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244 (1969); Comment, *supra* note 36, at 562.

42. See generally, Schuchman, *supra* note 38; Comment, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179 (1970).

43. "'We have to make sure that the punishment imposed is fair, but that it also serves as deterrent to others.'" *Johnson*, *supra* note 31.

44. ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, "Preliminary Statement," (1969) *reprinted in* SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 2-3 (West rev. ed. 1984).

action, only incidental to the action.⁴⁵

Many courts and commentators view misuse of clients' funds as one of the gravest forms of professional misconduct, and there is no argument that in *In re Lennan*⁴⁶ the attorney should have been subject to some disciplinary action. The question is whether disbarment was justified (*i.e.*, were any objectives served) in his case, given the mitigating circumstances, or more generally, whether the rule followed in New Jersey is justified.

The court in *Lennan* argued that any result other than disbarment "risks something even more important—the continued confidence of the public in the integrity of the bar and the judiciary."⁴⁷ Disbarment in this case, however, did not preserve the respectability of the profession and the courts better than any other form of punishment. Lennan's conduct did not show that he was unfit to practice or that he was not trustworthy. He returned all funds to his clients' accounts, and he cooperated fully with the Ethics Committee. There is little evidence to show that he is not worthy of practicing law.⁴⁸ His clients are still "secure in their confidence in the integrity" of Lennan. A public reprimand or, even more so, suspension would have proved to the public that if their funds are misappropriated *under any circumstances*, such behavior will not be tolerated.⁴⁹ The circumstances, however, may and should affect

45. See, e.g., *Ex parte Wall*, 107 U.S. 265, 288 (1882); *In re Berlant*, No. 348 at 2 (Pa. Sup. Ct. ed. Apr. 13, 1973) ("Moreover, the sanctions arising from such proceedings—censure, suspension or disbarment—are not primarily designed for their punitive effects, but for their positive effects of protecting the public and the integrity of the courts from unfit lawyers.") cited in Comment, *supra* note 36, at 561 n.26. See also Comment, *supra* note 33, at 419 ("Punishment of the individual attorney has generally been disavowed as an objective of professional discipline."). But see Comment, *supra* note 36, at 561 wherein the author states that "[w]hile protection of the courts, the public and the legal profession are cited most often as the goals of attorney discipline, it seems implicit within the concept of discipline itself that punishment and deterrence are additional objectives in the imposition of sanctions on lawyers." (emphasis added).

46. 102 N.J. 518, 509 A.2d 179 (1986).

47. *Id.* at ___, 509 A.2d at 183 (quoting in *In re Wilson*, 81 N.J. 451, 460, 409 A.2d 1153, 1158 (1979)).

48. The court noted that Lennan failed to obtain a second mortgage or ask his wife and daughter to loan him the money from their savings account. The court failed to consider that Lennan explained that he could not afford the high interest rates, thus he could not afford a second mortgage. Moreover, Lennan did not want to worry his wife, who was recently diagnosed as having diabetes, about his financial problems. The court manipulated the facts to illustrate that Lennan had other opportunities, but in actuality did not.

49. Certainly, disbarment illustrates this more strongly, but disbarment is not ap-

the severity of the sanction.

Moreover, the decision in *Lennan* conflicts with the intent of the ABA Code and the Model Rules. Even though neither offers much guidance for determining appropriate sanctions, both the ABA Code and the Model Rules argue that all circumstances should be considered when imposing sanctions.⁵⁰ For example, the Model Rules state that, "the Rules presuppose that whether or not discipline should be imposed for a violation, and the severity of a sanction, depend on all circumstances, such as the willfulness and seriousness of the violation, extenuating factors and whether there have been previous violations."⁵¹ Thus, under the Model Rules and the ABA Code, the court in *Lennan* should have considered the fact that no one ever complained about Lennan's work, no disciplinary charges were ever brought against him before this case, and he paid back all of his clients' accounts before the charges were brought against him.

Similar to the ABA Code and the Model Rules, the rule followed in most states, even in New Jersey until 1979,⁵² is that misappropriation of client funds or property requires disbarment in the absence of substantially mitigating circumstances.⁵³ New Jersey's rule, adopted in *Lennan*, precluding consideration of mitigating circumstances, essentially holds a lawyer strictly liable for commingling funds. The New Jersey rule cannot determine in each case if the objectives of disciplinary action are achieved because in some instances of commingling, the objectives of disciplinary action can be achieved without mandating permanent disbarment.

Nevertheless, some commentators argue that other attorneys will misappropriate funds if they know they risk only a public reprimand. However, this argument misses the point. Commingling will *not* be tolerated *unless* mitigating circumstances exist. An attorney who commingles funds risks disbarment if he cannot prove substantially mitigating circumstances. Another concern some commentators have is that attor-

appropriate for all circumstances.

50. See *supra* note 42 and accompanying text.

51. ABA MODEL RULES OF PROFESSIONAL CONDUCT Preamble: Scope (1983) (emphasis added), reprinted in SELECTED STATUTES, RULES AND STANDARDS ON THE LEGAL PROFESSION 70 (West rev. ed. 1984).

52. See *supra* note 8.

53. See C. Wolfram, *supra* note 1, at 176 n.98 and cases cited therein. Pennsylvania follows the rule that disbarment of an attorney for commingling of funds is not *per se* required, for each case must be examined in light of the circumstances of that case. See, e.g., Office of Disciplinary Counsel v. Lucarini, ____ Pa. ____, 472 A.2d 186 (1983).

neys can argue that extreme circumstances motivated their conduct.⁵⁴ However, such an argument mandates not only that an attorney is not entitled to argue any defense for his actions, but also that an attorney will be disbarred, even if substantial mitigating circumstances exist.

New Jersey's rule precludes consideration of the objectives of sanctions and, as in *Lennan*, appears to be concerned only with punishing the attorney and deterring others. To justify the decision in *Lennan* on the rationale that it will deter others is simply unfair to Lennan.⁵⁵ The harm Lennan posed to his clients does not warrant disbarment, nor should disbarment be mandated where the cost to the individual is so great and the benefit to society so small. The decision to disbar Lennan did not serve any additional goals than those which could have been achieved with suspension or public censure; consequently, Lennan should not have been disbarred. Disbarment is too harsh a remedy to impose without consideration of the facts surrounding the case and the objectives which the sanction will achieve.

IV. PROPORTIONATE AND APPROPRIATE SANCTIONS

Ironically, in light of the sanction mandated in *In re Lennan*,⁵⁶ the typical complaints with respect to disciplining lawyers are that the punishment is not severe enough,⁵⁷ or that it is too private.⁵⁸ In response to this criticism, state bars are adopting new disciplinary systems,⁵⁹ and some courts have considered adopting harsher rules.⁶⁰

54. See C. Wolfram, *supra* note 1, at 126.

55. If New Jersey followed the rule allowing for consideration of mitigating circumstances, as previously discussed, this would still provide an effective deterrent. An attorney who cannot show substantial mitigating circumstances will be disbarred for commingling funds.

56. 102 N.J. 518, 509 A.2d 179 (1986).

57. "Critics of the system, including the Association of the Bar of the City of New York, say that not enough of the discipline imposed by the courts is made public, and that greater publicity would result in greater deterrence." Johnson, *supra* note 31.

58. Heilbron, *Solving the Disciplinary Problem*, 6 CAL. LAWYER 53 (Apr. 1986). The article cited three problems with the disciplinary system: the discipline system was private; the penalties the system imposed seemed too gentle to fit the crime; and discipline took too long.

In New York only about one-half of one percent of the 8,000 to 9,000 misconduct complaints about lawyers filed in a typical year result in disbarment. This is a reflection of the severity with which disbarment is viewed. Johnson, *supra* note 31.

59. See, e.g., Egelko, *State Bar Discipline Under Fire*, 6 CAL. LAWYER 55 (June 1986).

60. Office of Discipline Counsel v. Lucarini, ____ Pa. ____, 472 A.2d 186 (1983). The Pennsylvania Supreme Court expressly refused to adopt a rule which requires dis-

Nevertheless, the sanction imposed in *Lennan* does not answer the critics' complaints. Although more stringent rules would be appropriate for many client complaints, this should not occur at the cost of individual rights and equal protection for all attorneys. Encompassed in equal treatment is that the discipline imposed should be proportionate to that in similar cases. The sanction imposed upon Lennan is grossly disproportionate to that imposed in other states in similar cases. For example, in Louisiana an attorney who had a pattern of commingling clients' funds for many years was only suspended from the practice of law for six months even though he testified that he would continue the practice.⁶¹ In addition, the Supreme Court of Minnesota recently held that although commingling usually calls for disbarment, a public reprimand was appropriate in some circumstances.⁶² In that case, the attorney commingled funds because of inadequate bookkeeping and mishandling of trust fund accounts. The court found that disbarment was not appropriate where (1) no client or any other person sustained any loss; and (2) where other mitigating circumstances existed.⁶³

Moreover, the sanction imposed in *Lennan* is disproportionate to those imposed in other disciplinary proceedings. In California, for example, attorneys are placed on interim suspension following criminal convictions.⁶⁴ Thus, if Lennan were convicted of a crime, he would eventually be able to continue practicing law. Commingling of funds, however, precludes the possibility of rehabilitation regardless of the circumstances surrounding the case and results in permanent disbarment of the attorney, although he has never been convicted of a crime.

barment *per se* when an attorney commingles funds, regardless of other facts in the case. In refusing to adopt this rule, the court stated that uniformity should not exist at the expense of "the discretion and fact-specific considerations needed to fashion appropriate discipline." *Id.* at ____, 472 A.2d at 188.

61. Louisiana State Bar Ass'n v. Jones, 372 So. 2d 1186 (La. 1979).

62. *In re Fling*, 316 N.W.2d 556 (Minn. 1982). See also *In re Mannis*, 295 Or. 594, 668 P.2d 1224 (1983) (An attorney was publicly reprimanded because he commingled funds even though he did not intend to enrich himself).

63. *Id.* at 558.

64. See, *Disciplined Attorneys Named*, CAL. BAR J. 55, 56 (Apr. 1986), reprinted in Allen, *The Legal Profession: Ethics and Responsibility in the Law Firm, Civil Practice Setting—A Sourcebook of Assigned Readings 1986-87*, Assignments 11-12 (1986). The sanction imposed is also disproportionate to the standards imposed for admission to the bar. See, Gillers & Dorsen, *Regulation of Lawyers: Problems of Law and Ethics* 182-89 (Little Brown 1985), reprinted in Allen, *supra* Assignment 3.

Because sanctions differ from state to state, comparing California and New Jersey may not be a fair comparison, but states should examine the procedures in other states when implementing sanctions.

V. CONCLUSION

Essentially, two arguments have been raised in this Article. First, Mr. Lennan should not have been disbarred. He was a competent attorney who, under financial pressures, "borrowed" money from his clients' accounts. Certainly, he deserved to be punished, but not disbarred. Second, the rule adopted in New Jersey which mandates strict liability and disbarment when an attorney commingles funds does not consider the longstanding objectives of disciplinary actions. Although in many circumstances the sanctions imposed are too lenient,⁶⁵ this rule is not the appropriate response to the problem. In short, the rule represents a step in the wrong direction.

In proposing new disciplinary rules and procedures, one should not ignore the important policies and objectives of disciplinary actions. As one commentator has stated, "Courts should seek to assure that sanctions, if not in parity, are proportional to the offense committed, reflect real needs for specific and general deterrence, and take account of the specific characteristics of the individual lawyer."⁶⁶ The New Jersey Supreme Court has failed to consider any of the above objectives.

65. For example, I would argue that in all circumstances where an attorney commits a felony or a crime of dishonesty (*i.e.*, fraud, embezzlement), he should be disbarred. However, such a rule still should consider mitigating circumstances.

66. C. Wolfram, *supra* note 1, at 125.