

# Addiction as a Mitigating Factor in Lawyer Sanctions: Toward a More Medicalized Approach

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## INTRODUCTION

In 2022, an audit revealed that a real estate lawyer in Vancouver, Canada had misappropriated over 8 million dollars of client funds.<sup>1</sup> However, in 2024 the bar

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1. See Bethany Lindsay, *Lawyer who Misappropriated \$8M from Clients to Feed Gambling Addiction*

sanctioned the lawyer with only a seven-year ban on legal practice—rather than permanent disbarment—because the association reasoned that the lawyer’s gambling addiction had contributed to his illicit behavior.<sup>2</sup> This scandal and its outcome place a spotlight once again on a decades-long debate regarding the degree to which lawyers suffering from an addictive disorder should receive leniency when sanctioned for professional misconduct.

When determining sanctions for an attorney suffering from addiction, two competing considerations must be balanced. On the one hand, addiction should be appreciated as an illness that often consumes the lawyer and their behavior. Too harsh an approach, the thinking goes, deprives the public of a talented attorney who could thrive when healthy, and punishes that same attorney for an illness that is largely out of their control. On the other hand, the self-regulating legal field must safeguard both legal clients and the legal profession itself from lawyers whose illnesses result in ineffective legal representation, illegal conduct, or unjust outcomes. Excessive leniency, in particular a lawyer’s continued ability to practice, contravenes this protective duty of the legal field by permitting an afflicted attorney to continue causing harm.

The American Bar Association’s (ABA) *Standards for Imposing Lawyer Sanctions (SILS)* explicitly acknowledge both of these interests and the need to balance them. Nevertheless, courts and commentators, even when utilizing this shared *SILS* framework, disagree on the relative weight that should be given to each of these considerations and how that weight should differ based on the specific context of a given disciplinary case. The lack of a decided-upon “best” approach generally threatens the likelihood that justice is done, and the uncertainty it creates jeopardizes the legitimacy of the legal field and the faith it engenders in the public. It is true that some degree of variation in the application of the *SILS* is inevitable under the current regulatory structure of the legal practice in the United States. Decisions regarding the regulation of lawyers have generally been left up to state supreme courts and state bar associations,<sup>3</sup> and while these state guidelines must comport with the Supremacy Clause,<sup>4</sup> both the federal government and (at least implicitly) the ABA have ceded this authority to the states.<sup>5</sup>

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Banned from Law for 7 Years, CBC News (Feb. 5, 2024), <https://www.cbc.ca/news/canada/british-columbia/bc-gambling-addiction-lawyer-misappropriated-funds-1.7105758> [<https://perma.cc/TCR2-PR6S>].

2. See *id.* A “law society” is the Canadian equivalent to a United States state bar association. This lawyer’s sanction was handed down by the Law Society of British Columbia.

3. See *The Integrated Bar Association*, 30 *FORDHAM L. REV.* 477, 477, 479 (1962) (first citing *Lathrop v. Donohue*, 367 U.S. 320 (1961) (holding that compulsory state bar associations are constitutional), then citing *In re Integration of State Bar*, 135 Okla. 505 (1939) (holding that state supreme courts have the power to integrate the bar even in the absence of a state statute granting that authority)).

4. See *Sperry v. Florida*, 373 U.S. 379, 402 (1963) (“the State maintains control over the practice of law within its borders except to the limited extent necessary for the accomplishment of the federal objectives.”); U.S. Const. art. VI, cl.2 (declaring that “[t]his Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

5. See Ralph W. Tarr, “State Bar Disciplinary Rules As Applied to Federal Government Attorneys,” *U.S. Department of Justice*, Aug. 2, 1985, <https://www.justice.gov/file/150631/dl?inline#:~:text=1%20U.S.%20Const%2C%20art.,96%2D132>.

While it could be argued that a national system of binding legal regulation would be preferable, that argument goes beyond the scope of this Note. Nevertheless, the ability for state supreme courts to unilaterally reassess the application of state legal regulation makes greater uniformity a realistic possibility.<sup>6</sup>

This Note argues the failure to adequately acknowledge and interact with the medical and psychological roots of addiction are a shared, critical failing of all current approaches to lawyer discipline cases involving addiction.<sup>7</sup> In other words, judicial balancing would be much more informed, and thus tend towards greater justice, if it more greatly emphasized medical evidence, testimony from medical or psychological professionals, and the scientific literature on addiction. Based on that assumption, this Note proposes that the *SILS* should be amended to explicitly direct courts, when faced with a lawyer discipline case in which the lawyer suffers from an addiction, to adopt a three-part framework to determine a fair penalty. First, the court should rely on medical records and expert testimony from a qualified psychiatrist or psychologist to establish that a lawyer suffers from an addiction recognized by the *Diagnostic and Statistical Manual of Mental Disorders (DSM-5)*.<sup>8</sup> Second, in order to determine whether an attorney's addiction had a mitigative impact on their misconduct, the court should rely on medical evidence and testimony to identify which criteria of addiction a given attorney met under the DSM-5 as well as any literature demonstrating an addiction-behavior link not acknowledged in the DSM-5. Third, a court should determine if the misconduct was so severe that it outweighs any mitigative impact that the attorney's addiction had on the misconduct.

Section I provides an overview of the realities of substance use and addiction in the legal field, then introduces the ABA's *SILS* and *Model Rules of Professional Conduct (Model Rules)*. Section II presents the various approaches that state courts have taken when considering the mitigative impact of addiction in lawyer discipline cases. This section also discusses the rationales and inconsistencies found in these approaches. Section III outlines the criteria under which various addictions can be established under the DSM-5 and the types of behavior that the DSM-5 explicitly connects to these types of addiction. Section IV articulates this Note's recommendation of a three-step process for considering lawyer

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6. See LUCY RICCA & THOMAS CLARKE, *THE BAR REIMAGINED: OPTIONS FOR STATE COURTS TO RESTRUCTURE THE REGULATION OF THE PRACTICE OF LAW 6* (*Stan. L. Sch. Deborah L. Rhode Center on the Legal Profession* 2023), [https://law.stanford.edu/wp-content/uploads/2023/09/Rhode\\_Center\\_Re-ImaginingTheBar.pdf](https://law.stanford.edu/wp-content/uploads/2023/09/Rhode_Center_Re-ImaginingTheBar.pdf) [<https://perma.cc/ZVL6-G95N>] (“[T]he path to meaningful reform runs through state supreme courts . . . Courts can, and should, reassess . . . and consider how to ensure proper legal services regulation”).

7. This refers both to approaches actually taken by state courts and those proposed by legal commentators.

8. The DSM-5 includes all of the mental disorders and conditions recognized by the American Psychiatric Association, and in the United States it is the preeminent, though not exhaustive, record of the symptoms and risk factors for each of these recognized disorders and conditions. See *Cleveland Clinic*, “DSM-5,” Oct. 14, 2022, <https://my.clevelandclinic.org/health/articles/24291-diagnostic-and-statistical-manual-dsm-5> [<https://perma.cc/8DD8-PFWQ>]. The most recent edition of the DSM, formally known as the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision (DSM-5-TR)* was introduced in 2022 as an update of the DSM-5. *Id.* The title “DSM-5” as used in this Note refers to the 2013 text revision of the DSM, not the original version.

discipline cases involving a lawyer suffering from addiction, a process that would include a much greater reliance on medical evidence and testimony than has been demonstrated in previous lawyer discipline cases.

## I. ADDICTION AND MISCONDUCT IN THE LEGAL FIELD

### A. SUBSTANCE USE AND ADDICTION IN THE LEGAL FIELD

Lawyers are no strangers to substance use and addiction. Surveys have found that anywhere from 18<sup>9</sup> to 21 percent<sup>10</sup> of lawyers abuse alcohol, compared to just 10.2 percent of the general population.<sup>11</sup> Cocaine usage rates have also been identified as higher in the legal field.<sup>12</sup> One paper cited by the ABA estimates that the rate of disciplinary proceedings involving substance abuse is somewhere between 40 and 70 percent.<sup>13</sup> Many of these seminal statistics, which have been cited in numerous academic papers, have been challenged as having faulty methodologies.<sup>14</sup> For instance, the study identifying over 20 percent of lawyers as abusing alcohol has been criticized for lacking a calculated response rate or accounting for response bias, rendering them “so deeply flawed statistically that none of its results can be trusted,” according to one critic.<sup>15</sup> Nicholas Lawson has even argued that the study that includes the 40-to-70-percent range includes no support for the claim.<sup>16</sup> Furthermore, other authors have acknowledged the dearth

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9. G. Andrew J. Benjamin, Elaine J. Darling & Bruce Sales, *The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers*, 13 INT'L J.L. & PSYCH. 233, 241 (1990), <https://www.sciencedirect.com/science/article/pii/016025279090019Y>.

10. Patrick R. Krill, Ryan Johnson & Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, 10 J. ADDICT. MED., 46, 48 (2016), <https://pmc.ncbi.nlm.nih.gov/articles/PMC4736291/> [<https://perma.cc/MBL5-KX8L>].

11. See National Institute on Alcohol Abuse and Alcoholism, *Alcohol Use Disorder (AUD) in the United States: Age Groups and Demographic Characteristics*, Sept. 2024, <https://www.niaaa.nih.gov/alcohols-effects-health/alcohol-topics/alcohol-facts-and-statistics/alcohol-use-disorder-aud-united-states-age-groups-and-demographic-characteristics> [<https://perma.cc/S983-YKW2>]; American Psychiatric Association, *Substance-Related and Addictive Disorders*, in *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, Text Revision* (2013) [hereinafter *DSM*] (noting that 12-month prevalence rates vary by racial identity and age group, but that even the highest estimated prevalences are 16.2 percent for individuals ages 18-29 years and 14.4 percent for African-Americans).

12. Benjamin, *supra* note 9, at 241.

13. Douglas B. Marlowe, *Alcoholism, Symptoms, Causes & Treatments*, in STRESS MANAGEMENT FOR LAWYERS 104, 130 (Amiram Elwork ed., 2d ed., 1997) (cited in Marjorie A. Silver, SUBSTANCE ABUSE, STRESS, MENTAL HEALTH AND THE LEGAL PROFESSION 2, (Touro Law Center 2004) available at <https://www.nylat.org/documents/CourseinaBox.pdf>).

14. See Nicholas D. Lawson, *To Be a Good Lawyer, One Has to be a Healthy Lawyer: Lawyer Well-Being, Discrimination, and Discretionary Systems of Discipline*, 34 GEO. J. LEGAL ETHICS 65, 75 n.37 (2021) (noting that, as of 2020, two allegedly statistically-flawed studies had been cited favorably by other academic articles 105 and 129 times, respectively), <https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2022/08/GT-GJLE210003.pdf> [<https://perma.cc/9CEB-XJQX>].

15. Paul F. Velleman & Ann C. Lapinski, *Statistics Failures Make Lawyer Addiction Estimates Worthless*, 10 J. ADDICT. MED. 286, 286–87 (2016).

16. Lawson, *supra* note 14, at 74–75.

of recent studies on substance abuse and addiction in the legal field.<sup>17</sup> Even assuming that these criticisms are accurate, there is still a non-negligible risk of addiction-related lawyer misconduct if the prevalence rates of addiction in the general population are assumed to apply to the legal field.<sup>18</sup>

The American legal workplace environment lends itself to substance use and addiction in a variety of ways. Many substance use disorders, as well as gambling disorder, are associated with high stress, and alcohol use begins for many lawyers in the stressful environment of law school.<sup>19</sup> The legal workplace is similarly highly stressful, increasing the risk of catalyzing or furthering addictive disorders.<sup>20</sup> Stress is not the only aspect of the legal field that can lead to substance use disorders, either. Alcohol, for instance, can serve as a “social lubricant” that increases a lawyer’s standing with clients and colleagues,<sup>21</sup> and a majority of attorneys have reported work-related social drinking.<sup>22</sup>

Lastly, the recent proliferation of sports betting in the United States presents an increased risk of gambling addiction, and gambling-addiction-related misconduct, amongst lawyers. Sports betting, made almost entirely illegal in the United States in 1992,<sup>23</sup> was legalized again in 2018 when the Supreme Court determined that the ban was unconstitutional.<sup>24</sup> While 12 states continue to ban sports betting via state law,<sup>25</sup> millions of Americans can now participate in the practice. Data indicate that Americans have been taking advantage of this newfound legalization, with revenue from sports betting in the United States increasing from roughly 400 million dollars in 2018 (before the Supreme Court decision) to over

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17. See Krill, *supra* note 10, at 46.

18. At the time that the DSM-5 was published, the 12-month prevalence rates for alcohol use disorder, opioid use disorder, sedative- or anxiolytic-use disorders, stimulant use disorder, and gambling disorder were roughly 14 percent, 0.9 percent, 0.3 percent, 0.4 percent, and 0.25 percent, respectively. See Bridget F. Grant et al., *Epidemiology of DSM-5 Alcohol Use Disorder: Results from the National Epidemiologic Survey on Alcohol and Related Conditions III*, JAMA PSYCHIATRY. Vol. 72, No. 8, 757–66 (2015); DSM, *supra* note 11. Cf. Krill, *supra* note 10, at 46 (noting that “although physicians experience substance use disorders at a rate similar to the general population,” substance use disorders amongst physicians have received a great deal of research attention due to the “intense public and professional interest in the matter”).

19. See Debra S. Austin, *Drink Like a Lawyer: The Neuroscience of Substance Use and its Impact on Cognitive Wellness*, 15 NEV. L.J. 826, 827 (2015).

20. *Id.* at 828.

21. Noorjahan Rahman, *Earning the Drinker’s Bonus: How Lawyers Can Use Alcohol and Other Alternatives to Build Social Capital*, 28 GEO. J. LEGAL ETHICS 875, 879–80 (2015).

22. *Id.* at 878.

23. See Amateur Sports Protection Act, 28 U.S.C. § 3702(1) (held unconstitutional in *Murphy v. National Collegiate Athletic Association*, 584 U.S. 453 (2018)).

24. See *Murphy v. National Collegiate Athletic Association*, 584 U.S. 453, 486 (2018) (“PASPA ‘regulates state governments’ regulation’ of their citizens . . . The Constitution gives Congress no such power.” (citation omitted)).

25. *Legality of sports betting in the United States as of September 2024, by state*, STATISTA (Sept. 27, 2024), <https://www.statista.com/statistics/1491261/sports-betting-legality-us/> [<https://perma.cc/B4UD-KJMP>].

11 billion dollars.<sup>26</sup> The largest demographic drivers of this increase are those who are young (below age 35), male, and wealthy.<sup>27</sup> These statistics place the legal profession on alert for a potential rise in gambling addiction, as 58 percent of lawyers are male, 19 percent are below the age of 35, and many lawyers earn six-figure salaries.<sup>28</sup> Of course, sports betting (and gambling in general) is not synonymous with addiction and can be practiced in moderation. Nevertheless, a study by Yeola et al. published in 2025 preliminarily suggests that gambling addiction has risen in the United States following the legalization of sports betting.<sup>29</sup>

## B. THE MODEL RULES AND THE SILS

The ABA's *Model Rules* were created in 1983.<sup>30</sup> They establish the responsibilities and duties of a lawyer, chief among them their status as a "representative of clients" and their need to be "competent," along with the responsibility of the legal profession "to assure that its regulations are conceived in the public interest and not in furtherance of . . . self-interested concerns of the bar."<sup>31</sup> While binding and instructive, the *Model Rules* do not "exhaust the moral and ethical considerations that should inform a lawyer."<sup>32</sup> This sentiment seemingly emphasizes that the *Model Rules* articulate not lofty goals but rather the bare minimum of acceptable lawyer conduct. Every state has adopted the *Model Rules* outright or with minor changes.<sup>33</sup>

Generally, at least one of three parts of the *Model Rules* are most likely to form the basis of a misconduct disciplinary hearing for an attorney suffering from an addiction: Rules 1.1-1.6, Rule 1.16, and Rule 8.4. Rules 1.1-1.6 center on the basic tenets of the client-lawyer relationship, compelling a lawyer to provide

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26. Total sports betting revenue in the United States from 2018 to 2024, STATISTA (Jun. 3, 2024), <https://www.statista.com/statistics/1126480/sports-betting-revenue-us/> [<https://perma.cc/AN6J-AS6D>].

27. See *Sports betting is everywhere. How do Americans feel about it?*, IPSOS (Feb. 1, 2023), <https://www.ipsos.com/en-us/sports-betting-everywhere-how-do-americans-feel-about-it> [<https://perma.cc/4XGU-FNLW>] (finding in 2023 that 69 percent of sports bettors were male, 44 percent had an annual income over 100,000 dollars, and 39 percent were under the age of 35).

28. American Bar Association, *Demographics*, <https://www.americanbar.org/news/profile-legal-profession/demographics/> [<https://perma.cc/AV8A-AHCN>].

29. Yeola et al., *Growing Health Concern Regarding Gambling Addiction in the Age of Sportsbooks*, JAMA, Feb. 17, 2025 (finding a significant increase in searches for gambling-addiction help across multiple states between 2016 and 2024), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2830019> [<https://perma.cc/QS6P-QA4Z>].

30. American Bar Association, MODEL RULES OF PRO. CONDUCT (2018), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/) [<https://perma.cc/UG8L-TNDV>].

31. American Bar Association, MODEL RULES OF PRO. CONDUCT: *Preamble & Scope*, [hereinafter *Preamble & Scope*], [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/model\\_rules\\_of\\_professional\\_conduct\\_preamble\\_scope/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/) [<https://perma.cc/A3QT-PLMW>].

32. *Id.*

33. American Bar Association, *Alphabetical List of Jurisdictions Adopting Model Rules*, [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/alpha\\_list\\_state\\_adopting\\_model\\_rules/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/) [<https://perma.cc/6WKZ-NF7J>].

“competent” and “diligent” representation to a client, communicate with them effectively and promptly, charge them reasonable fees, and keep their information confidential.<sup>34</sup> Rule 1.16 includes the requirement that a lawyer stop representing a client if “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.”<sup>35</sup> Rule 8.4 broadly prohibits “misconduct,” which entails not only express violations of the *Model Rules* but also crimes or conduct that “involv[e] dishonesty, fraud, deceit, or misrepresentation” or “is prejudicial to the administration of justice.”<sup>36</sup>

The ABA’s *SILS* were adopted in their current form in 1986 with the goal of giving state courts clarity on how to approach disciplinary cases involving violations of the *Model Rules*.<sup>37</sup> The *SILS* recommends that courts ask four questions in these types of cases:

- 1) What ethical duty did the lawyer violate?
- 2) What was the lawyer’s mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
- 3) What was the extent of the actual or potential injury caused by the lawyer’s misconduct?
- 4) Are there any aggravating or mitigating circumstances?<sup>38</sup>

Under section 9.32, “mitigating circumstances,” which are “factors that may justify a reduction in the degree of discipline to be imposed,”<sup>39</sup> includes “mental disability or chemical dependency including alcoholism or drug abuse.”<sup>40</sup> However, for this mitigative effect to apply, a lawyer must display 1) medical evidence verifying the condition, 2) a causal link between the condition and the misconduct, 3) a “meaningful and sustained period of successful rehabilitation,” and 4) an unlikelihood that the misconduct will recur.<sup>41</sup> The *SILS* have not been adopted by every state, but most states have either explicitly adopted them, adopted essentially identical provisions, or consider them as non-binding but persuasive guides when making disciplinary decisions.<sup>42</sup>

## II. APPLICATION OF DISCIPLINARY STANDARDS

### A. ADDICTION MITIGATION IN STATE COURTS AND BAR ASSOCIATIONS

In lawyer discipline cases, state courts have generally adhered to one of three approaches when weighing the mitigative impact of substance use disorders,

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34. MODEL CODE OF PRO. RESP. R. 1.1-1.6 (AM. BAR ASS’N 1980).

35. *Id.* r. 1.16.

36. *Id.* r. 8.4.

37. *Preface to STANDARDS FOR IMPOSING LAWYER SANCTIONS*, 1-2 (AM. BAR. ASS’N 1992) [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/sanction\\_standards.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/sanction_standards.pdf) [<https://perma.cc/B7J3-T6JR>].

38. *Id.* at 8.

39. *STANDARDS FOR IMPOSING LAWYER SANCTIONS*, r. 9.31 (AM. BAR. ASS’N 1992).

40. *Id.* r. 9.32.

41. *Id.*

42. See generally Leslie C. Levin, *The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1 (1998).

permitting mitigation for a disorder: 1) regardless of the legality of the underlying substance, 2) only for legal substances, or 3) only in cases that do not involve the misappropriation of client funds.<sup>43</sup> Additionally, courts have assessed the mitigating effect of gambling disorder, a non-substance-related addiction disorder, in a variety of ways.

Some state courts allow for all substance use disorders to potentially mitigate a sanction for misconduct. Pennsylvania, for example, has determined that substance abuse disorders involving alcohol<sup>44</sup> or cocaine<sup>45</sup> can serve as grounds to reduce the sanction for misconduct from disbarment to a temporary ban. The court in both cases relied heavily on the demonstrated success of the attorney's treatment for the substance abuse disorder, reasoning that permanent bans are unnecessary when the attorney will be able to provide effective legal representation with little chance of misconduct moving forward.

Alternatively, some state courts only allow for a substance use disorder to mitigate a sanction for misconduct if the disorder does not involve illegally obtaining or using a substance. In *In re Kersey* and *In re Temple*, the District of Columbia Court of Appeals found that substance abuse disorders involving legally-obtained drugs, including alcohol, could mitigate even severe and repeated instances of misconduct.<sup>46</sup> However, the court declined to extend this mitigative effect to substance abuse involving cocaine, emphasizing the unacceptability of a lawyer so regularly flouting the *law* rather than just the *Model Rules*.<sup>47</sup> Other state courts are willing to offer mitigation for cases involving addiction to an illegal substance. In *In re Rivkind*, the Supreme Court of Arizona provided no additional punishment for an attorney with a cocaine addiction who had previously been suspended due to a felony conviction of cocaine possession.<sup>48</sup> A significant motivating factor for the court in that case, though, was that the attorney's misconduct did not cause any harm to a client.<sup>49</sup>

The final approach to substance use disorder mitigation is probably the harshest, and only the New Jersey Supreme Court has adopted it. That court established in *In re Wilson* that disbarment as a result of client fund misappropriation should be "almost invariable" because of the severity of this violation of the *Model Rules*,<sup>50</sup> and it clarified in *In re Jacob*, *In re Hein*, and *In re Steinhoff* that mitigation based on an attorney's substance use disorder, involving legal or illegal substances, would only be granted if it had created a total "loss of competency,

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43. Rachel T. Hudson, *Pick Your Poison: Abuse of Legal versus Illegal Substances as Mitigation in Attorney Disciplinary Cases*, 22 GEO. J. LEGAL ETHICS 911, 912 (2009).

44. *Id.* at 914.

45. *Id.*

46. 520 A.2d 321, 324, 327 (D.C. 1987); 762 A.2d 530, 536-37 (D.C. 2000).

47. See *In re Marshall*, 762 A.2d 530, 538 (D.C. 2000).

48. 791 P.2d 1037, 1042-43 (Ariz. 1990).

49. *Id.*

50. 409 A.2d 1153, 1154 (N.J. 1979).

comprehension, or will” such that the attorney had no intent in committing the misconduct.<sup>51</sup> This approach varies sharply from the practices of other courts, which may provide mitigation for substance abuse even when multiple instances of client fund misappropriation occurred.<sup>52</sup>

State courts have generally taken a fairly lenient approach in offering mitigation for gambling disorder, sometimes in direct contradiction of the New Jersey rule on client fund diversion, which applies with equal force to misconduct stemming from gambling disorder.<sup>53</sup> In *In re Gemmer*, the Indiana Supreme Court stopped short of disbarment for a lawyer whose gambling addiction (and alcoholism) led him to divert over 22,000 dollars of client funds for personal use, instead giving him a minimum one-year suspension and requiring him to repay the stolen funds.<sup>54</sup> Similarly, in *In re Miciotto* the Louisiana Supreme Court only suspended a lawyer for a year with conditional readmission after his gambling addiction led him to divert 12,900 dollars of client funds for personal use, although the court relied in part on the fact that no harm to clients technically occurred due to quick replacement of the diverted funds.<sup>55</sup>

The acknowledgement of a lawyer’s gambling addiction has not been an automatic grant of mitigation. The Supreme Court of Nevada did not approve of a relatively-lenient disciplinary punishment in *Matter of Discipline of Dunkley*, rejecting a two-year suspension for client fund appropriation resulting from a lawyer’s gambling addiction.<sup>56</sup> However, the court in that case still acknowledged that gambling addiction is generally a mitigating factor.<sup>57</sup> The Supreme Court of Arizona has also acknowledged that gambling addiction can be a mitigating factor.<sup>58</sup> Nevertheless, it concluded in *In re Scholl* that there was no mitigation where a lawyer with gambling addiction filed false income tax returns, despite a psychologist’s opinion that the addiction contributed at least in part to the misconduct, because the lawyer failed to firmly establish the causal link.<sup>59</sup> And in *In re Register*, the Supreme Court of Louisiana permanently disbarred a lawyer with gambling addiction who had committed multiple acts of misconduct,

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51. 469 A.2d 498, 501 (N.J. 1984); 516 A.2d 1105, 1107 (N.J. 1986); 553 A.2d 1349, 1350 (N.J. 1989). In October 2024, the New Jersey Supreme Court issued an order allowing some attorneys who have been disbarred to apply for readmission to the bar, seemingly undermining the permanency of the *Wilson* rule. Supreme Court of New Jersey, Rule 1:20-21A(b)–(d), Oct. 15, 2024, <https://www.njcourts.gov/sites/default/files/notices/2024/10/n241015b.pdf?cb=893ec085> [<https://perma.cc/E36D-PC4Q>]. However, the order did not mention *Wilson*, so that case and its progeny currently remain good law. *See id.*

52. *See, e.g., In re Kersey*, 520 A.2d 321, 322, 326–27 (D.C. 1987).

53. *See Matter of Wade*, 250 N.J. 581, 598 (N.J. 2022) (“General proof of addiction to . . . gambling . . . which falls short of the *Jacob* standard, is insufficient to avoid disbarment for knowing misappropriation.” (citing *In re Goldberg*, 109 N.H. 163, 167, 172 (N.J. 1988))).

54. 679 N.E.2d 1313, 1313–14 (Ind. 1997).

55. 206 So.3d 860, 861, 864–65 (La. 2016).

56. 135 Nev. 659 (Nev. 2019).

57. *Id.*

58. *See In re Scholl*, 200 Ariz. 222, 226 (Ariz. 2001).

59. *Id.* at 226–227.

including neglecting client matters, failing to communicate with clients, and converting client funds for personal use, because the lawyer in that case also failed to establish a sufficient causal link.<sup>60</sup>

#### B. HARMFUL EFFECTS OF ADDICTION-RELATED MISCONDUCT BY LAWYERS

Regardless of the type of addiction involved, disciplinary precedent based on the *SILS* guidelines generally shows that state courts and bar associations are united in giving great weight to the harm that an attorney has done and the potential harm they might do if allowed to continue practicing law. This uniformity reflects the importance of internal regulation of the legal field as a means of quality control in legal practice. Providing clients with appropriate representation is one of the central tenets of the legal profession, and when lawyers fail to fulfill this pivotal responsibility they inflict very real harm on their clients.<sup>61</sup> While addiction is widely recognized as a disease within the medical field,<sup>62</sup> this understanding of addiction does not absolve attorneys who suffer from addiction of the harmful consequences of their misconduct, regardless of whether the lawyer or their addiction is “at fault.”

This more punitive notion of lawyer sanctions may be challenged by the availability of other avenues for wronged clients to seek recompense and justice. An attorney who commits an illegal act, such as theft, can be held civilly or criminally responsible through the normal avenues of judicial proceedings. A defendant in a criminal case may be able to bring an ineffective assistance of counsel claim against an incompetent attorney in order to belatedly receive due process. And all sorts of clients can bring legal malpractice claims, which have been generating record settlement awards for plaintiffs in recent years.<sup>63</sup> However, self-policing in the legal field plays a few unique and important functions. First, it sends a message to other lawyers that they must deal with addiction issues before they lead to legal misconduct. Lawyers are implicitly encouraged, through the threat of career-altering penalties and the promise of leniency through initiatives like lawyer assistance programs, to pre-emptively seek help.<sup>64</sup> Second, imposing disciplinary sanctions against lawyers who engage in misconduct improves the actual quality of the legal profession by removing from circulation—either through disbarment, suspension, or treatment—those lawyers who present a high risk of harm towards clients. Lastly, this system of meaningful internal accountability in

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60. 280 So. 3d 1139, 1147 (La. 2019).

61. *Preamble & Scope*, *supra* note 31.

62. *See, e.g., Drug Addiction (Substance Use Disorder)*, MAYO CLINIC (June 20, 2025), <https://www.mayoclinic.org/diseases-conditions/drug-addiction/symptoms-causes/syc-20365112> [https://perma.cc/Y4HE-PNFA].

63. Amanda O'Brien, *Legal Malpractice Claim Values Reach an 'All-Time High' in Last Year*, THE AMERICAN LAWYER (May 15, 2024), <https://www.law.com/americanlawyer/2024/05/15/legal-malpractice-claim-values-reach-an-all-time-high-in-last-year/?slreturn=20250107162826> [https://perma.cc/XD6F-VGB5].

64. Kristy N. Bernard & Matthew L. Gibson, *Professional Misconduct by Mentally Impaired Attorneys: Is There a Better Way to Treat an Old Problem?*, 17 GEO. J. LEGAL ETHICS 619, 631–33 (2004).

the legal field instills confidence amongst the public, increasing their ability to trust lawyers to provide adequate legal services.<sup>65</sup>

### C. INCONSISTENT UNDERSTANDING OF ADDICTION

While most courts are aligned in giving great weight to misconduct, the above cases demonstrate that these courts are not in agreement in the degree to which they balance this misconduct with the reality of a lawyer's addiction. This inconsistency seems to exist in part because of differing interpretations of addiction's effect on behavior. For example, the Supreme Courts in states such as Pennsylvania, Indiana, and Louisiana have considered addiction to so override individual choice that they have declined to disbar attorneys even when they flagrantly violate the law or commit significant misconduct, including the appropriation of client funds. At the same time, Louisiana in another case disregarded expert testimony that suggested the lawyer's actions were due to his addictions. Washington, D.C. acknowledges that leniency should be granted to those with addiction who commit misconduct, but does not apply that same logic to those whose misconduct includes illegal possession of the drug they are addicted to, an infraction that carries a much more direct relationship to the addiction than any misconduct. And New Jersey forbids judges from making *any* case-by-case decision on the role addiction played in a lawyer's misconduct if that misconduct involved misappropriation of client funds.

## III. ADDICTIVE BEHAVIORS AND THE DSM-5

### A. DSM-5 CRITERIA

The DSM-5, most recently updated in 2022, is the primary manual that physicians, psychologists, and other mental health professionals use to diagnose mental health disorders and conditions.<sup>66</sup> Five types of addiction recognized under the DSM-5 are particularly relevant due to their prevalence in the legal field and their potential to fuel lawyer misconduct: Alcohol use disorder, opioid use disorder, sedative or anxiolytic-related disorders (which can involve anti-anxiety medications), stimulant-related disorders (which can involve amphetamines, Adderall, or cocaine), and gambling disorder.

For each of the above addictive disorders, the DSM-5 provides a list of symptoms and requires that a minimum number be present in an individual in order to diagnose them with that addiction.<sup>67</sup> For the substance use disorders, an individual

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65. See, e.g., *In re Konopka*, 596 A.2d 733, 747 (N.J. 1991) (arguing that, in the case of a lawyer who commits financial misconduct against a client, "the public is entitled . . . as a simple matter of maintaining confidence, to know that never again will that person be a lawyer . . . Nor is there anything that affects public confidence more . . . than this Court's treatment of such offenses.").

66. See *Cleveland Clinic*, *supra* note 8.

67. See generally *DSM*, *supra* note 11.

must have at least two of eleven possible symptoms to receive a diagnosis.<sup>68</sup> Many of these criteria are the same across all of the substance use disorders, such as spending a substantial amount of time trying to obtain the substance, craving the substance, continuing use of the substance despite social problems arising from that use, and neglecting other activities in favor of substance use.<sup>69</sup> For gambling disorder, an individual must meet four of a possible nine symptoms to receive a diagnosis.<sup>70</sup> Each addiction is classified as “mild,” “moderate,” or “severe” based on the number of symptoms present.<sup>71</sup> The only baseline requirement across all of these addictions is that the symptoms lead to “clinically-significant impairment” within the last year.<sup>72</sup> Therefore, amongst people who receive an addiction diagnosis, there is a wide degree in variation both in addiction severity and symptom presentation.

The DSM-5 also explicitly notes several research-based associations between a given addictive disorder and certain behaviors or risk factors. While these connections might not be reflected in the symptom list, a mental health professional can nevertheless validly rely on them for guidance in making a diagnosis. For example, alcohol use disorder becomes more likely when alcohol availability, individual stress levels, and peer use increase.<sup>73</sup> Gambling disorder, too, is associated with periods of heightened stress.<sup>74</sup> Additionally, opioid use disorder, stimulant use disorder, and gambling disorder are all associated with higher rates of crime, including forgery, theft, and drug distribution.<sup>75</sup> All substance use disorders are generally linked to cognitive and physical impairment when an individual is actively under the influence of that substance.<sup>76</sup>

#### IV. RECOMMENDATIONS

##### A. PROPOSAL

This Note recommends that the *SILS* be amended so that it directs courts to adopt a three-step framework when considering disciplinary action for a lawyer suffering from addiction. First, the court should rely on medical records and expert testimony from a qualified psychiatrist or psychologist to establish that the lawyer suffers from an addiction recognized by the DSM-5. While this may already be the practice that courts utilize in lawyer discipline cases, it is nevertheless important to formalize it in the *SILS* to try to ensure best practices. The actions underlying addictive disorders do not inherently reach the level of a

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68. *See id.*

69. *See id.*

70. *See id.*

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

76. *See id.*

clinical addiction. The use of the mitigation process in lawyer discipline cases to provide leniency to lawyers with legitimate mental health conditions would thus be undermined if cases involving non-addicted substance use or gambling were allowed to prevail.

Second, in order to determine whether an attorney's addiction had a mitigative impact on their misconduct, courts should rely on medical evidence and testimony to identify. Although the mitigation step in the proposed framework involves a "yes/no" classification of whether the lawyer should receive some mitigation, the degree of mitigation (i.e., the severity of the penalty) operates on a spectrum, not a binary. The mental health professional who diagnosed the lawyer with an addiction, as well as expert witnesses who specialize in addiction, can assist judges in making this nuanced decision. These professionals can use their medical training and experience to speak to the severity of a given lawyer's addiction, the likelihood that that addiction contributed to the misconduct, and the lawyer's chances of recovery in a more authoritative way than a medically-untrained judge can. For example, a medical expert might testify that a given lawyer's addiction has a high chance of being controlled via rehabilitation, leading to a verdict of conditional readmission over disbarment.<sup>77</sup> Alternatively, an expert could state their belief that a lawyer's severe addiction presentation nevertheless does not reasonably account for the misconduct committed.

Third, a court should determine if the misconduct was so severe that it outweighs any mitigative impact that the attorney's addiction had on the misconduct. Where the severity of the misconduct does outweigh any mitigative impact of the addiction, it seems appropriate for courts to disbar attorneys, perhaps even permanently. This step importantly separates the severity of the addiction from the severity of the misconduct. In doing so, it allows judges to acknowledge the validity of addiction as a mental illness without allowing that mental illness to become an excuse for severe misconduct. While this approach may seem draconian, disbarment does not carry the same broad employment restrictions as does a criminal record, nor does it usually impose the type of substantial financial penalty that might be meted out in civil cases.

## B. DISCUSSION

This three-step framework can best be viewed as a way to bolster section 9.32 of the *SILS*. It is true that section 9.32 already requires a lawyer arguing mitigation due to addiction to provide medical evidence of their addiction, establish a causal link between their addiction and their misconduct, and convince the judges that the likelihood of repeat offense is small.<sup>78</sup> However, the *SILS* provides little

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77. Cf. Janice M. Holder, *Completing the Puzzle: Lawyer Assistance and Conditional Admission*, 49 DUQ. L. REV. 439, 444–46 (2011) (advocating for conditional admission to the bar for lawyers suffering from addiction).

78. STANDARDS FOR IMPOSING LAWYER SANCTIONS, r. 9.32 (AM. BAR. ASS'N 1992).

guidance on how a lawyer can accomplish these steps or what particular evidence judges should consider when making a decision. This leaves open the possibility that lawyers will fail to provide adequate support for their mitigation argument or that judges, who lack medical training, will make decisions based on an incomplete or incorrect understanding of addiction. It should also be acknowledged that many courts have and continue to utilize many of the approaches proposed in this Note.<sup>79</sup> The goal of recommending the addition of the three-step framework to the *SILS* is not to create a new evidentiary practice out of thin air, but rather to encourage consistency both within and between state courts and to clarify the degree to which judges should defer to medical expertise in cases involving addiction.

Using these steps as a foundation when weighing disciplinary leniency for attorneys suffering from addiction would ideally lead to several positive developments. Courts would ideally arrive at more consistent and logical results, regardless of the specific addiction or misconduct involved in a given case. The reliance on medical professionals would grant legitimacy to the process by avoiding judicial decisions based on an inadequate understanding of mental health. And the iterative nature of the process—particularly the separation of the mitigation and severity determinations—would allow courts to more clearly distinguish between an addiction as “mitigation” versus an “excuse.” In other words, judges could acknowledge that a lawyer would deserve mitigation due to their addiction in a case involving less severe misconduct. This type of decision would establish much clearer precedent for courts to follow in future cases and would give an appropriate amount of respect to the extreme impact that addiction can have on behavior.

The unique features of the proposed framework address some of the shortcomings of other approaches. The emphasis on medical evidence and testimony accomplishes several goals. First, it helps non-medically trained judges establish the validity of a defendant-lawyer’s claim of addiction. Doing so allows judges to more confidently proceed to the mitigation step and adds legitimacy to the disciplinary process by avoiding fraud. Second, medical evidence and testimony properly account for the fact that not all addictions are the same in terms of either severity or presentation. This differentiation is crucial in the mitigation step. It allows the actual impact of a given lawyer’s addiction on their misconduct to be more accurately considered, thus increasing the likelihood that a more just outcome is reached. Third, a reliance on expert testimony could help ensure that discipline decisions are not based on a misunderstanding of addiction. Some of the case precedent involving gambling disorder, for instance, has concluded that mitigation is not warranted because the misconduct occurred over a long period of

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79. See, e.g., *In re Scholl*, 200 Ariz. 222, 226 (Ariz. 2001) (relying on an expert witness to diagnose defendant lawyer with gambling addiction and opine on both the causal link between the addiction and the misconduct and the likelihood that the lawyer will repeat their misconduct).

time and because there was no causal link between the addiction and the misconduct.<sup>80</sup> However, these conclusions were made without any reference to medical evidence, testimony, or literature, so it is not clear that the judges relied on correct assumptions and understandings of addiction. Lastly, the emphasis on medical evidence and testimony takes attention away from the legality of a substance and directs it back towards actual addiction symptoms. In addition to avoiding seemingly perverse disparities in punishment based entirely on the difference in drug used, this refocusing is particularly important for an addiction such as opioid use disorder, which often begins with entirely legal use of prescribed opioids and only progresses to illicit drugs when an individual is already in the throes of addiction.<sup>81</sup>

The framework's case-by-case consideration of the severity of the misconduct serves as a more moderate method that will theoretically improve the public's faith in the legal field's ability to police itself. On the one hand, the judicial discretion of this step adds nuance and flexibility to the New Jersey approach, which is based on noble principles but is generally regarded as rigid and extreme.<sup>82</sup> On the other hand, this step theoretically prevents courts from using a lawyer's addiction to excuse any amount of severe misconduct, a critique that can be levied at those courts that have offered more lenient sanctions. In short, the purpose of encouraging courts to determine whether the severity of a lawyer's misconduct in a given case outweighs any mitigative effect that that lawyer's addiction had on the misconduct is to avoid the excesses on either end of the discipline spectrum.

This Note's proposed three-step framework finds some support in the approach taken by military review boards, which analogously aid in the internal regulation of the military by making disciplinary determinations. In particular, the framework borrows heavily from the "liberal consideration" framework used by military review boards when they determine whether to upgrade the discharge status of a servicemember diagnosed with post-traumatic stress disorder (PTSD) or traumatic brain injury (TBI).<sup>83</sup> Although the exact criteria considered by military review boards are different from those considered by courts reviewing lawyer discipline cases, both systems involve assessing the mitigative impact of a bio-psychological condition and weighing that against the harm done in order to determine a just punishment. The "liberal consideration" framework has allowed military review boards to reach more consistent decisions, and the percentage of successful discharge status upgrade requests has risen from single digits to just

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80. *See id.* at 226–27.

81. Roger D. Weiss et al., *Reasons for Opioid Use Among Patients with Dependence on Prescription Opioids: The Role of Chronic Pain*, 47 J. SUBSTANCE ABUSE TREATMENT 140, 145 (2014); Richard Miech, et al., *Prescription Opioids in Adolescence and Future Opioid Misuse*, 136 PEDIATRICS 1169, 1177 (2015).

82. *See Hudson, supra* note 43, at 917–18.

83. *See* Memorandum from A.M. Kurta to the Secretaries of the Military Departments, U.S. Dept. of Defense (Aug. 25, 2017), <https://dod.defense.gov/Portals/1/Documents/pubs/Clarifying-Guidance-to-Military-Discharge-Review-Boards.pdf> [<https://perma.cc/2ZT3-46ZW>].

under 50 percent.<sup>84</sup> If the legal field could follow a similar trajectory after implementing this three-step framework, then this could lead to a fairer, more balanced system of lawyer discipline.<sup>85</sup>

One of the more challenging realities for a court reviewing a lawyer discipline case is that one symptom, “significant interference with workplace responsibilities,” is one potential diagnostic criterion for each type of addictive disorder. A substance use disorder can be established in part by a “failure to fulfill major role obligations at work” due to substance use, and gambling use disorder can be established in part by gambling that “jeopardized or lost a significant . . . career opportunity.”<sup>86</sup> If this is one of the criteria used to establish an addiction—particularly in milder cases where it is one of the only criteria for making the diagnosis—then using that factor to then mitigate misconduct would apply circular reasoning. In other words, it would not make sense to base the existence of an addiction in large part on the work misconduct it led to and then mitigate the penalty for that misconduct because of the presence of an addiction. While this symptom’s inclusion in the DSM-5 makes it valid, courts should be cautious when there are few symptoms other than work-related issues.

### CONCLUSION

Addictive disorders, whether related to substances or to behaviors such as gambling, likely afflict lawyers at a higher rates than in the general population. This reality inevitably has led and will continue to lead to addiction-related lawyer misconduct and the need to impose sanctions on offending lawyers. It is therefore important to the well-being of individual lawyers, their clients, and the legal field as a whole that these sanctions are just and meted out consistently between various state courts. However, a preliminary review of state court disciplinary decisions in cases involving lawyers with addiction reveal stark differences in how state courts consider the mitigative impact of addiction. Courts disagree on whether addiction to legal substances should be treated differently than illegal substances, whether the severity of the misconduct should be controlling, and whether substance-based addictions should be considered differently than non-substance-based addictions. This inconsistency risks unjust and unpredictable outcomes, and it potentially stems from a misunderstanding or inadequate consideration of the medical roots of mental health disorders.

This Note advocates for a three-step framework for disciplinary cases involving lawyers with addiction that would base these cases more solidly in a medical understanding of addiction. Specifically, courts should 1) rely on medical records

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84. Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards’ Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 CALIF. L. REV. 1357, 1382 (2020).

85. However, the implementation of the liberal consideration policy has been criticized for not resulting in an appropriately-large increase in the number of discharge status upgrades. *See id.* at 1382–83, 1387–89.

86. *See DSM, supra* note 11.

and expert testimony from a qualified psychiatrist or psychologist to establish the lawyer's addiction under the DSM-5, 2) rely on these same sources to determine whether an attorney's addiction had a mitigative impact on their misconduct, and 3) determine if the severity of the misconduct outweighs any mitigative impact from the attorney's addiction. This proposed framework does not include a specific, normative argument either for or against greater leniency in lawyer discipline cases, as this is a case-by-case determination that should be made by a mental health professional. Rather, this Note argues that, by standardizing the courts approach and involving mental health professionals more closely in the discipline process, courts will arrive at more consistent and just conclusions.