Rationalizing Professional Misconduct: An Examination of Techniques of Neutralization in Lawyer Discipline Proceedings

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Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of
Doctor of Philosophy

in the
School of Criminology
Faculty of Arts and Social Sciences

SIMON FRASER UNIVERSITY

Fall 2019

Approval

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Degree:	**Doctor of Philosophy (Criminology)**
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Date Defended/Approved:	December 11, 2019

Abstract

This thesis investigates the use of neutralization techniques by lawyers to justify, excuse, and rationalize their behaviour in disciplinary action for misappropriation, real estate fraud, and conviction for serious financial criminal offences. In addition to assessing the nature and frequency of lawyer neutralizations, this study also considers the extent to which law society discipline hearing panels evaluate and respond to these defence and mitigation strategies in making a sanctioning determination. The dataset consists of 393 law society discipline decisions from eight of Canada's 14 provincial and territorial law societies decided between 1990 and 2017. Content analysis addresses the characteristics of these lawyers, how they use techniques of neutralization and are disciplined by the law societies, and how hearing panels evaluate and respond to these rationalizations. The research findings have implications for neutralization theory and its application to lawyer discipline, for stakeholders and policymakers. The conclusions focus on three issues: 1) the prevalence of substance use and other mental health concerns in lawyer discipline cases, 2) the role of post-offence mitigation in the sanction determination, and 3) the suggestion that mitigating factors should be re-examined as techniques of neutralization with the goal of neutralizing some of them when imposing sanctions in disciplinary cases.

Keywords: white-collar deviance; lawyer discipline; techniques of neutralization; professional self-regulation.

Acknowledgements

This thesis marks the culmination of a long journey that would not have been possible without the support, guidance, and encouragement of many people. It truly takes a village.

First and foremost, I would like to express my sincere gratitude and thanks to my senior supervisor, Professor Joan Brockman, for her mentorship, dedication, patience, and continuous support during this pursuit. She was instrumental in guiding me through the entire research process from ideation through completion. I would not have been able to finish my PhD without her in my corner. Thank you, Joan, for your profound belief in me and my work. For that, I am truly grateful.

I am extremely grateful to my other committee members, Dr. Margaret Jackson and Dr. Jacqueline Faubert, for their knowledge, insightful discussions, and invaluable suggestions throughout the preparation and review of this thesis, which contributed to the success of this study. You have had a tremendous impact on both my personal life and professional career.

I would also like to thank Dr. Deborah Connolly and Dr. Fiona Kay for graciously agreeing to serve as external examiners. Your feedback during the final stages of this research was very helpful.

I would like to extend my sincere thanks to Dr. Sheri Fabian for her friendship and for being a sounding board for me to discuss my research.

I am grateful for funding from the Social Sciences and Humanities Research Council of Canada (SSHRC) and for other financial assistance provided by Simon Fraser University that helped support my research.

To my father, Jim, mother, Sabina, and sister, Megan -- words cannot express how grateful I am to you for unwavering love and support over the years. Thank you for encouraging me to dream big and for always believing in me. You were my biggest source of strength and motivation throughout this endeavour. I dedicate this thesis to you, and to the loving memory of my father. He would have been so proud of this moment.

Finally, I am deeply indebted to my partner and best friend, Deva, for her unconditional love, support, and understanding throughout this lengthy and often challenging journey. Each and every day, she would remind me, “you are further ahead now than you were at the beginning of the day.” You provided me with unending inspiration and motivation, especially during difficult times. I love you dearly and look forward to celebrating our next chapter together.

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Chapter 1.

Introduction

White-Collar Crime and Misconduct

In 1939, Edwin Sutherland introduced the concept of “white-collar crime” to draw attention to crimes committed by those in the upper echelons of society and the fact that these offences were “not ordinarily included within the scope of criminology” (Sutherland, 1983, p. 9). Sutherland was one of the first theorists to challenge the widely held belief that crime was predominantly a lower-class phenomenon. He criticized criminology’s longstanding preoccupation with lower-class offenders and street crimes and the relative inattention given to crimes committed by organizations and persons in positions of power. Sutherland maintained that crime and deviance cut across all social classes and economic strata.

According to Sutherland and more current scholars, white-collar crimes are less likely to be criminally prosecuted than so-called street crimes and, if prosecuted, those who occupy a position of power in society generally fare better than street-level offenders in the criminal justice system (Brown, 2001; Friedrichs, 2010; Lynch, McGurrin, & Fenwick, 2004; Menzies, Chunn & Boyd, 2011; Nagel & Hagman, 1992; Natapoff, 2009; Pontell, Rosoff, & Peterson, 2007; Simon, 1999; Van Slyke & Bales, 2012; Snider 2000, 2001, 2003; Tombs & Whyte, 2003; Tillman, Calavita, & Pontell, 1996). In addition, many of the white-collar offences Sutherland identified in his research are segregated from the criminal justice apparatus, and are dealt with under regulatory, civil and administrative provisions. As such, white-collar criminals can more readily escape detection, criminal prosecution or conviction (and the attached stigma), even though their actions are just as, if not more, harmful than conventional crimes, and the conduct violations are often equivalent to acts prescribed by criminal statute (e.g., misappropriation, breach of trust, antitrust violations, tax evasion) (Gobert & Punch, 2003 p. 3; Pontell, 2016, p. 45). If processed at all, crimes of the powerful are often subject to civil and administrative penalties. Consequently, “white-collar criminals are segregated administratively from other criminals, and largely as a consequence of this are not regarded as real criminals…” (Sutherland, 1940, p. 8). In addition, Sutherland

reminds us that the while-collar class has a “loud voice in determining what goes into the statutes and how the criminal law as it affects themselves is implemented and administered” (p. 8).

Shover and Cullen (2008) suggest that the enduring controversy over definitions of white-collar crime can be understood as a conflict between two competing perspectives or paradigms on how we see crime and the world more generally. They label these the ‘Populist’ and ‘Patrician’ perspectives. These conflicting perspectives differ “in analytic emphasis and interpretation” of key issues central to the study of white-collar crime—one being how certain harms are selectively criminalized and prosecuted (Shover & Cullen, 2008, p. 156). The Populist perspective “situates white-collar crime in the struggle against socio-economic inequality” (p. 156). In other words, the populist approach emphasizes the social status and occupational position of the offender, as initiated by Sutherland, as the defining characteristic of white-collar crime. From this perspective, white-collar offences encompass a variety of harmful acts which may be treated as a violation of criminal, civil, or administrative law. Through this lens, white-collar crime conjures images of the corporate and professional elite using their status to illegally garner significant financial gains while evading prosecution. It elicits a critical, more politicized, reform-oriented view of crime (Copes & Vieraitis, 2009a, p. 330).

The Patrician perspective, on the other hand, “takes a narrower, more technical, and less reform-oriented view of white-collar crime” (Shover & Cullen, 2008, p. 156). Those who define white-collar crime from this perspective, like Tappan (1947), for example, focus on the distinctive characteristics of the offence, rather than the characteristics of the offender. From this perspective, white-collar crime involves only those acts that are codified in criminal statutes and enforced as such. It excludes some white-collar offences that are illegal; they are not considered criminal, because they are not prosecuted as such. According to Patrician constructions of white-collar crime, the focus should be on “collaring the crime, not the criminal” (see Shapiro, 1990). However, criminalizing white-collar crime is not imperative because alternative systems of social control are already “established to process claims of harm (the civil courts) and to prevent such actions from reoccurring (the regulatory system)” (Shover & Cullen, 2008, p. 165). The existence of multiple forums to censure the misconduct of the professional elite should ensure that malefactors are held accountable for their actions and that the public interest is protected. In an administrative context, then, the onus is on

professionals in a self-regulated industry to police their own, denounce professional misconduct, and safeguard the public against unscrupulous or rogue practitioners.

In the last half of the twentieth century, a large body of critical criminological, legal, and socio-legal scholarship has emerged again challenging the notion that crime and criminal law are objective phenomena, instead, arguing that the nature of crime and its control "is more a reflection of how society is structured than an indication of any inherent problems with those individuals regarded as criminals" (Des Rosiers & Bittle 2004, p. vii).[1] In other words, what we define as "crime" is a manifestation of political, economic and cultural forces operating within a given historical period. As the Law Commission of Canada (2003) suggests, "[t]here is certainly no single, timeless and unchanging notion of crime" (p. 12). To illustrate, although historically there has been some question as to whether corrupt or fraudulent practices should be considered criminal, today there appears to be consensus that these acts should be prohibited by law (Brockman, 2010, p. 54), although differential and segregated enforcement is still an issue.[2]

Critical scholars argue that "the problem of crime [is] indeed tied to the law, but only insofar as those who [make] the law [criminalize] the harmful behavior of some, the powerless, but not others, notably the powerful" (Henry & Lanier, 2001, p. 4). In more recent decades, feminist scholars (Balfour & Comack, 2004; Comack, 2006; Dalton, 1993) and critical race theorists (Chartrand & Webber-Pillwax, 2010; Mirchandani & Chan, 2007; Neugebauer, 2000) have pointed out the law's unequal application to women and racial minorities within criminal justice system, "noting that conceptions of crime and its control are rooted primarily in the experiences of white men" (Des Rosiers & Bittle 2004, p. viii).

In 2004, the Law Commission of Canada published a series of studies exploring definitions of crime and its enforcement—or how certain behaviour and individuals are criminalized while others are not. One study by Ericson and Doyle (2004) found that the differential application of laws to marginalized individuals and those from more desirable

[1] See Quinney (1970) for an earlier version of this argument.

[2] Clinard and Yeager (1978) remind us that "[o]nly a short step separates unethical tactics from actual violations of the law. Many practices that were formerly considered unethical have now been made illegal and [are] punished by government" (p. 264).

socio-economic backgrounds also exists in the private sector. The authors examined how insurance companies define and regulate fraudulent insurance claims. Overall, they found that insurance-claims adjusters and investigators favoured claimants from a more desirable socio-economic background and policed less desirable populations more intensely for fraud.

These critical perspectives reveal an inherent disconnect "between the law on the books and the law in action, or the differences between laws as they are written and laws as they are enforced" (Des Rosiers & Bittle 2004, p. xvii). As such, the enforcement of laws can be ineffective and harmful, with some offenders being over-policed, and others under-policed (see, for example, Mosher & Hermer, 2010; Nagel and Hagman, 1992; Tillman, et al., 1996). The result is an inequality of treatment between marginalized individuals and the powerful (Brockman, 2010, p. 53).

The current study adopts a populist approach to the study of white-collar crime and examines lawyers who commit fraud-like acts during the course of their occupational activities. A lawyer who misappropriates funds from a client, or engages in mortgage fraud, can be characterized as engaging in both a crime and professional misconduct. As such, the lawyer can be prosecuted in the criminal courts and/or disciplined through administrative action from the law society for the same conduct (see Murdoch & Brockman, 2001). Though fraud is prohibited pursuant to section 380 of the *Criminal Code*, lawyers who engages in fraud during the course of their occupation are not, according to the patrician perspective, considered white-collar criminals unless they are prosecuted for a crime. According to Sutherland and other scholars of white-collar crime (including the populist approach and many of the what-is-a-crime scholars), excluding behaviour that is a crime (but never enforced as such), but is treated as administrative violations, is not an objective way to examine crime. I therefore examine white-collar crime through a populist lens. As I discuss in greater detail below, the aim of this study is to explore self-regulation by the legal profession, and more specifically how provincial law societies use techniques of neutralization when they discipline lawyers who commit fraud-like acts during their occupational activities.

Regulating Canadian Lawyers

The legal profession in Canada is largely self-regulating—an exemplar of administrative segregation. Law societies are regulatory bodies, created by provincial and territorial legislation[3] that are managed by benchers elected by other lawyers, and more recently by a small number of government-appointed lay or public benchers. Law societies have a mandate to regulate the conduct of their members in the public interest through setting standards for admission to the profession, establishing codes of conduct, and disciplining lawyers who breach the rules (Federation of Law Societies of Canada, 2018e). Lawyers enjoy considerable autonomy from the state over most aspects of professional practice and discipline. In return for the ability to self-regulate, the legal profession is expected to develop standards of professional competence designed to protect the public, monitor for compliance, and discipline those who fail to meet the standards. Critics of lawyer self-regulation argue that the system is designed to protect the legal profession's reputation in order to promote the profession's autonomy and its monopoly on the provision of legal services. Some authors have suggested that the disciplinary system for lawyers has proven to be woefully inadequate at controlling wayward behaviour and in holding lawyers accountable for their misconduct (Abel, 1989; 2011; Brockman & McEwen, 1990; Brockman, 2004; Brown & Wolf, 2012; Devlin & Heffernan, 2008; Evans, 2014; Levin, 1998, 2007; Maute, 2008; Rhode, 1994, 2000; Slayton, 2007; Turner & Mishkin, 2002).[4]

Professional discipline is an important instrument of social control and a vital feature of any self-regulating system. However, public confidence in professional regulation depends on a commitment to the consistent enforcement of the rules and imposing proportionate sanctions where a finding of misconduct is established (Sossin, 2010, p. iii). Inadequate discipline is likely to have little specific deterrence or general deterrence on other lawyers and raises the question of whether the legal profession can

[3] The regulation of professions in Canada falls under provincial jurisdiction in accordance with subsection 92(13) of the *Constitution Act, 1867*. It should be noted, however, some self-regulating professions are governed by federal legislation, including aviation safety and air traffic control, immigration and citizenship consulting, and health care as it applies to indigenous populations.

[4] Philip Slayton, author of *Lawyers Gone Bad: Money, Sex and Madness in Canada's Legal Profession*, is of the view that lawyer discipline system in Canada is a "patchwork quilt" that varies from province to province, and from one case to another (p. 237).

be trusted to regulate itself in the public interest. How the rules are applied or enforced by the profession is as important as, or more important than, the rules themselves.

Steele and Nimmer (1976) suggest that, "[p]rofessional disciplinary systems can be examined from several perspectives, each of which significantly contributes to understanding the policy and operational issues implicit in the disciplinary process" (p. 946). Studies of lawyer misconduct and the lawyer sanctioning process have examined, for example, attrition rates between initial complaint and final disposition (Brockman & McEwen, 1990; Brockman, 2004), gender differences among disciplined attorneys (Hatamyar & Simmons, 2004; Payne, Time, & Raper, 2005; Bartlett, 2008), the prevalence of substance use and other mental health concerns among disciplined lawyers (Moore, Buckingham, & Diesfeld, 2015), and predictors of lawyer misconduct and sanction severity (Arnold & Hagan, 1992; Kelly, 1988; Levin, Zozula, & Siegelman, 2015; Piquero, Meitl, Brank, Woolard, Lanza-Kaduce, & Piquero, 2016). These valuable contributions notwithstanding, no known studies have examined the role and influence of neutralization (see Sykes & Matza, 1957) and impression management techniques in the lawyer discipline process.

One issue that may bear on self-regulation and professional discipline is the extent to which techniques of neutralization are used by lawyers who face discipline, and more importantly, adopted by lawyers who sit in judgment of other lawyers. Techniques of neutralization are psychological defence mechanisms used by individuals as a means of rationalization, stigma and impression management, and identity negotiation (Bryant, Schimke, Brehm, & Uggen, 2018). In the lawyer discipline context, these techniques are frequently presented in the form of personal mitigation, as either justifications or excuses, and are used by lawyers to redefine their misconduct in a way that minimizes culpability, manage one's tarnished reputation and social identity, and to avoid or minimize the associated punishment. Cressey (1953) suggests that such verbalizations may be embedded in the wider culture of organizations.

The present study investigates the different ways in which lawyers justify and rationalize their professional misconduct during disciplinary proceedings by applying various techniques of neutralization. Examining the specific neutralizations lawyers use to account for their misconduct sheds important light on the individual and situational factors that contribute to unethical behaviour by lawyers. In addition to assessing the

nature and frequency of lawyer neutralizations, this study also considers the extent to which law society benchers evaluate and respond to these techniques in making a sanctioning determination.

This study examines lawyers who are disciplined for financial misconduct including misappropriation of funds, mortgage and other fraud-related behaviour and who uses techniques of neutralization in the disciplinary process. It asks the following questions about these lawyers:

1. What are their characteristics?
2. How do law societies discipline such lawyers?
3. How do these lawyers use techniques of neutralization to rationalize their unethical or criminal behaviour during disciplinary proceedings?
4. What are the most frequently used techniques of neutralization?
5. How do law society hearing panel members evaluate and respond to these rationalizations when imposing disciplinary sanctions?

This research builds upon the work of Sykes and Matza (1957) and other criminologists, who have investigated the different types of neutralization techniques white-collar offenders employ to rationalize their criminal and/or unethical behaviours and maintain a positive self-concept and social identity. Whereas previous studies have focused mainly on the use of neutralizations by offenders convicted of criminal offences (Benson, 1985; Coston, 2014; Gottschalk, 2012; Haugh, 2014; Klenowski, 2012), the present study focuses on the process of neutralization that occurs in the administrative, or lawyer discipline context. The current study fills a gap in the literature by examining not only the types of neutralization techniques lawyers use to rationalize their professional misconduct, but also, how law society hearing panels evaluate and respond to these rationalizations when imposing disciplinary sanctions.

Structure of the Dissertation

The remainder of this dissertation is structured as follows. Chapter 2 begins with an overview of the concept of self-regulation and professional control over work. I then situate self-regulation within the context of the legal profession, examining how Canada's 14 provincial and territorial law societies, the profession's regulatory bodies,

regulate lawyers in the public interest. This section then described how the profession's regulatory bodies investigate and adjudicate complaints about member conduct and if necessary, impose disciplinary sanctions against lawyers who do not meet the prescribed ethical standards. Finally, I examine Sykes and Matza's (1957) neutralization theory as a framework to guide the research study.

Chapter 3 describes the research design and methodology used to collect and analyze the data that emerged from the discipline cases. It discusses the research site, sampling parameters, data collection, coding matrices, and analytical processes.

Chapter 4 presents a descriptive preview of the cases included in the study. It provides the demographic information and other characteristics of disciplined lawyers in the study, the overall features of the misconduct cases, and the types of disciplinary sanctions imposed against lawyers found guilty of serious financial misconduct. The findings that emerged from this stage of the analysis inform the second part of the study, which explores the role of neutralization techniques in lawyer disciplinary proceedings.

Chapter 5 examines the type and frequency of neutralization techniques used by disciplined lawyers as a form of explanation and justification for their unethical behaviour during disciplinary hearings. This chapter also investigates how the law society hearing panels evaluate and respond to lawyer neutralizations when imposing disciplinary sanctions.

Chapter 6 addresses the implications of my research findings on neutralization theory and its application to lawyer discipline, for stakeholders and policymakers. I focus on three issues: 1) the prevalence of substance use and other mental health concerns in lawyer discipline cases, 2) the role of post-offence mitigation in the sanction determination, and 3) whether mitigating factors should be re-examined as techniques of neutralization with the goal of rejecting and ultimately "de-neutralizing" their effects where appropriate. I then return to the issue of self-regulation and alternative regulatory structures that have emerged in countries such as Australia and England and Wales. These alternative structures raise questions about whether the legal profession in Canada should remain self regulating. Finally, this chapter addresses some of the limitations of this research, as well as directions for future study.

Chapter 2.

A Review of the Literature

The academic study of the professions has emerged as a prominent topic of inquiry and has undergone sustained analysis for over a century. Scholars, mainly sociologists, have endeavoured to answer a number of fundamentally important questions about the nature and role of professions in modern society. Some of the questions that have been the subject of considerable debate include: what is a profession? How are professions and professionals distinguished from other types of occupations and workers? What are the conditions required for a profession to exist? Other inquiries have examined how the professions have achieved and maintained a state-sanctioned monopoly over the provision of services (enforced by demarcationary strategies), and how they control entry to practice (enforced by exclusionary strategies). However, the way in which the professions' regulatory bodies, known as self-regulating organizations (SROs), discipline incompetent and unethical practitioners has received less attention.

This chapter examines the broader context of the regulation of work, and then looks more specifically at self-regulation as a means of controlling professional work. Next, I define self-regulation and its statutory purpose, followed by examination of the claimed benefits and critiques of self-regulation, and more specifically at the case for self-regulation by lawyers. I then look at how professional disciplinary processes have been examined through the lens of the misconduct funnel, adapted from the crime funnel by Brockman and McEwen (1990), and used by Brockman (2004) and Lokanan (2014, 2015) to examine professional discipline. I then discuss the lawyer discipline process and end the chapter with an examination of techniques of neutralization and their application to white-collar offences and misconduct.

Self-regulation as a Form of Social Control

Eliot Freidson (2001) presents a typology of three distinct logics or ideal forms of control over the work and services of an occupation: (1) free market consumerism, (2)

bureaucratic managerialism, and (3) professionalism.[5] First, the free market approach provides consumers with competitive choices in the marketplace. It assumes that consumers either have or can acquire adequate information in order to compare services and make informed decisions. According to this logic, power ultimately rests in the hands of market participants, who have the flexibility to choose the provider and services that best suit their needs (Zarifa & Davies, 2007, p. 261).[6]

Second, managerialism, or the bureaucratic model, relies on a centralized, top-down authority structure and reliance on professional managers to control the quality of services in hierarchal work sites. This logic is often associated with government bureaucracy. According to Freidson (2001), workers are motivated largely by the desire to sustain their employment and opportunities for organizational advancement than by their commitment to any particular kind of work and body of knowledge and skill. Management control systems encourage individuals to act in the best interests of the organization they serve. Although the managerialist model may protect consumers and ensure quality of service, it is often criticized for eroding professional autonomy.

Freidson (2001) presents the concept of professionalism as a third logic or way for organizing and controlling professional work. He argues that "professionalism may be said to exist when an organized occupation gains the power to determine who is qualified to perform a defined set of tasks, to prevent all others from performing that work, and to control the criteria by which to evaluate performance" (p. 12). According to Freidson, the ideal-typical profession is defined in terms of the following five interdependent characteristics: 1) an officially recognized body of knowledge and skill which is based on abstract concepts and theory and requires the exercise of discretion; 2) exclusive jurisdiction in a particular division of labour created and controlled by the occupation; 3) a sheltered position within in the labour market that is based on qualifying credentials created by the occupation; 4) a formal training program which is associated

[5] There are other systems that control professional work, including the criminal justice system and the common law tort system (Brockman, 2010, p. 60). For example, a medical doctor can face criminal prosecution for fraudulently billing Medicare (e.g., billing for services not rendered) or a malpractice claim for performing unnecessary surgery.

[6] In today's internet-driven world, consumers have greater access to information about the market and various products and services. Consumers are increasingly relying on ratings and online reviews (e.g., physician and lawyer rating websites, Consumer Reports, Better Business Bureau, etc.) to inform their purchasing decisions.

with higher education and is controlled by the occupation; and 5) an ideology that asserts a commitment to doing good work over economic reward and to the quality rather than the economic efficiency of work (pp. 127, 180).

Freidson argues that professionalism provides a more viable alternative than consumerism and managerialism, as it is a more pragmatic and cost-effective policy instrument. He recognizes, however, that most occupations are governed by hybrid or combination of logics and acknowledges that both bureaucratic and free market logics have gradually invaded the ideological core or "soul of professionalism." Freidson suggests that the current assault on professionalism can be attributed to the "conspicuous absence" of enforcement of professional codes of ethics and the resulting decline in the public's trust of professions (p. 216).

Professional self-regulation[7] often involves the delegation of government regulatory powers often through legislation to a profession's regulatory body—often referred to as a self-regulatory organization (SRO)—to regulate a field of activity and a group of practitioners in the public interest (Adams, 2017, p. 71).[8] The powers of self-regulation conferred upon an SRO by the state include promulgating rules and regulations; establishing practice entry requirements, usually in the form of licensing or registration; maintaining professional competencies through continuing education; enforcing and monitoring compliance with ethical and professional rules; adjudicating complaints about member conduct; and imposing disciplinary sanctions (Brockman, 1998; Brockman & McEwen, 1990; Gordon, 1988; Gorman, 2014; Manitoba Law Reform Commission, 1994; Priest, 1997-98; Schultze, 2007). In exchange for the privilege of self-regulation, SROs are expected to protect the public from harm by ensuring its

[7] Self-regulation can take a variety of forms ranging from voluntary codes of conduct to a scheme in which government is responsible for developing self-regulatory instruments, monitoring for compliance, and enforcing regulations (see, for example, Bartle & Vass, 2005; Black, 1996; CFA Institute, 2007; Michael, 1995; National Consumer Council, 2000; Priest, 1997-98; Rees, 1988). The extent of the legal authority delegated by the state to regulatory bodies varies according to the potential risk posed by the activities being regulated, level of government involvement/oversight, accountability, as well as several additional characteristics (Bailey, 2005, p. 46; Cohen & Sundararajan, 2015, p. 123; Priest, 1997-98, p. 240-241).

[8] The historical development of SROs reflects the fact that they were initially established to restrict competition and secure a monopoly over the provision of services through regulatory legislation. It is only more recently that self-regulating organizations have developed a "public interest" component to their mandate (Brockman, 1998, p. 613; Adams, 2016, p. 7; Pue, 1996, p. 287).

members practice in a competent and ethical manner. Some authors have characterized the relationship between the professions and the state as a form of social contract, which outlines a series of reciprocal rights and obligations on the parties to their mutual benefit (see Cruess & Cruess, 2008). As discussed below, although professionalism is grounded in a commitment to public service, such regulatory powers have the dual characteristic of serving both the professions and the public, highlighting the Janus-faced nature of the professions.

Arguments in Favour of Self-Regulation

Self-governance and self-regulation are recognized as defining characteristics of a profession (Abel, 2011, p. 1). Proponents of self-regulation argue this regulatory model offers several distinct advantages over government regulation for consumers, professionals, government, and the economy and society as a whole. There are at least four potential advantages of self-regulation, including leveraging industry knowledge and expertise; greater flexibility and adaptability; greater incentives for compliance; and lower monitoring and administrative costs.

Expertise

The claim to both professional status and autonomy in practice rests upon the development of a complex body of knowledge and technical skills, acquired only through a lengthy period of formal education and training (Posner, 1998, p. 2; Randall & Kindiak, 2008, p. 343). Upon completion of an accredited program, candidates must pass and meet the minimum prescribed standards for entry into professional practice. Members of some professions must also undergo continuing professional development to keep their knowledge and skills current. As Bierig (1983) notes, “[l]ay persons lack specialized training to fully evaluate and understand judgments professionals make” and therefore, “[t]hey must trust professionals to decide in their best interest” (p. 617). This renders government oversight of professional activities both difficult and impracticable. As such, members of a profession are in the best position to set qualifications and standards of practice, evaluate member conduct, and determine the most appropriate way to ensure the public’s protection. Above all, present-day professional SROs claim to be committed to a professional ethos that places the interests of consumers and of the public ahead of

their own interests. From this perspective, it is much more cost effective for government to rely on an occupational group's specialist knowledge and expertise than to reproduce it at the agency level (Michael, 1995, p. 182).

Flexibility and Efficiency

Another argument in favour of self-regulation is that SROs can devise and administer regulatory requirements with greater speed and efficiency than government agencies because they "are not subject to the same kinds of procedural and due process hurdles that government is, nor do they face the same political constraints" (Coglianese, Healey, Keating, & Michael, 2004, p. 6). Thus, by eliminating bureaucratic inefficiencies, SROs are able to better monitor and adapt more quickly to changing market conditions, technological innovations, and new technical knowledge (Michael, 1995, p. 182; Omarova, 2010, p. 674). SROs can more easily create and modify their own rules to meet changing circumstances and environments, which permits more targeted enforcement and compliance (Majone, 1996, p. 23). Lastly, a more flexible regulatory environment "is less likely to stifle innovation or excessively limit consumer choice" (Miller, 1985, p. 897).

Incentives for Compliance

One of the most important advantages of self-regulation is that it can provide greater incentives for compliance (Manitoba Law Reform Commission, 1994, pp. 12-13; Michael, 1995, p. 183; Priest, 1997-98, p. 270). The proponents of self-regulation maintain market participants are more likely to perceive rules developed by the industry as more reasonable than those issued by government agencies (Campbell, 1999, p. 716). Thus, industry participants are more likely to "internalize ethical behavior and principles since the rules are based on social norms and conduct of peers rather than top-down prescriptive rules" (Castro, 2011, p. 6). This element of a "buy-in" to the regulatory system and organizational culture is achieved by the "persuasive argument" that self-regulation is a pre-emptive strategy to prevent more direct government regulation (Lemon & Sing, 2015, p. 52). As such, professional SROs "have a vested interest in keeping their own houses in order for a variety of reasons, not the least of which is to keep the government from doing it for them" (Brockman, 1997, p. 213).

In addition, regulatory bodies have a vested interest in maintaining and overseeing compliance with industry rules and codes of conduct to weed out "bad apples" and enhance the overall reputation of the industry (Casey, 1994, p. 1-3; Swire, 1997, p. 12). Moreover, SROs argue that they can achieve higher levels of regulatory compliance than government regulation, "because they can 'quicken the sense of responsibility' in their members" (Brockman, 1997, p. 214). And, in addition to the threat of disciplinary action, more informal sanctions for violating professional norms can take the form of peer pressure, social disapproval, and ostracism (Gunningham, 1991, pp. 298-9; Morgan & Yeung, 2007, p. 95).

Lower Costs

Another distinct advantage of self-regulation is that it benefits government and taxpayers, because it is more efficient and less costly than government regulation. Regulatory processes, including rulemaking and monitoring and enforcement programs for non-compliance, can be expensive and resource intensive (Castro, 2011, p. 7). Under a system of self-regulation, all costs are internalized by private entities rather than taxpayers. SROs can commit resources much more quickly than government agencies. SROs assume responsibility for potential liabilities for regulatory actions through mandatory professional liability insurance and reimbursement from client protection funds (Devlin & Heffernan, 2008, p.189; Priest, 1997, 98, p. 269). Thus, from a purely economic perspective, self-regulation is an attractive alternative to public regulation because "the state simply cannot afford to do an adequate job on its own" (Ayres & Braithwaite, 1992, p. 103).

Arguments Against Self-Regulation

Notwithstanding the arguments in favour of self-regulation, there are also numerous disadvantages to this regulatory model. Criticisms of professional self-regulation include the notion that self-regulation puts SROs in a conflict of interest position, results in inadequate enforcement and sanctions, and fosters anti-competitive practices. In addition, SROs may not have adequate resources available or dedicated to disciplining their members.

Conflict of Interest

Perhaps the most enduring criticism of self-regulation is the inherent conflict of interest between an SRO's regulatory and representative functions (Adams, 2016, p. 1; Brockman & McEwen, 1990, p. 3; Devlin & Heffernan, 2008, p. 190; Omarova, 2010, p. 696). Although professional regulation is intended to protect the public interest, critics charge it "fails to fulfill its theoretical promise" and, instead, serves the relevant service sector and its members at the expense of the public (Gunningham & Rees, 1997, p. 366; see also Brockman & McEwen, 1990, p. 3; Green & Hrab, 2003, p. 4). Some commentators express concern that self-regulated professions could use their law-making powers to pursue their own self-interests in ways that are inconsistent with the public interest (Freidson, 1970; Johnson, 1972; Larson, 1977; Saks, 1995; Van den Bergh, 2006; Webb, 2004). To this end, regulation is used as a smokescreen for defining and protecting occupational turf (i.e., scope of practice), limiting competition, generating monopoly rents for practitioners, enhancing collective professional status, and staving off government regulation (Abbott, 1983; Abel, 1989; Arnold & Kay, 1995; Benham & Benham, 1975; Berlant, 1978; Brockman, 2015; Coglianese et al., 2004; Gallagher, 1995; Larson, 1977; Leicht & Lyman, 2006; Ogus, 2004; Parkin, 1979; Priest, 1997-98; Van den Bergh, 2006, Weeden, 2002). Such criticisms have been borne out by evidence showing that self-regulating professions often put their own interests above those of their clients and the broader public interests (see, inter alia, Abel, 2003; Cramton, Cohen, & Koniak, 2004; Dixon-Woods et al., 2011; Gallagher, 1995; Lee, 1995; Paton, 2008; Saks, 1995; Wald, 2004; Webb, 2004).

Opponents also cite the inherent conflict of interest that exists by entrusting SROs to police the activities of their members and take appropriate disciplinary action against those who violate the rules. The thrust of this argument is that the professional disciplinary structure—including the investigation, prosecution and adjudication of complaints—is designed, operated, and managed by the regulated community. There has been a long-standing perception that allowing professionals to judge the conduct of their peers is akin to "asking the fox to guard the henhouse" (Abel, 2011, p. 65; Irwin,

Lane, Mendelson, & Tighe, 2012, p. 1067).[9] A 1994 Manitoba Law Reform Commission report examining the regulation of professions and occupations in the province noted:

> Although an allegiance to a practitioner community can result in compliance with community norms, close ties between practitioners can also result in an inappropriate unwillingness to report or act upon the incompetent or unethical behaviour of colleagues and may even cause practitioners to cover up for one another. A sense of community might also cause practitioner-administrators to overlook or deal lightly with offences and minimize publicity about unethical or incompetent behaviour in an effort to protect the image of the occupational community. (p. 49)

Such concerns are well documented in the literature. Over the past several decades, a series of scandals and regulatory failures in the United Kingdom, for example, have led to the demise of the long and storied tradition of professional self-regulation of the British legal and medical professions (Dixon-Woods, Yeung, & Bosk, 2011, Flood, 2011). Regulatory functions have been relocated to outside the professions, with independent government bodies now responsible for investigating and disciplining solicitors and health care professionals for professional misconduct. Similarly, a number of Australian states have stripped lawyers of the right to self-governance (Baldwin, Cave, & Malleson, 2004; Flood, 2011; Haller, 2010; Paton, 2008; Schneyer, 2013).

Inadequate Enforcement

Another criticism of self-regulated professions includes inefficiencies in enforcement of professional discipline and the perception of leniency when it comes to imposing disciplinary action (Lahey, 2011). Complaints against practitioners are routinely dismissed as outside the jurisdiction of regulators or unfounded (see, for example, Abel, 1989, p. 156). Disciplinary bodies are also accused of treating practitioners who violate the rules with unusual leniency when misconduct is established (see Abel, 1989, p. 147; Arnold & Kay, 1995, p. 325; Brockman, 2004, pp. 55-6). Sanctions which are too lenient are unlikely to deter illegal, incompetent or unethical conduct (Haller, 2001; Levin, 2007,

[9] From this perspective, “there is a natural tendency to suspect that lenient sanctions might be more the product of professional solidarity than actual justice” (Luty, 2004, p. 1002).

p. 3; Lokanan, 2014, p. 237; Wilson, Chappell, & Lincoln, 1986, p. 242; Zacharias, 2003, p. 698). Some of these issues are discussed further under the misconduct funnel.

Professional disciplinary processes have also been criticized as overly secretive and lacking transparency. In some jurisdictions, discipline is still conducted behind closed doors and the public (including the complainant) is prevented from attending proceedings (Abel, 2011; Brockman, 2010; Clark, 1970; Levin, 2007; McKay, 1991; Wilson et al., 1986; Zaharias, 2003). And, once misconduct is established, disciplinary decisions and the names of those disciplined are kept secret (see, for example, Brockman, 2018). In more recent years, concerns about transparency have been mitigated through increased participation of lay members in the disciplinary process and the opening of disciplinary hearing to the public, along with publication of names of those disciplined.

Anti-Competitive Behaviour

Self-regulating professions have also been criticized for facilitating anti-competitive conduct. A main assumption underlying market control theory is that SROs "act as assertive economic interest groups, with market control [as] their primary raison d'être" (Halliday, 1998, p. 247; see also Abel, 1989; Larson, 1977). From this perspective, there is a risk that SROs may exploit their monopoly power to restrict competition to the detriment of consumers and enable incumbent practitioners to achieve supra-competitive profits (Ogus, 1995, p. 99; Van den Bergh, 2006, p. 156). Self-regulating professions can limit competition by creating barriers to market entry, including restrictions on entry into a profession (through licensing regimes or establishing excessive educational or training requirements), inter-jurisdictional labour mobility, overlapping services and scope of practice, and regulations on advertising, pricing, and business structures (Benham & Benham, 1975, p. 422; Competition Bureau Canada, 2007, p. 15; Mysicka, 2014, pp. 12-13). These and other anti-competitive practices, such as hoarding knowledge, may "precipitate, rather than correct, market failure by creating, enhancing or preserving the market power of incumbents, which may lead to a lower supply or quality of services at higher prices than in a competitive market" (Competition Bureau Canada, 2007, p. 20). In addition, limiting competition in professional services can give rise to an increase in prices, which can place a

disproportionate burden on poor and disadvantaged consumers (Priest, 1997-98, p. 273).

Insufficient Resources

While proponents of professional self-regulation claim this regulatory model is more efficient and cost-effective than government regulation, critics point out that some SROS may be unwilling to commit the resources needed to monitor the conduct of their members or respond effectively and efficiently to consumer complaints (Michael, 1995, p. 189). In many cases, the costs associated with complaints-handling and disciplinary enforcement are borne by members of the professions through the payment of membership fees, and therefore are often underfunded and understaffed (Boddewyn, 1984; Devlin & Heffernan, 2008; Fishman, 1991; Friedrichs, 2010; Katz, 2011; Pearce & Wald, 2012).[10] Professional discipline tends to operate reactively, "primarily on the basis of complaints, rather than actively seeking out problematic behaviour before it is too late" (Devlin & Heffernan, 2008, p. 194). Furthermore, while some regulatory bodies, like provincial law societies, have the authority to initiate investigations without a specific complaint (e.g., practice audits), these actions are rare. As Hirsch (2013) suggests, the reactive nature of professional discipline systems "almost ensures that many violations will go unnoticed" (p. 144). The resource problem is exacerbated by the fact that many complaints take years to resolve, further adding to agency costs (Wilkins, 1992, p. 829).

Why Lawyers May or May Not be a Special Case for Self-Regulation

Lawyer independence, an historical and deeply ingrained tradition within the legal profession, is often cited as a justification for lawyers' right to regulation. Such a system ensures that lawyers are free to carry out their work without fear of reprisal or outside interference (see, inter alia, Appleby, 2016; Baldwin et al., 2004; Banks, 2018; Chief Justice of Ontario Advisory Committee on Professionalism, 2001; Devlin & Heffernan, 2008; Dodek, 2012; Gallagher, 1995; Gordon, 1988; Green, 2013; International Bar Association, 2016; Law Society of British Columbia, 2008; Macdonald, 2001; MacKenzie, 2001; Paton, 2008; Pearce, 1995; Remus, 2014; Rhode, 2000; Semple,

[10] Some, but not all, of the costs are sometimes recovered from members who are disciplined.

Pearce, & Knake, 2013; Sheehy & McIntyre, 2006; Turriff, 2010; Woolley, 2012c). A lawyer is expected to advocate zealously on behalf of the client within the bounds of law and professional ethics (Craig, 2018, p. 101; Hutchinson, 1999, pp. 89-91; Woolley, 2012b, p. 149).

Proponents of self-regulation also tend to "link their arguments about professional independence to some more general conception of the public good" (Wilkins, 1992, p. 854). From this perspective, professional independence is regarded as a cornerstone of liberal democracy; it is central to the protection of individual rights, promoting access to justice, and preserving the rule of law (Council of Bars and Law Societies of Europe, 2005, p. 2; Devlin & Heffernan, 2008, pp. 187-188; Kirby, 2005, p. 134; Law Society of British Columbia, 2008, p. 4; MacKenzie, 1990, p. 320; Monahan, 2007, pp. 148-149; Pue, 2016, p. 13; Wilkins, 1992, pp. 854-855). Canadian courts have long recognized that an independent bar is a fundamental feature of a free and democratic society. In *Attorney General of Canada v. Law Society of British Columbia* (1982), Estey J., for the Supreme Court of Canada, wrote the following:

> The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference, in the political sense, with the delivery of services to the individual citizens in the state, particularly in fields of public and criminal law. The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through those members, legal advice and services generally. (pp. 335-36)

In *Pearlman v. Manitoba Law Society Judicial Committee* (1991), Iacobucci J. also affirmed the legal profession's authority to self-govern, quoting the following passage from a report commissioned by the Ontario Ministry of the Attorney General:

> Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political interference and influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursions from any source, including the state. (p. 887)

In *Finney v. Barreau du Québec* (2004), LeBel J. said:

> An independent bar composed of lawyers who are free of influence by public authorities is an important component of the fundamental legal framework of Canadian society. In Canada, our tradition of allowing the legal profession to regulate itself can largely be attributed to a concern for protecting that independence… (para. 1)

And, in *LaBelle v. Law Society of Upper Canada et al.* (2001), the Ontario Superior Court discussed the important role an independent legal profession plays in protecting the public and the rule of law in the following terms:

> The legal profession has a unique position in the community. Its distinguishing feature is that it alone among the professions is concerned with protecting the person and property of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment from the state. The protection of rights has been a historic function of the law, and it is the responsibility of lawyers to carry out that function. In order that they may continue to do so there can be no compromise in the freedom of the profession from interference, let alone control, by the government... (para. 34)

Conversely, critics, which include academic lawyers and practitioners, question the historical, legal, and practical justifications underlying the assertion that self-regulation is essential to preserving the independence of the bar. The claim that the legal profession ought to be self-governing because it has always been self-governing is an inherently circular argument and is hardly a convincing rationale for maintaining the status quo (Arthurs, 1995, p. 801; Pearson, 2015, p. 563; Pue, 2016, p. 8; Webb, 2008, p. 245; Wilkins, 1992, p. 854). Some authors have argued that the legal profession is as much a creature of the state as other professions, and statements promoting independence as a professional virtue are nothing more than rhetoric opposing external regulation (Pue, 1995).

In response to claims that professional independence is “an indispensable adjunct of the rule of law” (Arthurs, 1995, p. 801), critics often point to the existence of different regulatory models in other jurisdictions in which legal professionals are regulated and licensed by the state (see Abel, 1988, p. 10; Arthurs, 1995, p. 801; Deflem, 2008, p. 188; Johnsen, 1988, p. 86; Schmidt, 2008, pp. 2; Woolley, 2012b, p. 147; Walker et al., 2013, p. 161). Changes to the way legal services are regulated in other advanced liberal democratic societies—like Australia, New Zealand, Scotland,

England and Wales, Ireland, and South Africa—represent a significant shift away from professional self-regulation toward co-regulatory structures in which law societies share in whole or in part responsibility for oversight and regulation with independent statutory agencies (see Buckingham, 2012; Devlin & Heffernan, 2008; Haller, 2010; Paton, 2008; Semple, 2017; Webb, 2008).

Lastly, from a more practical perspective, lawyers historically have opposed any involvement of non-lawyers in the regulatory process, arguing the responsibility of setting and enforcing ethics rules and practice standards is "really only the business of lawyers" (Webb, 2008, p. 244). The rationale for excluding the public from this process is that only lawyers can understand the inherent complexities of the law and legal practice. Yet, as Devlin and Heffernan (2008) point out, "while it is true that lawyers may have the expertise to distinguish between proper and improper conduct, that does nothing to ensure that they will in fact exercise that expertise in the public interest" (p. 194). On the contrary, the legal profession has been accused of exploiting its monopoly power to maximize profits and enhance professional status, often at the expense of its mandate of protecting the public interest (Abel, 1989, p. 232, Arthurs, 1995, p. 801; Hadfield, 2000, p. 982; Hurlburt, 2000, p. 112; Parker, 1999, pp. 12-17; Wendel, 2014, pp. 2564-2566). Also, while the profession's regulatory bodies are responsible for investigating complaints against lawyers and for imposing disciplinary sanctions, critics have pointed to the law societies' failure to adequately discipline members who violate the rules. From a contrarian perspective, granting law societies the power to discipline their own members is "seen more as an exercise in public relations than as a mechanism to control deviance" (Brockman, & McEwen, 1990, p. 3). Some of the benefits and criticisms of lawyer discipline systems are discussed below.

Misconduct Funnel

For decades researchers have used the "crime funnel" analogy to describe the high attrition rates as cases make their way through the various stages of the criminal justice system (Hagan, 1977; Ratcliffe, 2008; Siegel, 2013; Silverman & Teevan, 1986). The crime funnel refers to the fact that only a small percentage of the total number of cases investigated by the police result in a successful prosecution and conviction, and fewer still end in incarceration (O'Regan, 2017, p. 21). The funnel analogy is not unique to describing the criminal justice process. Brockman and McEwen (1990), for example,

proposed the “misconduct funnel” to illustrate how self-regulating professions deal with complaints about member conduct.[11] The misconduct funnel incorporates both the espoused benefits (funnel in) and criticisms (funnel out and funnel away) of professional self-regulatory discipline systems (Brockman, 2004, p. 55). This section examines the various components of the misconduct funnel and its application to the regulation of the legal profession and lawyer discipline.

Funnel In

The professions argue they can effectively harness their monitoring and enforcement powers to protect the public from incompetent or unethical practitioners. That is, SROs claim to “funnel in” deviant behaviour that would otherwise go unchecked and subject it to investigation, adjudication and discipline (Brockman & McEwen, 1990, p. 3). Given their industry-specific knowledge and expertise, SROs are able to “scrutinize a wider variety of behaviours and thereby ensure a higher standard of conduct than if the public had to rely on government regulation” (p. 3) or some other external enforcement mechanism, such as criminal law or civil suits (Devlin & Heffernan, 2008, p. 189; Middleton, 2005, p. 825).

Despite these claimed advantages, lawyer discipline has historically been described as a narrow and reactive complaint-driven process (Arnold & Kay, 1995; Brockman & McEwen, 1990; Devlin & Heffernan, 2008; Fellmeth, 1991; Gallagher, 1995; Guttenberg, 1994; O’Sullivan, 2002; Parker & Evans, 2018; Pearce & Wald, 2012; Rhode & Luban, 2009; Steele & Nimmer, 1976). Disciplinary agencies rely almost exclusively on complaints from aggrieved clients to identify possible code of conduct violations, rather than taking more proactive steps to detect lawyer misconduct (Abel, 1986, p. 403; Brockman & McEwen, 1990, p. 13; Lerman, 2006, p. 891; Rhode, 2000, p. 159). Some authors argue that “relying on consumers to detect improper practice is, by itself, inadequate as a method of enforcing practice standards and ensuring the safety of the public” (Manitoba Law Reform Commission, 1994, p. 70). Moreover, even though law societies have the authority to carry out spot audits to ensure compliance with the

[11] More recently, the misconduct funnel was used to examine self-regulation in the securities industry, namely how the Investment Dealer Association (IDA) (Now the Investment Industry Regulatory Organization of Canada (IIROC)) processed complaints against investment brokers and dealer members (Lokanan, 2014; 2015).

rules and initiate an investigation without a complaint, “these actions are the exception rather than the rule” (Devlin & Heffernan, 2008, p. 194).

There is also considerable criticism about the types of complaints regulators “funnel in” to their discipline systems. Although the vast majority of client complaints are about fees and inadequate professional services, such as failure to communicate with clients and neglect of client matters, disciplinary agencies tend to focus enforcement efforts on serious misconduct professional misconduct, criminal convictions involving moral turpitude, intra-professional disputes (e.g., unfair or deceptive competitive practices), and inter-professional intrusions on lawyers’ monopoly (e.g., unauthorized practice of law) (Abel, 1989; p. 152; Arthurs, 1995, p. 802; Brockman, 2004, p. 56; Levin, 1998, p. 26; Maute, 2008, p. 70; Parker, 2002, p. 681; Rhode & Woolley, 2012, p. 2766; Rosenfeld, 1994, p. 184; Schemenauer, 2007, p. 647; Steele & Nimmer, 1976, pp. 952-956; Webb, 2008, p. 247).

In describing the “ethical economy” of lawyer regulation in Canada, Harry Arthurs (1998) suggests the profession has “a tendency to allocate its scarce resources of staff time, public credibility and internal political consensus to those disciplinary problems whose resolution provides the highest returns to the profession with the least risk of adverse consequences” (p. 112).[12] As part of the “risk/reward” relationship, law societies focus regulatory attention on those lawyers at the margins of the profession—sole practitioners and small-firm lawyers—and are reluctant to initiate proceedings against lawyers working in larger firms. Arthurs (1998) writes:

> The ethical economy, then, shapes prosecutorial discretion by directing it towards the least powerful elements in the profession, but also by mobilizing the full force of formal discipline proceedings against dishonesty and regulatory offences, two forms of misbehaviour which generate few controversies either within the profession or in the public mind. (p. 115)

While this approach to conduct and disciplinary issues purportedly offers “more bang for the buck,” the ethical economy of lawyer regulation conveys the erroneous impression that the disciplinary system is an efficient and effective means of regulating unethical behaviour of lawyers. Given that regulators focus on high reward/low risk

[12] Some authors argue that the ethical economy of lawyer regulation is prevalent in other jurisdictions as well (Maute, 2008; Rhode & Luban, 2009).

cases, the use of official agency discipline statistics may not be a valid measure of the overall prevalence and scope of lawyer misconduct. Studies of lawyer discipline show that the majority of unethical behaviour in the legal profession remains undetected and unpunished (Hirsch, 2013, p. 144; Lerman, 2002, p. 913; Rhode, 1985a, p. 509; Webb, 2008, p. 239; Woolley, 2012a, p. 249). Therefore, the cases of misconduct that do come to light likely represent the tip of a much larger iceberg and the "funnel in" aspect of self-regulation loses credibility.

Funnel Out

Professional SROs are sometimes "accused of 'funneling out' so many complaints that they are ineffective in controlling wayward professionals" (Brockman, 2004, pp. 55-56). This criticism encompasses two aspects of professional discipline. First it is argued that complaints-handling processes are designed to "funnel out" a significant number of consumer complaints from the system. Second, even when misconduct is established, SROs have been criticized for being too lenient on their members, imposing sanctions that are unlikely to have any meaningful deterrent effect (Brockman & McEwen, 1990, pp. 15-16; Gillers, 2014, p. 510; Luty, 2004; p. 1002; Workie, 1996, p. 1372).

Lawyer disciplinary systems are not immune from these criticisms. Like attrition rates in the criminal justice system, the vast majority of complaints against lawyers are dismissed as beyond agency jurisdiction or unfounded. The studies to date show that, on average, less than 10 percent of all complaints against lawyers proceed to a formal discipline hearing, and less than two percent of complaints result in some form of public discipline (Abel, 1989, 2011; American Bar Association, 1992a; Brockman & McEwen, 1990, Brockman, 2004; Clark, 1970; Donovan, Welsh, & Evans, 2005; Fellmeth, 1987; Lippman, 2015; MacAuley, 1986; Marks & Cathcart, 1974; Ostberg, 1990; Parker, 1997; Rhode, 2000; Standefer, 1981; Steele & Nimmer, 1976; Weber, 1987).

Attrition rates in lawyer disciplinary systems are attributed in part to the fact that a complaint must first pass over a series of procedural hurdles before a final sanction is imposed. Upon receiving a complaint, intake staff must first determine whether there is a basis for investigation. For example, according to the Law Society of British Columbia, a complaint will be screened out at this stage if:

- it is unsubstantiated (insufficient information is provided to warrant further consideration);
- it falls outside the jurisdiction of the Law Society;
- it is frivolous, vexatious or an abuse of process; or
- the allegations, if proven, would not constitute a discipline violation (Law Society of British Columbia, 2017a).

If there is a basis for investigation, the Law Society will gather evidence relevant to the case. At the conclusion of the investigation, the Law Society may dismiss the complaint, refer the file to the Practice Standards Committee for remedial measures, or forward it to the Discipline Committee for further investigation (Law Society of British Columbia, 2017a). Where possible, the Law Society attempts to resolve complaints at an early state through informal means, such as mediation or arbitration (see Rule 3-5.1). If the Law Society refers a complaint to the Discipline Committee for further review, the Discipline committee can, at the conclusion of its investigation, dismiss the complaint, send the lawyer a conduct letter, order a conduct meeting, order a conduct review, or take formal action by issuing a citation. If a citation is issued, the matter will proceed to a formal hearing before the disciplinary panel to determine if the lawyer is guilty of professional misconduct or a breach of the Law Society Rules.[13] If the allegations are not supported by evidence, the citation is dismissed. If misconduct is established, a second hearing is held to determine the appropriate disciplinary action, which may include a fine, reprimand, suspension, or disbarment (see s. 38(5) of the *Legal Profession Act*).

The funneling out process is further compounded by the fact that "the complaints processes run by law societies are not especially consumer friendly" (Devlin & Heffernan, 2008, p. 194). Filing a complaint is "notoriously difficult" (Barton, 2015, p. 212). To illustrate, most disciplinary agencies require complaints to be submitted in writing before they will initiate an investigation (e.g., Law Society of British Columbia Rule 3-2). As such, some complainants may screen themselves out, as they may be unable to articulate allegations of misconduct in writing, or they are unwilling to do so when faced with a seemingly complicated and time-consuming complaints process (Brockman & McEwen, 1990, p. 16; Guttenberg, 1994, p. 966). The reluctance among

[13] At any stage in the proceedings the Law Society can reach an agreement with the lawyer regarding the disposition of the allegations.

clients to initiate complaints against lawyers also stems from the apparent lack of consumer knowledge to recognize potential malpractice or misconduct issues (Gallagher, 1995, p. 612; Manitoba Law Reform Commission, 1994, p. 70; Rhode & Woolley, 2012, p. 2763; Wilkins, 1992, p. 829).[14] Some clients may not complain even though professional misconduct may have occurred, because the client may benefit from the lawyer's unethical behaviour (Haller, 2001, p. 6). Furthermore, self-screening might occur based on the types of complaints clients are seeking to file.

Although this aspect of "funnel out" is often considered a criticism of professional disciplinary systems, the large number of complaints screened out of the system "is not necessarily a negative event" (Brockman & McEwen, 1990, p. 16). Effective screening procedures enable disciplinary personnel to dismiss frivolous and harassing complaints, as well as resolve certain types of matters through informal means, thereby freeing up scarce resources in an already overburdened system (Manitoba Law Reform Commission, 1994, p. 70). Notwithstanding these benefits, the approach to handling consumer complaints about lawyers can undermine public trust and confidence in the disciplinary process.

In addition to funneling complaints out of the disciplinary system, researchers have found that disciplinary agencies frequently impose unduly lenient sanctions on lawyers who violate disciplinary rules, even in cases of serious misconduct, such as misappropriating client funds and other financial wrongdoing (Abel, 1989, 2008; Brockman & McEwen, 1990; Brockman, 2004; Gillers, 2014; Levin, 1998; Guttenberg, 1994; Parker, 1997; Reasons & Chappell, 1985; Reiter, 1978; Rhode, 2000; Tisher, Bernabei, & Green, 1977; Seneviratne, 1999; Turner & Mishkin, 2002). Studies of lawyer discipline have also highlighted disparate treatment of lawyers who engage in similar misconduct (see, for example, Gillers, 2014; Hatamyar & Simmons, 2004; Kelly, 1988; Nirenberg, 1999). The problem of inconsistent sanctions in cases involving similar acts of misconduct may result from several factors, including consideration of aggravating and mitigating factors (McPike & Harrison, 1984, p. 94). Inconsistent sanctions cast

[14] As noted earlier, the information asymmetry problem may be particularly acute where services are purchased once or only infrequently, which limits the ability of consumers to acquire knowledge concerning the quality of services they receive.

doubt on the fairness and efficacy of the lawyer disciplinary system and can undermine public confidence in the legal profession's ability to self-regulate.

Funnel Away

The concept of "funnel away" is also seen as a further barrier to effective regulation. Self-regulating professions are sometimes criticized for diverting complaints of misconduct away from the criminal justice system, in effect, shielding their members from criminal prosecution—a form of administrative segregation. Although members of professions can face multiple proceedings arising out of a single wrongful act (e.g., professional discipline systems, the criminal justice system, the civil law system, and in some cases other professional regulatory bodies), there is a perception that they are spared from the criminal justice system when they are dealt with by an SRO (Brockman, 2004, p. 57; Coleman, 1985, p. 153).

Research shows that it is relatively rare for lawyers to face criminal prosecution for misconduct that is also criminal or illegal in nature, and even fewer cases result in conviction (Brockman & McEwen, 1990; Donovan, et al., 2005; Wallace, Mendleson, & Bazao, 2014; Pedersen, Nicholson, & Marcoux, 2017; Nicholson, Kubinec, & Pedersen, 2017). In 2014, investigative journalists at the *Toronto Star* identified 236 disciplinary cases where lawyers were sanctioned by the Law Society of Upper Canada (now known as the Law Society of Ontario) between 2003 and 2013 for professional misconduct that included "criminal-like" behaviour, such as theft, fraud, forgery, perjury, and breach of trust.[15] According to the *Star's* findings, only 41 lawyers (17%) faced criminal charges.[16] The penal sanctions imposed on those who were convicted were generally lenient, ranging from non-custodial sentences to community services. Only 12 lawyers received a prison sentence.

In 2014, the Law Society of Upper Canada established a new disclosure policy to provide a framework for reporting suspected criminal activity by its members to law

[15] Importantly, there is no indication whether the *Star's* analysis considered whether there was sufficient evidence to proceed with a criminal prosecution.

[16] The main reason for not reporting lawyers to police, according to the Law Society, was that confidentiality provisions of the *Law Society Act* prohibited the regulator from disclosing privileged information to third parties, such as law enforcement agencies (Wallace, et al., 2014).

enforcement authorities. The policy, published on the Law Society's website, indicates that the organization will report to police "where there are reasonable grounds to believe that a licensee or any other person has been involved in criminal or illegal activity" (Law Society of Upper Canada, 2017). According to the policy, however, the Law Society is prohibited from disclosing information that is subject to the confidentiality provisions outlined in the *Law Society Act*.[17] As a general rule, reports "will include a summary of the relevant allegations based on information received with the initial complaint" (Law Society of Upper Canada, 2017).[18] Before the report is made, however, the regulator will ordinarily obtain consent from the complainant and/or client. Lastly, the policy document notes, "On release of decisions of the Law Society Tribunal, any matter that raises issues of criminal or illegal activity will be reported to law enforcement" for further investigation (Law Society of Upper Canada, 2017).

A number of other law societies have established, as part of their public interest mandate, policies and procedures for reporting lawyers suspected of committing criminal offences to law enforcement, although the extent of information sharing arrangements varies across jurisdictions. The Law Society in Alberta, for example, is required by legislation to refer a disciplinary matter to the province's minister of justice and solicitor general in cases where the Hearing Committee has reasonable and probable grounds to believe a lawyer has committed a criminal offence, although legislation prohibits the disclosure of any information subject to solicitor-client privilege (see sections 78(6) and 78(7) of the *Legal Profession Act*). And in Manitoba, members of the Law Society's complaints investigation committee "have a duty to disclose to a law enforcement authority any information about possible criminal activity on the part of a member that is obtained during an investigation…" (section 69(2)(d) of *The Legal Profession Act*).

Reporting suspected criminal activity to authorities, however, does not ensure perpetrators will be held accountable for their actions. Cases may be funneled out of the criminal justice system for a variety of reasons. Financial crimes can be particularly difficult to investigate and prosecute, because they often require significant resources

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[17] According to section 49.12(1), "A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part."

[18] The Law Society may disclose protected information to law enforcement authorities if there is "a significant risk of harm" to the lawyer or another person, and where "making the disclosure will reduce the risk" (see section 49.12 (2)(f)).

and expertise many law enforcement agencies do not have (Friedrichs, 2010, p. 278). In addition, the criminal standard of proof (beyond a reasonable doubt) is higher than the civil standard of proof (on a balance of probabilities), which is required in disciplinary proceedings.[19]

The different venues (criminal, civil, administrative) could yield different results (*Bennett v. British Columbia (Securities Commission)*, 1992, p. 162; *Gillen v. College of Physicians and Surgeons of Ontario*, 1989, para. 8) for other reasons. Administrative tribunals are generally not bound by the rules of evidence applicable to criminal or civil proceedings, although they may seek guidance from the courts on evidentiary issues (Houle, 2005, p. 104). The hearing panel is entitled to consider any evidence it deems relevant even if the evidence would not be admissible in a court of law (*Hale v. The Superintendent of Motor Vehicles and Attorney General of B.C.*, 2004, para. 23), with some exceptions, such as information protected by solicitor-client privilege (see, for example section 49.13(2) of the *Law Society Act* (Ontario)). Also, hearsay evidence, which is often inadmissible in criminal trials, can be admissible in professional disciplinary hearings (*Law Society of Upper Canada v. Bellefeuille*, 1997; *Khaliq-Kareemi (Re)*, 1989; *Kuntz v. College of Physicians & Surgeons of B.C.*, 1987, para. 23). Administrative tribunals must, however, comply with the rules of procedural fairness and natural justice when hearing a case.

Self-Regulation and Lawyer Discipline

There are 14 provincial and territorial law societies across Canada that, together, regulate over 100,000 lawyers, 4,500 Quebec notaries and 6,000 licensed paralegals in Ontario (Federation of Law Societies of Canada, 2018a).[20] The provincial law societies

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[19] In light of the potentially serious consequences that can result from a finding of professional misconduct (such as a loss of livelihood, career, and reputation), the balance of probabilities test requires that proof be "clear and convincing and based upon cogent evidence" (*Re Bernstein and College of Physicians and Surgeons of Ontario,* 1977, p. 485; see also *F.H. v. MacDougall*, 2008, paras. 31; *Heath v. College of Physicians and Surgeons of Ontario*, 1997, para. 53).

[20] Each province and territory has one law society with the exception of Quebec, which has two governing bodies: the *Barreau du Québec*, representing lawyers, and of the *Chambre des notaires du Québec*, which represents notaries. The Law Society of Upper Canada became responsible for regulating paralegals in 2007 as a result of amendments to Ontario's *Law Society Act*. And, more recently, the regulation of legal services in British Columbia is expanding, as notaries in that province increase their professional status (see, for example, Gourley, 2016).

"exercise their regulatory powers over lawyers through establishing criteria for entry into the profession and by promulgating ethical codes which are then enforced through a complaints and discipline process" (Dodek, 2012, p. 65).[21] As part of their public protection mandate, Canada's law societies are charged with investigating and prosecuting complaints about lawyer conduct, and if necessary, disciplining members of the profession who violate the required standards of conduct (Federation of Law Societies of Canada, 2018d).

The law societies are governed by boards of directors, which are made up of lawyers elected by their peers, and lay members, appointed by the provincial government.[22] The Federation of Law Societies of Canada (FLSC), an umbrella organization representing all 14 provincial law societies, is charged with "strengthening Canada's system of governance of an independent legal profession, reinforcing public confidence in it and making it a leading example for justice systems around the world" (Federation of Law Societies of Canada, 2018b). Some of the FLSC's most recent initiatives include developing a *Model Code of Professional Conduct*, which sets out the standards of conduct expected of members; and setting new national standards for how law societies handle complaints and discipline matters (Federation of Law Societies of Canada, 2018c).

Law society disciplinary proceedings are characterized as quasi-judicial in nature and hearing must be conducted in accordance with common-law principles of natural justice (Gasparini, 1976, p. 485).[23] Although discipline decisions are subject to judicial review, the courts have long recognized that benchers are in the best position to determine whether a lawyer's conduct has crossed the line into misconduct and that they must exercise this responsibility in the public interest. Iacobucci J., who penned the unanimous judgment in *Pearlman v. Manitoba Law Society Judicial Committee* (1991)

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[21] The *Office des professions du Québec* (OPQ) is an independent government body that oversees all professional associations across the province, including the Barreau du Québec. Members of the public can complain to the OPQ if they are dissatisfied with services they have received from professionals, including members of the Bar (Office des professions du Québec, 2017).

[22] There are number of voluntary legal associations, such as the Canadian Bar Association (CBA), the Criminal Lawyers' Association, and the Trial Lawyers Associations, which have been established to promote the interests of their members (Dodek, 2012, pp. 64-65).

[23] The two basic principles of natural justice concern the right to a fair and impartial hearing (*audi alteram partem*) and freedom from bias (*nemo iudex in causa sua*).

quoted with approval from the decision of *Law Society of Manitoba v. Savino* (1983), wherein the Court of Appeal said, "No one is better qualified to say what constitutes professional misconduct than a group of practising barristers who are themselves subject to the rules established by their governing body" (para. 24).

There appears to be general agreement in the case law that the purpose of law society disciplinary proceedings is "not to punish offenders and exact retribution, but rather to protect the public, maintain high professional standards, and preserve the public confidence in the legal profession" (MacKenzie, 2001, p. 26-1). This passage has expressly been cited with approval in numerous lawyer discipline decisions (see *Guttman v. Law Society of Manitoba*, 2010, para. 75; *Law Society of British Columbia v. Hordal*, 2004, para. 51; *Law Society of British Columbia v. McRoberts*, 2011, para. 8; *Law Society of British Columbia v. Nielsen*, 2009, para. 26; *Law Society of British Columbia v. Batchelor*, 2013, para. 40; *Law Society of British Columbia v. Straith*, 2016, para. 139; *Law Society of Alberta v. Merchant*, 2007, para. 168; *Law Society of Saskatchewan v. Kloppenburg*, 2011, para. 13).

Once an adverse finding is made against a member of the profession, the appropriate penalty should be determined by reference to these three general purposes. In the case of *Law Society of Upper Canada v. Rosenthal* (1999), the benchers elaborated on these three inter-related objectives, listing additional considerations which relate to the sanctioning process:

> The determination of a just and appropriate penalty must serve these three disciplinary objectives and this requires consideration of the gravity of the misconduct and the need for both specific and general deterrence. Finally, the particular circumstances of the offending solicitor and the context of the misconduct must be taken into account. It is here that factors might be identified that serve to mitigate the severity of the appropriate penalty. (para. 48)[24]

Since the responsibility for lawyer discipline is a matter of provincial and territorial responsibility, the relevant factors to consider when deciding on an appropriate disciplinary penalty vary across jurisdictions. To illustrate, the leading authority in BC on

[24] Similarly, in *Law Society of Upper Canada v. Kazman* (2008), the Appeal Panel outlined four general principles a hearing panel should consider when deciding on an appropriate disciplinary penalty: specific deterrence; general deterrence; improved competence, rehabilitation and/or restitution; and maintaining public confidence in the legal profession (paras. 73-76).

the key factors informing the sanctioning process is *Law Society of British Columbia v. Ogilvie* (1999). The hearing panel in this case articulated as part of a general analytical framework a non-exhaustive list of factors that may be considered in determining an appropriate sanction, including:

a) the nature and gravity of the conduct proven;

b) the age and experience of the respondent;

c) the previous character of the respondent, including details of prior discipline;

d) the impact upon the victim;

e) the advantage gained, or to be gained, by the respondent;

f) the number of times the offending conduct occurred;

g) whether the respondent has acknowledged the misconduct and taken steps to disclose and redress the wrong and the presence or absence of other mitigating circumstances;

h) the possibility of remediating or rehabilitating the respondent;

i) the impact on the respondent of criminal or other sanctions or penalties;

j) the impact of the proposed penalty on the respondent;

k) the need for specific and general deterrence;

l) the need to ensure the public's confidence in the integrity of the profession; and

m) the range of penalties imposed in similar cases. (para. 10)

The hearing panel recognized that not all of the factors will necessarily be relevant in every case. This purposeful approach to sanctioning "has become the touchstone for analysis of penalty in the regulation of lawyers in British Columbia" (*Law*

Society of British Columbia v. Martin, 2006, para. 28) and has been cited and followed by Law Society adjudicators in New Brunswick,[25] Manitoba,[26] and Saskatchewan.[27]

Similarly, the Law Society of Upper Canada has also established a similar framework for determining the appropriate penalty in cases where misconduct has been established. In *Aguirre* (2007), the hearing panel set forth the following list of factors that may be relevant to penalty:

> a) the existence or absence of a prior disciplinary record;
>
> b) the existence or absence of remorse, acceptance of responsibility or an understanding of the effect of the misconduct on others;
>
> c) whether the member has since complied with his/her obligations by responding to or otherwise co-operating with the Society;
>
> d) the extent and duration of the misconduct;
>
> e) the potential impact of the member's misconduct upon others. In this regard, consideration may be given not to the merits of the complaints that prompted the Society's intervention (unless proven at the hearing), but to how the member's unresponsiveness did or might reasonably be expected to affect the client's interests;
>
> f) whether the member has admitted misconduct, and obviated the necessity of its proof;
>
> g) whether there are extenuating circumstances (medical, family-related or others) that might explain, in whole or in part, the misconduct;
>
> h) whether the misconduct is out-of-character or, conversely, likely to recur. (para. 12)

And in Alberta, the *Law Society of Alberta Hearing Guide* sets out the relevant factors to be considered in determining the appropriate sanction. The guidelines identify

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[25] See *Weir v. Law Society of New Brunswick* (2017); *Allen v. Law Society of New Brunswick* (2017).

[26] See *Doolan v. Law Society of Manitoba* (2016); *Ritchot v. The Law Society of Manitoba* (2010).

[27] See *Law Society of Saskatchewan v. Duncan-Bonneau* (2014*); Law Society of Saskatchewan v. Oledzki* (2009); *Law Society of Saskatchewan v. McLean* (2009).

a number of general factors to be taken into account by the hearing committee and stress that the weight given to each factor will depend on the facts of the particular case:

a) The need to maintain the public's confidence in the integrity of the profession, and the ability of the profession to effectively govern its own members.

b) Specific deterrence of the member in further misconduct.

c) Incapacitation of the member (through disbarment or suspension).

d) General deterrence of other members.

e) Denunciation of the conduct.

f) Rehabilitation of the member.

g) Avoiding undue disparity with the sanctions imposed in other cases. (para. 60)

The hearing guide also includes several case-specific factors, which may include:

a) The nature of the conduct:

    i. Does the conduct raise concerns about the protection of the public?

    ii. Does the conduct raise concerns about maintaining public confidence in the legal profession?

    iii. Does the conduct raise concerns about the ability of the legal system to function properly? (e.g., breach of duties to the court, other lawyers or the Law Society)

    iv. Does the conduct raise concerns about the ability of the Law Society to effectively govern its members?

b) Level of intent: the appropriate sanction may vary depending on whether the member acted intentionally, knowingly, recklessly or negligently. In some cases, the need to protect the public or maintain the public confidence in the legal profession may require a particular sanction regardless of the state of mind of the member at the time.

c) Impact or injury caused by the conduct.

d) Potential injury, being the harm to a client, the public, the legal system or the profession.

e) The number of incidents involved.

f) The length of time involved.

g) Whether and to what extent there was a breach of trust.

h) Any special circumstances (aggravating/mitigating) including the following:

- prior discipline record
- risk of recurrence
- member's reaction to the discipline process (acknowledgement of wrongdoing, guilty plea, self-reporting, refusal to acknowledge wrongdoing, etc.)
- restitution made, if any
- length of time lawyer has been in practice
- general character
- whether the conduct involved taking advantage of a vulnerable party
- a dishonest or selfish motive
- personal or emotional problems
- full and free disclosure to those involved in the complaint and hearing process or cooperative attitude toward proceedings
- physical or mental disability or impairment
- delay in disciplinary proceedings
- interim rehabilitation
- remorse
- remoteness of prior offences. (para. 61, cited in *Law Society of Alberta v. Bondar*, 2011, para. 49)

It is well established that the determination of the appropriate sanction in a particular case is "informed by, but not strictly bound to, earlier precedent. Each case is decided on its own merits, according to the discretion of the Benchers" (*Law Society of Saskatchewan v. Armitage*, 2009, para. 5).[28] The above guidelines are designed to provide a general model to guide the sanctioning process. The myriad of factors may be viewed as falling along a broad mitigation-aggravation continuum. The guidelines do not specify how the various factors should be prioritized or weighted against each other.

[28] As noted by the hearing panel in *Law Society of Upper Canada v. G.N.* (2004), "[t]here is a well-accepted principle of administrative law that stare decisis does not apply to administrative tribunals. A tribunal is not bound to follow its own decisions on similar issues, although it may consider an earlier decision persuasive and find that it is of assistance in deciding the issue before it" (para. 46).

Moreover, a number of these considerations are presented as neutral factors which can then be considered either in mitigation or in aggravation of the sanction to be imposed. This approach provides for a considerable degree of discretion and flexibility in the imposition of a sanction in a given case (*Law Society of Alberta v. Williamson*, 2006, para. 47).

Personal mitigation forms an important part of a hearing panel's deliberations on penalty and can be a decisive factor in justifying the imposition of less serious sanctions (*Law Society of Upper Canada v. Silver*, 2015, p. 50). Techniques of neutralization are particularly relevant to the present study, because these linguistic devices "are simply an extension of conventionally (and legally) accepted views of mitigating circumstances" (Roshier, 1972, p. 70). In later chapters, I show how lawyers are prone to using various neutralization techniques to account for, justify, or excuse their unethical behaviour and how law society adjudicators evaluate and respond to these neutralizations in making a sanctioning determination—sometimes treating them as mitigating factors, resulting in a more favourable disposition.

Possible Sanctions Imposed for Ethics Violations and Other Sanctionable Conduct

The discipline hearing panel can impose a range of disciplinary penalties or orders following a finding that a member has engaged in acts of professional misconduct or conduct unbecoming a lawyer. Available sanctions vary among jurisdictions, but generally include: directing that the member be disbarred; granting the member permission to resign from the law society; suspension from practice; imposing conditions or restrictions on the member's practice; reprimanding the member; imposing a monetary fine; and ordering the member to pay all or part of the costs incurred by the law society in connection with the investigation and hearing.

The sanction of disbarment, or expulsion from the law society, is the most severe punishment which can be meted out to a lawyer for professional misconduct and has been described by the courts as the "professional equivalent of capital punishment" (MacKenzie, 2001, p. 26-46; see also *Law Society of Upper Canada v. Hatcher*, 2012; *Nova Scotia Barristers' Society v. Clarke*, 1993; *Law Society of Upper Canada v. Evans*, 2006; *Law Society of British Columbia v. Ranspot*, 1997; *Law Society of Saskatchewan*

v. Nolin, 2008). The penalty of disbarment is typically reserved for the most serious ethical violations, such as conduct involving dishonesty. In addition to losing one's license to practice, the penalty of disbarment typically carries significant social and professional stigma and is likely to bring serious consequences for the disciplined lawyer's future (*Law Society of British Columbia v. Gellert*, 2014, para. 43; Wolfram, 1986, p. 128).[29] Although disbarment may adversely affect the lawyer's life, this form of discipline is viewed as necessary to protect the public, deter similar misconduct, and preserve public confidence in the legal profession (MacKenzie, 2001, pp. 26-46, 26-47).

The granting of permission to resign is in many ways the same as revocation (*Law Society of Upper Canada v. Flumian*, 2015, para. 7). Like disbarred lawyers, those who are granted permission to resign lose the privilege to practice law. This disposition is generally reserved "for those lawyers who have a unique story" (*Law Society of Upper Canada v. Kolman*, 2002, para. 40). Gavin MacKenzie (2001) comments on the distinction between disbarment and permission to resign as follows:

> Cases in which lawyers have been permitted to resign are usually those in which misconduct is sufficiently serious to justify disbarment but in which mitigating circumstances persuade the benchers that the stigma of disbarment in addition to withdrawal of the lawyer's right to practise law would be unfair. The practical result of the penalty is the same, except to the extent that an Admission Committee may give more favourable consideration to an application for readmission brought by a former lawyer who has been given permission to resign. (p. 26-49)

Evidence put forward in mitigation must meet the threshold of extraordinary or exceptional circumstances to justify consideration of a penalty other than revocation (*Law Society of Upper Canada v. Black*, 1993; *Law Society of Upper Canada v. McLellan*, 2009; *Law Society of Upper Canada v. Mucha*, 2008). There must be a requisite nexus or causal connection between a lawyer's proffered mitigation and the underlying misconduct. That is, mitigating factors must explain *why* the misconduct occurred, and that it was both out of character and unlikely to be repeated in the future (*Law Society of Manitoba v. MacIver*, 2003, para. 27; *Law Society of Upper Canada v. Mucha*, 2008, para. 28; *Law Society of Upper Canada v. Reilly*, 1995). Factors that rise to the level of exceptional mitigating circumstances include, but are not limited to,

[29] Lawyers may sometimes request permission to resign or to be suspended indefinitely in order to avoid the stigma of disbarment.

psychological impairment (*Law Society of Upper Canada v. Pennell*, 1998), chemical dependency (*Law Society of Upper Canada v. Rosenthal*, 1999), compassionate grounds (*Law Society of Upper Canada v. Purewal*, 2008), age (*Law Society of Upper Canada v. Sussman*, 1997), and precarious health or infirmity (*Law Society of Upper Canada v. Khalifa*, 2006).

A suspension order is another serious form of discipline that can be imposed if misconduct allegations are proven. A lawyer may be suspended from the practice of law for a specified term or for an indefinite period (i.e., until conditions imposed under the suspension order are met). During the period of suspension, the member is prohibited from practicing law and his/her rights and privileges are forfeited. The lawyer may be reinstated as a member of the bar or may be required to petition for reinstatement once the suspension period has ended. Before resuming practice, the lawyer may be required to fulfill one or more conditions, such as paying costs of the disciplinary proceedings, making restitution to clients, or presenting evidence of general fitness or rehabilitation. And, upon reinstatement from a period of suspension, the law society may impose one or more conditions or restrictions on the member's practice. A suspension order is often imposed in cases of serious misconduct where the lawyer proffers evidence of compelling mitigating circumstances, such as substance use disorders or other mental health issues.

A reprimand, or written warning, is the lowest form of discipline and is usually imposed for minor ethical lapses. Unlike disbarment or suspension, a reprimand is not an incapacitating sanction in that it does not interfere with the lawyer's ability to practice law. This form of punishment serves to denounce the conduct in question, provide the necessary protection to the public, and prevent a recurrence of any similar behaviour in the future. Written decisions are sometimes made public on the law society's website, legal research databases, and discipline digests.

Law society hearing panels also have the authority to impose economic sanctions,[30] such as fines and restitution, for professional misconduct. Whereas

[30] Fine amounts vary by province and also varied over time. For example, the Law Society of British Columbia can fine the respondent lawyer an amount not exceeding $50,000—up from $10,000 in 1998 (see section 38(5)(c) of the *Legal Profession Act*). Maximum present-day fines in other provinces include the following: the Law Society of New Brunswick can order the respondent to pay a fine not exceeding $25,000 (see s. 60(1)(b) *Law Society Act* and Rule 82(b));

restitution merely requires the lawyer to repay what was taken, fines are imposed to deter misconduct and promote compliance with the rules (see *Law Society of Upper Canada v. Barraclough*, 2012, para. 27; *Law Society of British Columbia v. Niemela*, 2012, para. 19). In *Law Society of Upper Canada v. Hamdani* (2015), the hearing panel was of the view that fines, coupled with more usual penalties, such as reprimands or suspensions, can be more effective at achieving the accepted goals of lawyer discipline than other sanctions used alone. Although a fine is among the lowest forms of punishment for an ethics violation, a substantial fine may be, in a strictly economic sense, greater than a suspension or reprimand (Haller, 2001, p. 9).

In many provinces, legislation provides for the imposition of a broad range of rehabilitative sanctions. Rehabilitative orders are often imposed concurrently with other disciplinary measures such as a suspension. These types of sanctions often take the form of conditions or restrictions on the lawyer's practice including, for example, practice supervision, successful completion of remedial education courses, or participation in a drug or alcohol treatment program. The use of rehabilitative or remediation measures is consistent with the purposes of lawyer discipline and can be an effective method for correcting and preventing the underlying misconduct, enhancing professional competence, as well as facilitating the successful rehabilitation of the lawyer. Rehabilitative sanctions are typically imposed where mitigating factors explain why the misconduct occurred, and where the conduct is both out of character and unlikely to be repeated (*Law Society of Upper Canada v. Reilly*, 1995).

Theoretical Framework

The purpose of the present study is to examine the role of neutralization techniques in the lawyer discipline context. The study uses Sykes and Matza's (1957) neutralization theory as an analytic framework to examine not only the different types of neutralization techniques used by lawyers to rationalize their misconduct, but also, the

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the Law Society of Upper Canada may impose a fine on a member of not more than $10,000; (see section. 35(1) of the *Law Society Act*); the Law Society of Saskatchewan has the authority to impose a fine in any amount that the discipline committee may specify (s. 53(3)(a)(iv) of the *Legal Profession Act*); similarly, in Manitoba there no prescribed maximum amount of fine which may be imposed ((s. 72(1)(d) *The Legal Profession Act*).

extent to which law society adjudicators evaluate and respond to lawyer neutralizations when imposing sanctions.

Gresham Sykes and David Matza introduced neutralization theory in 1957 to explain how juvenile delinquents rationalize or justify their illegal behaviour and manage potential stigma. They theorized that adolescents learn a series of self-talk strategies called “techniques of neutralization” that allow them to overcome any anticipated guilt or shame and maintain a noncriminal self-image, despite their involvement in delinquency. Techniques of neutralization “are critical in lessening the effectiveness of social controls and…lie behind a large share of delinquent behavior” (p. 669).

Similarly, Sutherland (1949) maintained that white-collar offenders learn criminal behaviour in much the same way as street-level offenders. He stated:

> [t]he data which are at hand suggest that white collar crime has its genesis in the same general process as other criminal behaviour, namely, differential association ... Businessmen are not only in contact with definitions which are favorable to white collar crime but they are also isolated from and protected against definitions which are unfavorable to such crime … As part of the process of learning practical business, a young man with idealism and thoughtfulness for others is inducted into white collar crime … He learns specific techniques for violating the law, together with definitions of situations in which these techniques may be used. (pp. 139-140)

He viewed the origins of white-collar crime as rooted in “the learned definitions and experiences that occur within the workplace” (Piquero, Tibbetts, & Blankenship, 2005, p. 160). Sutherland also observed that white-collar offenders often deny their own criminality and do not think of themselves as “real criminals,” when compared to street criminals. He wrote, “[b]usinessmen develop rationalizations which conceal the fact of crime…Even when they violate the law, they do not conceive of themselves as criminals…Businessmen fight whenever words that tend to break down this rationalization are used” (cited in Benson, 1985, p. 584). Sutherland’s observations laid the foundation for further theoretical development in differential association and its application to white-collar crimes and offenders.

Donald Cressey’s (1953) study of the social psychology of embezzlement was also an important contribution to our understanding of white-collar criminality. Like Sutherland, Cressey’s work was rooted in the notion that criminals learn their behaviour

as well as definitions favourable to the violation of law through interaction with others. Cressey believed the theory of differential association was relevant to understanding why seemingly good people come to commit crimes, “especially how motives and drives behind such acts may originate from ‘definitions unfavorable and favorable’ to the law” (Klenowski, 2012, p. 464). In his seminal book *Other Peoples’ Money*, Cressey (1953) sought to better understand the root causes of occupational fraud. He was especially interested in the individual and situational factors that induce otherwise honest, law-abiding individuals to commit workplace fraud or, as Cressey described it, “criminal violation of financial trust” (p. 20).

Cressey developed an explanatory framework for financial fraud from interviews with 133 incarcerated offenders convicted of embezzlement and other crimes involving a violation of financial trust. Based on these interviews, Cressey (1953) found that trust violators employed various linguistic devices, which he termed “verbalizations” or “vocabularies of adjustment,” which enabled them to deny their own criminality and maintain self-images as trusted and honest people. They rationalized their crimes by viewing them “(a) as noncriminal, (b) as justified, or (c) as part of a general irresponsibility for which [they are] not completely accountable” (p. 93). These verbalizations helped offenders reconcile the dissonance between their illicit behaviour and their desired social identities (p. 94). Most respondents, according to Cressey, rationalized their crimes by convincing themselves they were merely “borrowing” the money temporarily. Other trust violators claimed they were “entitled” to the money and rationalized that the entrusted funds rightfully “belonged” to them; their conduct was situational and related to an “unusual business trend”; they needed the money out of “necessity” to provide for their families; they were fed up and had a devil-may-care attitude; and their crimes were the result of “personal defects”, or a loss of self-control (pp. 102-138). More than a decade later, Cressey (1965) suggested that the mental process by which embezzlers justify their crimes is “the crux of the problem” (p. 15). As he said, “I am convinced that the words and phrases that the potential embezzler uses in conversations with himself are actually the most important elements in the process that gets him into trouble” (p. 15).

Cressey (1953) reached two interesting conclusions regarding the phenomenon under study. The first and most fundamental observation Cressey made was that the rationalizations used by trust violators were both necessary and essential for a violation

of financial trust to occur. Cressey stressed that the vocabularies of adjustment provided by offenders were not only *ex post facto* justifications for crimes that had already been committed but were "pertinent and real 'reasons' which the person has for acting" (p. 137). These explanations helped occupational offenders maintain self-images as trusted, law-abiding people, despite their trust violations. For Cressey, the "[t]he rationalization is [the offender's] motivation, and it not only makes his behavior intelligible to others, but it makes it intelligible to himself" (p. 95).

Second, Cressey pointed out that rationalizations are not created in a vacuum; rather, definitions favourable to crime are developed within the corporate environment and culture of the organization. He wrote:

> Each trusted person does not invent a new rationalization for his violation of trust, but instead applies to his own situation a verbalization which has been made available to him by virtue of his having come into contact with a culture in which such verbalizations are present. Cultural ideologies which sanction trust violation are in basic contradiction to ideologies which hold non-violation as the norm, and in trust violation the trusted person applies a general rule to his specific case. (p. 137)

Cressey's pioneering study of the social psychology of trust violation laid the foundation for decades of subsequent research examining the motivations and rationalizations of various types of occupational offenders.

Neutralization Theory

Building upon Sutherland's (1947) notion of differential association and Cressey's (1953) concept of vocabularies of adjustment, Sykes and Matza (1957) introduced neutralization theory to describe the mental processes delinquent youth use to resolve the dissonance between their contemplated acts and their desired social identity. At the time, the dominant view within criminology was that juvenile delinquency was primarily a lower-class phenomenon. Many subcultural theories argued that juvenile delinquency and gang membership stemmed from the inability of working-class youths to attain middle-class goals (see Cohen, 1955; Cloward & Ohlin, 1960; Miller, 1958). Albert Cohen (1955), for example, saw the emergence of delinquent subcultures as a way for working-class youth to resolve the problem of "status frustration", which results from unequal access to legitimate opportunities. For Cohen, delinquent gangs provided

disaffected lower-class boys with new, and often illegitimate, opportunity structures to achieve social status, gain the respect and acceptance of their peers, and enhance their self-worth.

Sykes and Matza (1957) criticized subcultural theories for overemphasizing the extent to which delinquent youth rejected the dominant values of the larger society. In contrast, neutralization theory maintains that most delinquents retain at least some commitment to the conventional moral order and that young offenders typically experience feelings of guilt and remorse when they commit deviant acts. Sykes and Matza suggested that delinquents accept conventional definitions of right and wrong and that they recognize the wrongfulness of their actions. These factors, they suggested, dissuade most adolescents from engaging in criminal or delinquent acts. Thus, to facilitate the release from moral restraint, Sykes and Matza theorized that delinquent youth develop a set of justifications for their behaviour, called "techniques of neutralization." These justifications serve to minimize feelings of guilt and protect one's self-concept while committing delinquent acts.[31] According to Sykes and Matza (1957), techniques of neutralization "are critical in lessening the effectiveness of social controls and…lie behind a large share of delinquent behavior" (p. 669). Regarding the timing of neutralization processes, Sykes and Matza (1957) suggested that the justifications and rationalizations delinquents use not only follow deviant behaviour as a means of protecting individuals from self-blame and the blame of others, but they also precede the act and thus make the behaviour possible (p. 666).[32]

Sykes and Matza (1957) outlined five techniques of neutralization used by delinquent youth to justify their criminal or delinquent behaviour: (1) denial of responsibility, (2) denial of injury, (3) denial of victim, (4) condemnation of the condemners, and (5) appeal to higher loyalties (see Table 2-1). More than half a century after Sykes and Matza published their seminal article, researchers have expanded this typology to include additional techniques of neutralization, such as the metaphor of the ledger (Klockars, 1974), defense of necessity (Minor, 1981), claim of entitlement, denial

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[31] In later work, Matza (1964) argued that most delinquency is mundane and episodic, suggesting that neutralizations provide adolescent youths temporary relief from moral constraints and allow them to "drift" back and forth between delinquent and conventional behaviours (p. 69).

[32] Similarly, Scott and Lyman's (1968) typology of accounts examines the different ways social actors justify and excuse untoward behaviour when questioned by others in order to neutralize social disapproval and restore equilibrium within social relationships.

of the necessity of the law, and claim of normality (Coleman, 1994), claim of relative acceptability (Henry & Eaton, 1989) or justification by comparison (Cromwell & Thurman, 2003), claim of individuality (Henry & Eaton, 1989), denial of negative intent (Henry, 1990), and justification by postponement (Cromwell & Thurman, 2003) (see Table 2-1 for a summary of the more common techniques of neutralization identified in the literature).

Table 2-1 Techniques of neutralization

Authors	Techniques of Neutralization Defined	Contextual Examples
Sykes & Matza (1957)	Denial of responsibility. This technique of neutralization, also referred to as the master account, involves the offender denying any personal accountability for his/her law-violating behaviour by claiming his/her actions were accidental or driven by forces beyond his/her control. The individual sees himself/herself as a victim of circumstance.	"I didn't mean to do it." "It was an accident." "I couldn't help it."
	Denial of injury. Here, the transgressor rationalizes his/her behaviour by suggesting that the act in question did not cause any real harm or injury, thereby minimizing or negating the wrongfulness of the act.	e.g., "No harm, no foul." "I was only 'borrowing' the money and had every intention of paying it back." "Banks make big profits; they can afford the loss." "Insurance will cover the damage."
	Denial of the victim. According to Sykes and Matza, the offender justifies his/her actions by denying the existence of a victim; any resulting injury may be framed as a form of rightful retaliation or punishment. By depriving victims of their status, the offender seeks to reduce his/her sense of moral culpability.	"He started it." "She had it coming to her."
	Condemnation of the condemners. With this technique of neutralization, the offender attempts to shift attention from his/her wrongdoing to the motives and behaviours of those who disapprove of his/her acts, thereby repressing the wrongfulness of the behaviour in question. The individual typically perceives the law and authorities as unfair, and might level accusations their condemners are hypocritical and/or corrupt.	"Why are you singling me out?" "You have no right to stand in judgment of me." "The entire system is corrupt."
	Appeal to higher loyalties. Many offenders argue they engage in deviant or criminal behaviour not out of self-interest, but for the benefit of others, such as smaller social groups to which they belong (e.g., peer group, gang, family, work colleagues). The needs of the individual's immediate social group take precedence over the demands of the larger society.	"I would never snitch on my friends." "I did it for my family." "I had to protect my client's interests." "I was protecting my friend," "My colleagues needed me".

Authors	Techniques of Neutralization Defined	Contextual Examples
Klockars (1974)	Metaphor of the ledger. Individuals who invoke this neutralization technique typically admit wrongdoing but rationalize their offences by suggesting their overall past good behaviours outweigh this particular instance of law breaking. By emphasizing all the good they've done, offenders are able to avoid moral blame and maintain a noncriminal self-concept, despite their offending.	"I'm a good person; this isn't a reflection of my character." "I've done far more good than bad in my life." "Yes, I acted unlawfully, but I have done a lot of charitable work in my community over the years."
Minor (1981)	Defense of necessity. According to Minor (1981), "[i]f an act is perceived as necessary, then one need not feel guilty about its commission, even if it is considered morally wrong in the abstract" (p. 298). In framing their illicit behaviour this way, offenders are less likely to experience guilt or shame over their illegal acts, especially if they consider their actions necessary for the safety, survival, or wellbeing of themselves or others (Coston, 2014, p. 3).	"I had no other choice." "This course of action was the lesser of two evils." "I needed the money to provide for my family." "It's a competitive marketplace; I had to break the law in order to stay in business."
Coleman (1994)	Claim of entitlement. The individual attempts to reconcile his/her unlawful or unethical behaviour by arguing he/she is merely taking what he/she believes is rightfully owed to him/her. As a result, the individual can avoid moral culpability for his/her actions.	"I was within my rights." "I took what was rightfully mine." "I am underpaid and overworked." "I was mistreated by the organization." "I took the money because I was going to receive it eventually."
Coleman (1994)	Claim of normality. The claim of normality neutralization suggests that the law in question is out of touch with societal norms and expectations and that it is no longer valid or necessary. Since everyone else is doing it, the individual feels he/she has done nothing wrong, thereby avoiding moral culpability. the aim here is to reframe the deviant behaviour as normal.	"Everyone is doing it." "Everyone cheats on their taxes." "All athletes look for ways to enhance their performance."
Coleman (1994)	Denial of the necessity of the law. The individual perceives the law in question to be excessive, unreasonable, or unfair, and thus there is no need to obey the law because it does not serve the larger interests of society. This neutralization also implies that authorities engage in inconsistent and arbitrary enforcement of the laws (MacGregror, 2008, p. 270).	"The law is unfair and infringes my rights as a citizen". "Smoking marijuana is harmless and punishes nonviolent individuals unfairly" (Liddick, 2003, p. 624).
Henry & Eaton (1989); Cromwell & Thurman (2003)	Claim of relative acceptability or justification by comparison. Offenders often try to justify their conduct by drawing a comparison with other perpetrators whom they view as "real criminals" or with other conduct that is more serious and harmful in nature, thereby downplaying the negative consequences of their behaviour.	"There are others worse than me". "People engage in much worse activity".

Authors	Techniques of Neutralization Defined	Contextual Examples
Henry & Eaton (1989)	Claim of individuality. The claim of individuality enables offenders to justify their conduct by the fact that they do not care about what others think, and therefore engage criminal acts to satisfy their own individual desires (Odou & Bonnin, 2014, p. 107).	"I don't care what anyone else thinks".
Henry (1990); Stadler & Benson (2012)	Denial of negative intent or denial of criminal intent. This neutralization technique entails an offender accepting responsibility for his/her actions but avoiding self-blame by denying he/she intended to cause any harm or damage. White-collar offenders tend to deny their actions were motivated by a guilty mind.	"I didn't mean any harm".
Cromwell & Thurman (2003)	Justification by postponement. Individuals are aware their behaviour is wrong, but temporarily suppress moral dissonance and feelings of guilt by putting the incident out of their mind until a later time.	"I just don't think about it when I am doing it. If I do, it seems wrong, so I ignore the feeling and tell myself I will think about it later. After all, by then, it is already done, and I cannot do anything about it" (McGregor, 2008, p. 272)
Cromwell & Birzer (2012)	Relabeling. This neutralization focuses on the individual rather than the deviant act. The offender relies on various self-serving, cognitive distortions to shed a deviant or criminal label and construct a positive self-image. This neutralization is often facilitated through the use of the metaphor of the ledger.	"I'm not a career criminal. I just dabbled in illegal activities." "Rascals have escapades, criminals commit crimes" (Cromwell & Birzer, 2012, p. 518)

Although neutralization theory was initially applied to the study of juvenile delinquency, the theory has since been used to investigate a wide range of deviant behaviours, including property crimes (Copes, 2003), dogfighting (Forsyth & Evans, 1998), digital piracy (Holt & Copes, 2010; Ingram & Hinduja, 2008; Moore & McMullan, 2009; Odou & Bonnin, 2014), political corruption (Gannet & Rector, 2015), genocide (Alvarez, 1997; Bryant et al., 2018), terrorism (Bandura, 2004), serial killers and sexual murderers (Coston, 2014; James, & Gossett, 2018; Silvio, McCloskey, & Ramos-Grenier, 2006; Pettigrew, 2018), and white-collar deviance (see, for example, Benson, 1985; Coleman, 2006; Conklin, 1977; Geis, 1967; Gottschalk, 2012; Haugh, 2014; Kieffer & Sloan, 2009; Klenowski, 2012; Klenowski, Copes, & Mullins, 2011; Leasure, 2016; Piquero, Tibbetts, & Blankenship, 2005; Pogrebin, Poole, & Martinez, 1992; Pontell, Jesilow, & Geis, 1982; Shover & Bryant, 1993; Stadler & Benson, 2012; Thurman, St. John, & Riggs, 1984; Vieraitis, Piquero, Piquero, Tibbetts, & Blankenship,

2012; Willott, Griffin, & Torrance, 2001; Dabney, 1995; Gauthier, 2001; Hollinger, 1991; Evans & Porche, 2005; Jesilow, Pontell, & Geis, 1993).[33]

While Sykes and Matza's (1957) techniques of neutralization theory provides a seemingly useful framework for understanding how individuals rationalize various criminal and deviant behaviours, much of the research on neutralization to date suffers similar limitations. A comprehensive review of these issues is beyond the scope of this thesis, but I discuss two of these limitations.[34]

One problem that has confronted neutralization research is the difficulty in determining the temporal order of neutralizations and crime (Copes, 2003, p. 123).[35] Sykes and Matza (1957) contended that techniques of neutralization precede deviant behaviour in order to make such behaviour possible. Empirical studies examining this assumption have yielded mixed results. Several studies have found a positive relationship between neutralization acceptance and participation in delinquency,

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[33] Neutralization theory has also been used to help explain shoplifting (Cromwell & Thurman, 2003), fencing (Klockars, 1974), identity theft (Copes & Vieraitis, 2009a, 2009b; Copes, Vieraitis, & Jochum, 2007; Copes, Vieraitis, Cardwell, & Vasquez, 2013), the misuse of alcohol, illicit drugs, and prescription stimulants (Bennett et al., 2014; Cutler, 2014; Dodder & Hughes, 1987; Peretti-Watel, 2003; Priest and McGrath, 1970; Weinstein, 1980), "sexting" practices among college students (Renfrow & Rollo, 2014), digital piracy (Holt & Copes, 2010; Ingram & Hinduja, 2008; Moore & McMullan, 2009; Odou & Bonnin, 2014), online hacking (Turgeman-Goldschmidt, 2009), information security violations (Padayachee, 2015; Siponen & Vance, 2010; Willison & Warkentin, 2013), cyberloafing (Lim, 2002), snitching (Pershing, 2003; Rosenfeld, Jacobs, & Wright, 2003), use of performance-enhancing drugs (Monaghan, 2002; Klein, 1986; Sefiha, 2012), academic dishonesty (McCabe, 1992; Olafson, et al., 2013), unethical behaviours by marketing professionals (Vitell & Grove, 1987), animal liberation activism (Liddick, 2013), illegal hunting (Eliason, 2003; Eliason & Dodder, 1999; von Essen et al., 2014), elder abuse (Tomita, 1990), the mistreatment of women (Gailey & Prohaska, 2006), unauthorized migration (Ryo, 2015), honour crimes (van Baak, Hayes, Freilich, & Chermak, 2018), hate crimes (Byers & Crider, 2002), contract murder (Levi, 1981), sexual gun violence (Pogrebin, Stretesky, Unnithan, & Venor, 2006) violent crimes involving adolescents (Agnew, 1994), sex crimes (Scully & Marolla, 1984; Miller & Schwartz, 1995), sex trafficking (Copley, 2014), pedophilia (De Young, 1988; deYoung, 1989; Durkin & Bryant, 1999), prostitution (Brooks-Gordon & Gelsthorpe, 2003), and sexual abuse by clergy (Spraitz & Bowen, 2016; Spraitz, Bowen, & Bowers, 2016; Spraitz, Bowen, & Arthurs, 2017). Furthermore, the use of neutralization techniques does not appear to be limited to those who commit criminal or deviant acts. Sykes and Matza's theory has also been used explore religious dissonance (Dunford & Kunz, 1973), abortion (Brennan, 1974), the behaviour of beauty pageant mothers (Heltsley & Calhoun, 2003), and the ways in which victims of crime deal with the effects of their victimization (Ferraro & Johnson; Higginson, 1999).

[34] See Maruna and Copes (2005) and Fritsche (2005) for a comprehensive summary of neutralization theory and a synthesis of relevant empirical literature.

[35] This sequencing issue has been described as the "most significant stumbling point for neutralization theory" (p. 271).

although the effects are small to moderate in size (see Agnew & Peters, 1986; Ball 1966; Hirschi, 1969; Minor 1981; Mitchell, Dodder, & Norris, 1990; Thurman 1984). Hindelang (1970) and others (Hamlin, 1988), however, argued that neutralizations are merely ex post facto rationalizations used to justify wrongdoing. Concerning the proverbial "chicken-or-the-egg" dilemma, Hirschi (1969) suggested that both sides could be correct. He asserted that neutralizations may start off as after-the-fact rationalizations to justify or excuse initial deviant acts but then become the rationale that facilitate future offending (see also Akers, 1985; Copes & Maruna, 2005; Cromwell & Thurman, 2003).[36] The main criticism leveled against these studies is that they rely on cross-sectional designs, "which cannot disentangle the sequential relationship of neutralizations and deviance" (Maruna & Copes, 2005, pp. 264-265). To overcome this methodological problem, some researchers have employed longitudinal analyses (Agnew, 1994; Minor, 1981; Shields & Whitehall, 1994). In one of few such studies, Agnew (1994) explored the relation between neutralization and the use of violence using a national sample of adolescent youths. His analysis revealed that acceptance of neutralization techniques had a positive effect on future violent behaviours in particular situations.

In light of inconsistent findings in the literature, some argue that Sykes and Matza's theory of neutralization does not represent a theory of crime, but rather, describes the different ways individuals rationalize criminal or deviant acts after their commission. If neutralization occurs after the fact of crime, the theory loses its explanatory power because "it merely describes how people react to their delinquency, as opposed to explaining their misdeeds" (Goldstraw-White, 2011, p. 28). The question of whether neutralizations precede deviant behaviour or are merely after-the-fact rationalizations that individuals use to excuse or justify their behaviours remains elusive.

A second problem with Sykes and Matza's theory is the question of whether offenders are committed to the dominant social order. Neutralization theory argues that most criminals subscribe to the prevailing norms and values of society and therefore must use neutralizations to free themselves from the guilt and negative self-image associated with their crimes. Sykes and Matza acknowledged that neutralizations were

[36] This perspective may have particular relevance to white-collar crime, given that such offences often consist of multiple acts over a long period of time. Therefore, any rationalization offered by an offender after the fact "likely reflects that offender's pre- and inter-act thinking." (Haugh, 2014, p. 3147, footnote 1).

not a factor for some offenders but claimed that very few delinquents were entirely committed to delinquent values (Topalli, 2005). However, research confirms that many persistent offenders are committed to a subcultural lifestyle and therefore do not feel the need to neutralize their crimes (Copes, 2003; Hindelang, 1970; Regoli & Poole, 1978; Sheley, 1980; Shover, 1996; Topalli, 2005). Furthermore, Sykes and Matza's statement implies that neutralization is "a factor only for those potential offenders who have a strong bond to the conventional moral order" (Minor, 1981, p. 300), and therefore unnecessary for individuals with low normative commitment or those who are committed to deviance.

Yet, there is some evidence that conformity and individual norm acceptance is not a necessary condition for neutralization effects to take place (Fritsche, 2005; Minor, 1981; Sheley, 1980; Thurman, 1984; Topalli, 2005). Studies examining the use of neutralizations by both violent and persistent offenders show that even criminals with a low level of moral commitment employ techniques of neutralization to justify their acts and maintain a positive self-concept (Agnew, 1994; Levi, 1981; Presser, 2004; Scully & Marolla, 1984, Topalli, 2005). More recently, Topalli (2005) explored how "hardcore" offenders (i.e., those fully committed to the deviant subculture) engage in neutralization to support their offending. He found that many persistent street offenders do not experience guilt from engaging in serious criminal activity and therefore do not feel the need to neutralize their actions. They do, however, employ techniques of neutralization to excuse or justify subcultural norm violations, such as snitching or showing mercy. For these hardened offenders, neutralizations are used as a means of legitimizing serious criminal behaviour and protecting a hardcore image consistent with the "street code." Topalli argues that neutralization theory's current emphasis on a conventional cultural value orientation must be expanded to include those who are less attached to the social order. One possible explanation for these inconsistent findings may be that research often fails to distinguish between neutralization and commitment to unconventional beliefs (Minor, 1981; Austin, 1977; Agnew, 1994).

Other limitations inherent in neutralization research include problems with sample selection, generalizability, and whether existing neutralizations are conceptually distinct from one another. Despite these shortcomings[37], Sykes and Matza's neutralization

[37] I return to some of the limitations of techniques of neutralization in Chapters 3 and 6.

theory does have merit. A well-established body of literature suggests this perspective may have particular relevance to white-collar crime and deviance (see, for example, Benson, 1985; Coleman, 2006; Conklin, 1977; Geis, 1967; Gottschalk, 2012; Haugh, 2014; Kieffer & Sloan, 2009; Klenowski, 2012; Klenowski, Copes, & Mullins, 2011; Leasure, 2016; Piquero, Tibbetts, & Blankenship, 2005; Pogrebin, Poole, & Martinez, 1992; Pontell, Jesilow, & Geis, 1982; Shover & Bryant, 1993; Stadler & Benson, 2012; Thurman, St. John, & Riggs, 1984; Vieraitis, Piquero, Piquero, Tibbetts, & Blankenship, 2012; Willott, Griffin, & Torrance, 2001; Dabney, 1995; Gauthier, 2001; Hollinger, 1991; Evans & Porche, 2005; Jesilow, Pontell, & Geis, 1993).

Neutralization Research and White-Collar Offending

Techniques of neutralization appear to be especially applicable to white-collar offenders (Coleman, 1987). Neutralizations are not only precursors to white-collar crime and deviance (Haugh, 2014), they also allow offenders to maintain a noncriminal identity, avoid stigmatization, and deny the wrongfulness of their actions (Benson, 1985). Kieffer and Sloan (2009) suggest that techniques of neutralization are particularly important for white-collar offenders because they have "a greater 'stake' in conformity" than other offenders (p. 324).[38]

In contrast to street offenders, for example, white-collar offenders generally are older, better educated, of higher status, married with children, gainfully employed, financially well-off, and are less likely to have a criminal record (Benson & Cullen, 1988; Benson & Kerley, 2000; Benson & Simpson, 2015; Hollinger, 1991; Klenowski & Dodson, 2016; Piquero & Benson, 2004; Shover & Hochstetler, 2006; Weisburd & Waring, 2001; Weisburd, Wheeler, Waring, & Bode, 1991; Wheeler, Weisburd, Waring, & Bode, 1988; Wells, 2011; Wheeler, Mann, & Sarat, 1988). Because of these factors, individuals in the middle and upper classes have a strong commitment to conventional society and therefore have more to lose by their contemplated illegal behaviour (Braithwaite & Geis, 1982; Kieffer & Sloan, 2009; Piquero, 2012; Weisburd, Waring, & Chayet, 1995; Weisburd et al., 1991; Wheeler, 1992). Some authors refer to this as the "fear of falling," or the fear of losing the financial and professional status one has worked

[38] See also Benson (1985), noting that "almost by definition white-collar offenders are more strongly committed to the central normative structure" (p. 587).

so hard to achieve (Weisburd et al., 1991; Wheeler, 1992; Piquero, 2012). However, situations may arise in which the very same factors that encourage conformity may also propel some individuals into crime (Piquero & Benson, 2004, p. 160). Benson and Simpson (2015) suggest that "it is the awareness of potential illegality that provokes the offender's use of neutralizations to undermine the moral stigma that would accompany involvement in criminal activity" (p. 202).

White-collar offenders not only use these techniques prior to violating the law, but they are equally adept at conjuring justifications and rationalizations after the fact of crime to help explain away their actions (Kieffer & Sloan, 2009, p. 324). Elite offenders frequently exhibit noncriminal self-identities and tend to view themselves as respectable, law-abiding members of society (Gibbons & Garrity, 1962, p. 31). Even when they violate the law, white-collar offenders convince themselves that they are "not really criminals" and that their acts are "not really crimes" (Benson, 1985; Coleman, 1987; Cressey, 1953; Chibnall & Saunders, 1977; Croall, 1988; Geis, 1967; Gottschalk & Smith, 2011; Hollinger, 1991; Jesilow et al., 1993; Klenowski, et al., 2011; Simon, 1999). Researchers have observed that white-collar offenders, much like street criminals, rely on various techniques of neutralization to rationalize their acts, manage the stigma of a criminal label, and avoid damage to their self-concept (Stadler & Benson, 2012).

The most common strategy used by white-collar offenders is to deny any responsibility for their crimes by attributing their actions to others or forces beyond their control (i.e., external locus of control). They may appeal to accidents, ignorance, or blame their behaviours on personal problems, such as mental health and substance use disorders, emotional distress, or perceived financial difficulties (Benson, 1985; Box, 1983; Croall, 1988; Kieffer & Sloan, 2009; Perri, 2011). Many white-collar offenders are also prone to assuming the role of victim rather than perpetrator. Studies have shown that white-collar criminals often try to excuse their behaviour by scapegoating or shifting the blame to other persons ("It was someone else's fault") (Croall, 1988). Conklin (1994) found that executives, for example, are inclined to shift the blame for corporate illegalities down through the corporation. They assert their firms broke the law "because their subordinates misunderstood orders or took the law into their own hands" (p. 194). Similarly, employees deny responsibility by maintaining they were coerced or threatened by others (Langton & Piquero, 2007), acting under orders of a superior (Benson, 1985; Box, 1983; Gottschalk, 2017; Punch, 1996), or rationalize that they were simply following

normal business practices and that “everyone else is doing it” (Benson, 1985; Chibnall & Saunders, 1977; Coleman, 1987; Evans & Porche, 2005; Klenowski et al., 2011). In these circumstances, the offender may feel as though he/she “had no choice” but to violate the law and was thus acting out of necessity. Appeals to necessity are especially common among persons working in large organizations and corporations (Coleman, 1987, p. 412).

In a similar vein, organizational settings tend to be highly competitive environments. The pressures to meet performance targets, and the substantial rewards for success (e.g., promotion, financial inducements) can lead some people to engage in highly questionable, unethical, or illegal behaviours (Conklin, 1994, p. 170; Gottschalk, 2014, p. 81). In defence of their actions, offenders may rationalize their behaviour by appealing to a higher loyalty, such as financial or other business interests (Benson, 1985; Coleman, 1987; Geis 1977; Gobert, 2008). By appealing to higher loyalties, white-collar offenders can justify or excuse their crimes by placing the blame onto the values or goals of the organization or company for which they work (Piquero et al., 2005, p. 170).

Denial of injury is another common rationalization used by white-collar offenders. Although the economic and social costs associated with white-collar crimes are significant, those involved in white-collar crimes almost always insist that their actions did not cause any “real” harm or injury, especially when compared with violent street crimes. According to Benson and Simpson (2015), it is relatively easy for white-collar offenders to deny any injury or harm because “the consequences of their illegal acts fall upon impersonal organizations or a diffuse and unseen mass of people” (p. 145). This rationalization is prevalent among those persons occupying a position of trust and fiduciary responsibility. They engage in verbal reasoning that redefines their acts as something other than crime, such as “I was only borrowing the money, not stealing” or “I will pay the money back, no one will get hurt” (Cressey, 1953; Klenowski, 2012; Nettler, 1974). A related neutralization technique used in business settings involves denying victims of white-collar crime victim status. To illustrate, Bernard L. Madoff, convicted of defrauding his client investors of more than $50 billion in the largest Ponzi scheme in U.S. history, proclaimed, “Fuck my victims…I carried them for twenty years, and now I’m doing 150 years” (Fishman, 2010).

In trying to make sense of their crimes, white-collar offenders also emphasize the complex maze of laws and regulations that govern corporate and professional behaviour. The laws regulating business practices in many industries can be particularly complex and difficult to interpret (Benson & Simpson, 2015, p. 182). Statutory language is often vague or ambiguous and thus open to interpretation. As such, the line between what is legally (and ethically) permissible and what is not can easily be blurred. This complexity, Benson (1985) argues, "gives rise to an ambiguity in the connection between the act and the offender's motive" (p. 604). It makes it possible for offenders to minimize the wrongness of their acts or deny committing any crime at all. They are prone to describe their violations as "mistakes", "oversights", "misunderstandings", or "technical violations" (Benson, 1985; Conklin, 1977; Croall, 1988). Similarly, individuals involved in organizational crimes may deny the authority of the laws they have violated by asserting such laws constitute an unjust or unnecessary intrusion of government into private enterprise (Coleman, 1987, p. 411; Heath, 2008, p. 609).

White-collar offenders also justify their crimes by presenting them against the backdrop of an otherwise law-abiding life history. As noted earlier, many white-collar criminals are indeed first-time offenders. Thus, the conduct in question is presented as "out of character" for the offender, an "aberration", an "isolated incident", or "momentary lapse" in an otherwise exemplary life (Benson, 1985; Cressey, 1953; Klenowski et al., 2011). Klockars (1974) refers to this justification as the "metaphor of the ledger", or the idea that individuals rationalize their illicit behaviour by comparing it to their previous good works. The act of counterbalancing good deeds with bad ones is consistent with the psychological phenomenon known as moral self-licensing (Monin & Miller, 2001). Moral licensing theory posits that previous good deeds may empower or liberate individuals to engage in immoral behaviour (Merrit, Effron, & Monin, 2010). That is, individuals establish "moral credits" by having previously engaged in prosocial behaviour, which justify engaging in morally questionable behaviour (*a priori* justification). In addition, constructing a moral self-concept may also help the offender avoid the criminal label and stigmatization that typically are attached to violating the law (*a posteriori* rationalization).

Neutralization theory may also be useful to understanding how and from whom white-collar offenders learn to use techniques of neutralization (Klenowski, 2012, p. 465). Some criminologists believe that offenders "find the 'vocabularies' they use to

neutralize their future criminal behavior from their environment" (Haugh, 2014, p. 3146). As noted earlier, Sutherland (1949) and others have argued that white-collar criminals learn the motives, drives, rationalizations and attitudes conducive to crime through interaction with others. In his study of violations of financial trust, Cressey (1965) found that the rationalizations embezzlers used to justify their crimes were not invented "on the spur of the moment", but rather, "exist as group definitions" of situations in which criminal or unethical behaviour is considered "appropriate" (p. 15). In other words, individuals apply existing definitions that sanction criminality to their own behaviour, recasting them as normative acts.

There is some evidence to support the notion that offenders learn rationalizations from their co-workers as part of the formal and informal socialization processes that occur within organizational settings (Benson, 1985; Box, 1983; Coleman, 1987; Cressey, 1953; Dabney, 1995; Furnham, 2012; Kiefer & Sloan, 2009; Klenowski, 2012; Piquero, et al., 2005; Vieraitis et al., 2012). This might include the "corporate capitalist environment generally, or a specific occupational subculture in which an offender works" (Haugh, 2014, p. 3164). This concept may be applicable to professional work generally and the legal profession specifically. Although an ethos of professionalism is conveyed to aspiring lawyers during law school, "much of the learning about the norms and values of the legal profession appears to occur in the workplace, where new lawyers learn from other lawyers who work around them and from observing conduct outside their offices" (Levin, 2012, p. 359). And, studies examining behavioural ethics in organizations show that psychological closeness and feeling connected to those who behave unethically "can create distance from one's own moral compass" and lead to greater moral disengagement (Gino & Galinsky, 2012, p. 15). Therefore, one can reasonably assume that lawyers learn many of the motivations, justifications, and rationalizations for engaging in unethical conduct from their fellow coworkers on the job.

Sykes and Matza (1957) argued that offender neutralizations are learned from and sanctioned by the criminal law itself. In a later work, Matza (1964) suggested "[t]he law contains the seeds of its own neutralization" (p. 61). He further stated that "[t]he criminal law, more so than any comparable system of norms, acknowledges and states the principled grounds under which an actor may claim exemption" (p. 61). To illustrate, an individual may be exempted from criminal liability, and potentially avoid sanctions, if he/she provides a legally recognized justification or defence, such as the absence of

intent (*mens rea*), self-defence, necessity, and insanity (also known as the defence of mental disorder). Such a notion is especially applicable to white-collar offences because, "[i]n many offences there is an apparent lack of intent, particularly where a diffusion of responsibility is involved…and where…the consequences of that violation, such as injury, were not intended" (Croall, 2001, p. 9). More specifically, Haugh (2014) suggests that neutralizations may also originate in the context of sentencing hearings. He notes that sentencing judges routinely inquire into the offender's motivations and rationalizations, either crediting or rejecting them as part of the discretionary sentencing process (p. 3186). Judicial inquiry into the neutralizations defendants employ can "increase individualized sentencing and even potentially disrupt the mechanisms that cause some white collar crimes" (p. 3188).

Indeed, Sykes and Matza's (1957) techniques of neutralization has received considerable attention in the criminological literature over the past 60 years. Since its introduction, neutralization theory has been used to explain a wide variety of deviant and criminal behaviour. It is also relevant to understanding white-collar and corporate crime. To date, few studies have examined how members of the professions rationalize their unethical behaviours during conduct hearings, much less how self-regulating disciplinary bodies inquire into these neutralizations when imposing sanctions for professional misconduct.[39] The present study fills this gap in the literature by examining not only the types of neutralizations techniques disciplined lawyers use in defence of their wrongdoings, but also the extent to which law society adjudicators evaluate and respond to these rationalizations when making a sanctioning determination.

Given the nature of the archival data used in this study (discussed in Chapter 3), it is not possible to determine how or when lawyer rationalizations came into being. The study is therefore limited to examining the post-offence external manifestations of techniques of neutralization.

[39] In one study, Pershing (2003) applied the concept of neutralization techniques to help explain occupational misconduct (whistleblowing) within a military environment.

Chapter 3.

Research Design and Methodology

The purpose of the current research is to explore the different techniques of neutralization used by lawyers disciplined for financial misconduct including misappropriation, mortgage fraud, insurance fraud, and securities fraud. As stated in Chapter 1, the study was guided by the following research questions about such lawyers:

1) What are their characteristics?
2) How do law societies discipline such lawyers?
3) How do these lawyers use techniques of neutralization to rationalize their unethical or criminal behaviour during disciplinary proceedings?
4) What are the most frequently used techniques of neutralization?
5) How do law society hearing panel members evaluate and respond to these rationalizations when imposing disciplinary sanctions?

This chapter presents the research design and methodology of the study. It discusses research methods used to examine white-collar crime and then, more specifically, the use of archival data and its strengths and limitations. I then move to describing the processes for selecting research materials, the research site, and methods of data collection and analysis. The chapter concludes with a discussion of the methods and processes used to analyze and interpret the data.

The Use of Archival Data in Studying Techniques of Neutralization in Lawyer Discipline

Historically, the focus of criminological research and theory has been directed toward traditional street crimes and offenders. The relative paucity of white-collar crime research can be attributed, in part, to the absence of readily available data on white collar offences—including official crime statistics, offender-self reports, and victimization surveys—as well as a lack of accessibility to white-collar offender populations (Friedrichs, 2010 p. 34; Klenowski & Dodson, 2016, p. 112). According to Benson and

Simpson (2015), official crime statistics in the United States, for instance, are not a reliable measure of the incidence or the prevalence of white-collar crime because the Uniform Crime Report (UCR) includes only limited data on a small number of white-collar offences (p. 19). As Rosoff and his colleagues (2020) note, "[t]here are virtually no systematic counts…of the numbers of white-collar offenses that occur in a given year or the number of individuals arrested for these offenses" (p. 17). Similarities exist in Canada. The lack of official statistical information is due in part to varied definitions of what constitutes white-collar crime (i.e., offender- or offence-based definition). However, even in official statistics which include white-collar criminals, the white-collar identity of the offenders is not obvious. Therefore, researchers interested in studying white-collar offenders must seek out data from other sources.

The methods most widely employed by researchers to generate data specific to white-collar crime include interviews with offenders (Benson, 1985; Cressey, 1953; Jesilow et al., 1993; Klenowski, 2012), self-report surveys (Hollinger, 1991), surveys with offenders (Dhami, 2007; Leasure, 2016) and non-offenders (Piquero et al., 2005; Vieraitis et al., 2012); field research/observation (Croall, 1989; Shapiro, 1984), case studies (Calavita, Pontell, & Tillmann, 1997; Glasberg, & Skidmore, 1998), archival research (Haugh, 2014; Gottschalk, 2012; Weisburd et al., 1991), or a combination of multiple data sources and research methods (Evans & Porche, 2005). Archival research is quite common in the white-collar crime literature (Payne, 2017, p. 6). Case records produced by formal organizations are common sources of data in white-collar crime studies because researchers can use them to develop databases from which a great deal of information can be extracted. Based on my familiarity with legal research databases and sociolegal research, I opted to use administrative tribunal decisions as the source of data to study lawyers' use of neutralization techniques during disciplinary proceedings. Electronic full-text databases, such as LexisNexis Quicklaw and the Canadian Legal Information Institute (CanLII), provide access to the decisions of administrative tribunals, including lawyer discipline cases adjudicated by the provincial law societies.

Archival research offers researchers several advantages over other methods. First it is a pragmatic and cost-effective way of generating a database or sample for study (Jones, 2010, p. 1011). The data already exist and are archived in databases, which are maintained by various public and private entities. As a result, archival

research is generally less costly than alternative methods of data collection (Whitley, Kite, & Adams, 2013, p. 521). Second, archival materials have become increasingly accessible in digital format, which facilitates electronic searching and retrieval of relevant sources using simple and advanced search functions. A third advantage of archival research is that it can be used to collect longitudinal datasets to identify and track trends (Bryman, 2016, p. 302; Jauch, Osborn, & Martin, 1980, p. 520; Jones, 2010, p. 1011; Palys & Atchison, 2014, p. 221). Fourth, it is a type of unobtrusive measure, which minimizes reactive measurement effects typically associated with observational methods (Jackson, 2016, p. 84). And, lastly, research involving publicly available or accessible records can mitigate certain ethical risks or considerations, such as informed consent, anonymity, or review by the research ethics committee (Adams & Lawrence, 2015, p. 113).

While archival data provide researchers several advantages, there are inherent limitations when using them as data sources. First, archival records are susceptible to the problems of selective deposit and selective survival (Palys & Atchison, 2014, p. 221). Electronic legal research databases, such as Quicklaw and CanLII, can provide particularly fruitful sources of data for study. However, the scope of the coverage of cases varies according to the materials released for publication by courts and tribunals—in this instance, the provincial law societies. Some lawyer disciplinary proceedings are not made available to the public due to legal restrictions on publication (i.e., temporary or permanent publication ban), while some decisions may be omitted by mistake, delay, or changes in record keeping procedures (Hall & Wright, 2008; Palys & Atchison, 2014; Whelan, 2012). It is therefore not possible to know how many cases were heard by the law societies during the period of study or estimate how many cases are missing.

Another limitation of using archival data sources is that the materials are collected by someone other than the researcher for some other purpose. The researcher therefore has little control over the nature of the data or how the data were collected (Zaitzow & Fields, 2006, p. 329). To further complicate the issue, archival records frequently contain incomplete, missing, or inaccurate information (Stewart & Kamins, 1993, p. 26). In the current study, for example, the type of information included in the cases varied considerably. Some of the cases offered a detailed statement of facts, an exhaustive review of the relevant legal issues and evidence, and the reasons given by the hearing panel for its decision or recommendation as to the appropriate disciplinary

action, while other cases offered few details or a brief summary of what the hearing panel decided. Some of the cases did not include demographic characteristics such as the disciplined lawyer's gender, age, year of call, or practice setting at the time of misconduct. And in some cases, crucial information was omitted from the decision, such as medical records or other evidence tending to explain why the misconduct occurred, largely due to restrictions on publication (e.g., evidence received in camera). Problems with availability of data were further complicated by the fact that several jurisdictions use a bifurcated hearing process—that is, the fact-finding and penalty hearings are held at different times. Where this was the case, the hearing decision and disposition on the merits of the complaint were often unavailable, and I had to glean details about the case from the summary provided in the decision on penalty.

Archival research is also susceptible to the problem of experimenter or researcher bias. Researcher bias refers to the effects that the researcher's beliefs and expectations can have on the results or outcome of a study (Ogden, 2012, p. 359). In archival research, experimental bias "can take the form of selecting only those records that support one's hypothesis or interpreting the content of those records in a way that is biased by one's own expectations" (Goodwin, 2010, p. 388). These problems can be difficult to avoid in archival research because researchers must often sift through and dissect the vast array of records prior to including them in the analysis to ensure they are relevant to the topic being studied (Privitera, 2017, p. 231). In addition, the data that are used can be open to multiple interpretations. In the current study, experimenter bias was reduced by clearly defining appropriate inclusion and exclusion criteria and variables of interest prior to data collection.

The final problem discussed here is whether the results of a study using archival data can be generalized beyond the immediate sample or research context. By its nature, archival research may necessitate the use of total population or non-probability sampling methods, because identifying the entire population of records in a database is often challenging. However, the purpose of this exploratory study was not to generalize the findings, but rather to obtain insights into the role of neutralization techniques in the context of lawyer discipline. Much of the research on neutralization techniques in the context of white-collar crime has focused on how offenders in the criminal context justify their actions. The role of neutralizations in professional disciplinary proceedings, however, remains largely unexamined. The present study is designed to fill this gap in

the literature by not only investigating how wrongdoing lawyers rationalize their professional misconduct, but also, how the administrative adjudicative bodies hearing these cases evaluate and respond to lawyer neutralizations when imposing discipline.

Dataset

The dataset used in this study consists of 393 lawyer discipline cases from eight of Canada's 14 provincial and territorial law societies decided between 1990 and 2017.[40] Initially, the aim of the study was to include cases from as many jurisdictions as possible, however, the publication of tribunal decisions is inconsistent and varies across jurisdictions. Some provinces have taken steps over the years to improve transparency and public access to their disciplinary processes. The Law Society of Upper Canada, for example, publishes tribunal decisions dating back to 1991. In contrast, the Law Society of New Brunswick did not open their disciplinary hearings to the public until 2009. The Law Society's policy on publication of discipline cases states that "[h]istorical cases relating to matters that arose before July 1, 2009 and going back to January 1, 1997…are currently being translated for publication through the Canadian Legal Information Institute" (Law Society of New Brunswick, 2017).[41] Disciplinary matters prosecuted prior to January 1, 1997 are not available to the public. Consequently, disciplinary proceedings involving New Brunswick lawyers are underrepresented in the study. Some jurisdictions, such as Prince Edward Island, Yukon, and Nunavut do not provide access to any disciplinary records. And while cases decided by the Law Society of the Northwest Territories are publicly available, its database did not contain any cases relevant to the current study. Cases from Quebec were excluded from the analysis because the provincial government's Office des professions du Québec (OPQ) oversees the self-regulatory bodies for lawyers (the Barreau du Québec) and for notaries (the Chambre des notaires du Québec) along with more than 50 other professions

[40] In May 2007, the Law Society of Upper Canada became responsible for regulating paralegals in Ontario. Three of the cases included in this study involved paralegals and are included in the reference to lawyers.

[41] The policy also states, "[b]ecause these decisions relate to matters that are not public, the decisions will be published in an anonymized format that does not reveal the names of the lawyers involved…".

(Gouvernement du Québec, 2017) and as such are not fully self-regulating as they are in other provinces.

Disciplinary cases were eligible for inclusion in the study if the proceedings resulted in disciplinary action regarding financial misconduct and the lawyers used one or more techniques of neutralization to justify or rationalize their misconduct. There were also some criminal cases involving financial crimes by lawyers that did not always match up with the law societies' terminology. All criminal cases were put into a category of their own (discussed later).

A two-stage case selection process was used to identify discipline decisions for inclusion in this study. The first stage of the selection process involved searching the law society discipline decision databases available in the Quicklaw and CanLII legal research databases using basic and advanced queries. Key search terms included "misappropriation", "misapplication", "wrongful conversion," "theft," "mortgage fraud," "knowing participation," and "criminal conviction," as well as variations of these search terms. The search strategy also included creating filters and search strings using different Boolean operators to narrow the search and produce more relevant results. In addition, discipline decisions were identified by noting up cases using the "QuickCITE" feature in Quicklaw and the "Cited by" feature in CanLII. Noting up case law provides key information about the history (whether it has been appealed to a higher court) and judicial treatment (whether it has been considered in subsequent decisions) of a case. Noting up a case can be a useful method for identifying comparable cases, such as those dealing with similar facts or legal issues. In addition, cases retrieved from the Quicklaw and CanLII databases were cross-referenced against information published on law society websites, such as disciplinary records and case summaries, in an effort to locate as many cases as possible. Practitioner-oriented publications, such as discipline case digests and discipline databases, were also surveyed to identify possible cases for study.

The initial search of these sources produced more than 1,500 results. These cases were screened to determine the nature of disciplinary charges and whether any formal disciplinary action was taken against the lawyer. Cases not meeting the inclusion criteria noted above were eliminated from the sample. A total of 525 cases were selected for further screening. Each case was then scrutinized to determine whether

disciplined lawyers used at least one technique of neutralization to justify their unethical behaviour (the processes involved in coding neutralization data are described below). Of these, a further 132 cases (25 percent) were eliminated from further investigation because the offending lawyer did not engage any techniques of neutralization during the disciplinary proceedings. In most of these cases, the respondent lawyer either did not attend the hearing or decided not to testify or call evidence in defence. This left a total of 393 lawyer discipline cases for analysis. These cases comprise the entire population of publicly available discipline decisions, but do not necessarily reflect the entire universe of relevant discipline cases because it is not possible to know the number of cases that have been withheld from publication, owing to differential reporting practices among the provincial regulators. The discipline cases for this research were imported into the NVivo software tool to facilitate data management, coding, and analysis.

Data Collection and Analyses

As noted above, the purpose of this research was to investigate lawyers' use of neutralization techniques in professional discipline hearings, and how hearing panels responded to those techniques. Content and thematic analyses were used to analyze the quantitative and qualitative data collected from the lawyer disciplinary cases. Content analysis is defined as "a research technique for making replicable and valid inferences from texts (or other meaningful matter) to the contexts of their use" (Krippendorf, 2013, p. 24). This method is well suited to the current study for several reasons. First, content analysis provides a systematic method for compiling, organizing, and synthesizing large amounts of textual information to discern patterns and relationships in the data (Stemler, 2001, p. 1). Second, data obtained through this method are amenable to both quantitative and qualitative analyses (Bryman, 2006; Hall, 2018; Krippendorf, 2013; Insch, Moore, & Murphy, 1997; Neuendorf, 2017; Palys & Atchison, 2014; Silverman, 2001; White & Marsh, 2006; Weber, 1990).[42] And third, the categories used in content analysis can be determined using inductive and deductive analysis processes or a combination of both (Elo & Kyngäs, 2008, p. 109).

[42] Hall (2018) summarizes the goals of quantitative and qualitative approaches to content analysis as follows: "[q]uantitative content analysis aims to develop numerical data that can be studied statistically, while qualitative content analysis focuses on the characteristics of language as communication with attention to the content or contextual meaning of the text" (p. 399).

In recent years, content analysis has become a widely used method to study the content of legal decisions by courts and administrative adjudicative bodies (Burns & Hutchinson, 2009; Hall & Wright, 2008; Jacobson, 2002; Oldfather, Bockhorst, & Dimmer, 2012; Salehijam, 2018; Van Harten, 2012). This procedure provides researchers with the means to look beyond legal doctrine and empirically examine the reasons and legal arguments judicial and administrative decision makers use to justify their decisions. According to Hall and Wright (2008):

> [S]tudying opinions simply as vessels for bare outcomes or case holdings, while insightful, is not fully satisfying because such studies do not take full advantage of the rich reservoir of information within judicial opinions. It would be a waste to study only the skin of cases and to throw away their fruit. Judicial opinions are detailed repositories that show what kinds of disputes come before courts, how the parties frame their disputes, and how judges reason to their conclusions. It is the factual and analytical richness of judicial opinions that establish their substantive legal importance. Empirical legal researchers correctly recognize that it 'is almost impossible to study law in a meaningful way without some attention to the [content of] opinions that contain these justifications'. (p. 90)

Analyzing cases quantitatively "can tell us the *what* of case law," while a qualitative lens is suited to "understanding the *why* and *wherefore*" (p. 83). To illustrate, quantitative methods can be used to document trends within aggregates of cases, such as case outcomes (i.e., win or loss) and the various legal and extralegal factors that influence judicial decision making. A purely quantitative approach by itself, however, "runs the risk to neglect what might be important aspects of the textual meaning" (Langer & Beckman, 2005, p. 194). Qualitative research fills this void by enabling a detailed exploration of the content of legal decisions retrospectively to learn more about "how opinions are constructed and how results are justified" (Hall & King, 2010, pp. 136-137). As Juliano and Schwab (2001) note, "the judicial opinion is the judge's story justifying the judgment" (p. 559). A contextual analysis of legal decisions is useful for distilling the relevant facts, legal rules and principles, cases precedents, and other factors that support the court's conclusions. This approach, therefore, produces a more complete understanding of the research problem by synthesizing different but complementary findings (Berg, 2001; Guest, MacQueen, & Namey, 2012; Hesse-Biber, 2010; Morse, 1991).

In the current study, data generated through quantitative content analysis procedures were entered into an Excel spreadsheet, sorted, and analyzed using descriptive statistics, such as frequency counts, percentages, and measures of central tendency (e.g., mean and median). Cross-tabulations were also used to investigate patterns and relationships among variables. The quantitative findings provided, for example, summary data on case outcomes across offence types and jurisdictions, the characteristics of lawyers who were disciplined for fraud-like behaviour, the individual and situational context of lawyer misconduct, and the neutralizations used by lawyers to rationalize or justify their unethical conduct.

Qualitative data were coded and analyzed iteratively via content and thematic analyses using QSR NVivo 12 software. Visualization tools, such as word clouds, explore and comparison diagrams, hierarchical charts, and tree maps were used to help identify constructs, patterns, trends, and relationships in the textual data. The qualitative data were incorporated in the study to "illuminate the meaning of statistical results by adding a narrative understanding to quantitative research findings" (Hesse-Biber, 2010, p. 6). I was able to assess the nature and frequency of the neutralization techniques used by disciplined lawyers to avoid moral culpability, manage or preempt perceived stigma, maintain a non-deviant identity, and minimize the negative consequences associated with their misconduct, as well as how the law society benchers inquired into lawyers' stated motivations and rationalizations when imposing discipline. This approach, therefore, allowed for a robust and comprehensive analysis of the phenomenon under study, yielding greater insights and understanding than would be gained by either approach alone (Bernard, 2000, p. 325).

Coding the Data

Techniques of Neutralization

The coding scheme for this study was developed and refined through an iterative analysis process involving both deductive and inductive approaches to coding and theme development (Fereday & Muir-Cochrane, 2006). This iterative process enabled the development of a comprehensive analytical schema. The initial set of codes and categories was developed a priori based on the theoretical framework of the study (Sykes & Matza, 1957) and prior research examining neutralization and various types of

crime and deviance. Although the initial coding process was largely deductive, I remained open to additional categories and themes emerging from the data. Table 2-1 lists the 14 neutralization categories used in the first stage of analysis.

The coding scheme was pretested with a small sample of disciplinary cases (10 cases from each offence category) to determine whether the a priori neutralization categories were clearly defined and accurately reflected the concepts being measured. It was also necessary to determine whether the initial categories were independent, mutually exclusive, and exhaustive (see Cohen, 1960, p. 38). The various neutralization statements (e.g., rationalizations, excuses, and justifications) were assigned to one of 14 categories indicating whether the respondent lawyer used a particular neutralization technique. It became apparent in the first round of coding that some of these verbalizations could be classified in more than one category. To illustrate several lawyers said they were in a desperate financial situation and that they resorted to misappropriating funds from the trust accounts of their clients as a means of providing for their families. The lawyer's motive for the thefts, conceivably, could be coded under either the defense of necessity or the appeal to higher loyalties neutralization categories. In the above example, however, the lawyer's behaviour appeared to be motivated by a concern for the welfare of others rather than for oneself. The "vocabulary of survival" (Heath, 2008, p. 605) is used by the lawyer to recast the defense of necessity into an appeal to higher loyalties. Therefore, to maintain accuracy and consistency of the results, this verbalization was coded under the appeal to higher loyalties category. The limitations concerning the conceptual distinctiveness and measurement of individual neutralizations are discussed in Chapter 6.

After pilot testing the coding scheme, some of the initial codes were deleted, modified, and integrated, while new categories were created as new insights emerged from the analysis. For example, six neutralization categories were omitted either because they were not relevant to the study or the observed frequencies were too low to allow meaningful analysis.[43] The revised coding scheme consisted of the following eight broad neutralization codes: denial of responsibility; denial of injury; denial of victim;

[43] These categories include the claim of normality (Coleman, 1994), denial of the necessity of the law (Coleman, 1994), claim of individuality (Henry & Eaton, 1994), claim of relative acceptability (Henry & Eaton, 1989), justification by postponement (Cromwell & Thurman, 2003), and relabeling (Cromwell & Birzer, 2012).

condemnation of condemners; appeal to higher loyalties; metaphor of the ledger; defense of necessity; and claim of entitlement. The NVivo analysis revealed no new neutralization categories.

During subsequent rounds of coding, linkages between concepts emerged and some codes were integrated into a larger overarching theoretical construct. For example, the "denial of injury" and "denial of victim" categories appeared to provide similar measures of the same concept. Due to the similarity of their content, these two categories were collapsed into a single category and given the label "denial of victim/injury" (the decision to merge these two variables was guided by Stadler and Benson's (2012) study comparing the neutralization techniques of a sample of incarcerated white-collar and non-white collar offenders).[44] The coding rules for these attributes were subsequently modified, and all such examples were classified under "denial of victim/injury." This process yielded seven principal neutralization categories, which are listed in Table 3-1.

Fifteen subcategories emerged from my analysis of the lawyer discipline cases following multiple rounds of coding and analysis, and they were subsequently added to the coding scheme. The denial of responsibility neutralization, for example, has been described as the "master account" (Cohen, 2001, p. 61), as it is an all-encompassing explanation for criminal or deviant behaviour. Offenders frequently deny responsibility by claiming their actions are due to forces beyond their control. In the current study, lawyers denied responsibility for their conduct by claiming their misconduct was the result of inadvertences, mistakes, or caused by psychological, emotional, or other medical problems. These varied excuses reveal distinct attempts to reduce blame or culpability. As a result, subcategories were added to the core neutralization categories to capture the different dimensions of lawyer neutralizations (see Table 3-1). In total, twenty-two coding categories and subcategories emerged from the analysis of the data. The revised coding scheme was applied to the entire set of 393 disciplinary cases.

The study was also interested in how law society adjudicators evaluated and responded to lawyer neutralizations when imposing disciplinary sanctions. Where a lawyer invoked neutralization techniques, the hearing panel's response to each

[44] Other researchers have also noted the similarity between the denial of injury and denial of victim neutralization techniques (see Landsheer, Hart, & Kox, 1994, p. 45).

individual neutralization was assigned to one of three categories: 1=yes (credited as mitigating factor), 2=no (rejected as mitigating factor), or 3=unknown. The quantitative data were coded and analyzed using Excel (frequency counts and percentages), while Nvivo was utilized to classify and categorize all text segments reflecting these three response categories.

Table 3-1 Categories and subcategories used to code lawyer neutralizations

Neutralization techniques	Subcategories of neutralization techniques
Denial of responsibility	Mental health or substance use problems
	Personal and emotional problems (e.g., separation or divorce, child custody, death of a loved one, personal/professional stress)
	Physical impairment (e.g., medical condition, illness, disease, or disability)
	Appeals to accident, defeasibility, or inexperience
	Scapegoating or blaming others
Denial of injury/victim	Restitution to clients whose funds were wrongly taken
	No one harmed by the misconduct (i.e., no harm, no foul)
	"Borrowing" client money
Condemn the condemners	----------
Appeal to higher loyalties	Acting in the best interests of the client
	Protect/provide for family or friends
	Loyalty to community members
Metaphor of the ledger	Good character and reputation in the community
	Cooperation with law society throughout investigation
	Absence of a prior discipline history
	Self-report misconduct
	Voluntary rehabilitative/remedial efforts
Defense of necessity	----------
Claim of entitlement	----------

Although some interpretation is unavoidable in a content analysis, the aim is "to keep vagaries in interpreting cases to a minimum" (Juliano & Schwab, 2001, p. 557). To avoid misinterpreting how the benchers inquire into lawyer neutralizations and their variable effects on the sanctioning decision, I focused on the manifest rather than latent content

when coding this variable.[45] As a result, a limitation arising from the content analysis of archival records is that it was not always possible to determine how much weight was attached to some lawyer neutralizations. This was particularly pronounced in cases where lawyers offered multiple techniques of neutralization in respect of the same disciplinary offence.

Case Characteristics

A separate coding scheme was devised to capture the quantitative attributes from the lawyer discipline cases. The variables of interest include demographic characteristics of disciplined lawyers, experience in the practice of law, the disciplined lawyer's practice setting, the types of legal matters in which the misconduct occurred, the category of offence committed, and the types of sanctions imposed by the hearing panels. Most of the coding categories used in compiling the quantitative data were adapted from an analytical schema designed for a study of fraud and sexual misconduct by doctors and lawyers.[46]

Lawyer's Gender

Disciplined lawyers were coded as male or female based on the member's first/given name, as cited in the case. For non-Anglo and gender-neutral names, the lawyer's gender was determined by searching cases for gender-based pronouns, such as "he," "she," "his," or "her." This method was also used to identify gender in cases where the law societies anonymized their decisions by substituting initials for lawyers' full names.

Lawyer's Experience in the Practice of Law

A measure for years of experience in law practice was estimated by calculating the difference between the year of call and the date the ethical violations were alleged to have occurred. If the discipline decision did not indicate the year the lawyer was called to the bar, a search of the relevant law society lawyer directory was conducted to ascertain

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[45] Juliano and Schwab (2001) point out that "[s]cholars interpret and translate the judges' words, trying to assess nuances of meaning, arguing that the judges implied something while saying something else" (pp. 557-58).

[46] The coding scheme was devised by Joan Brockman while working on a SSHRC grant entitled "*The Construction of Deviant Professionals: Sex, Lies, and Bill(k)ing the State*."

this information. The time lapse between the misconduct and disciplinary hearing was not included, because there can often be a lengthy delay in proceeding with a disciplinary hearing.[47] Including the time between the alleged misconduct and disciplinary proceedings as "years of experience" could distort the utility of this variable. Experience in the practice of law was categorized into one of four groupings identified in the *2016 Statistical Report of the Federation of Law Societies of Canada*: 0-5 years; 6-10 years; 11-15 years; 16-20 years; 21-25 years; or 26 years plus.

Lawyer's Practice Settings

Lawyers may practice in a variety of settings and capacities throughout their legal careers. They can practice in association or partnership with other lawyers, or as sole practitioners. Lawyers can also "practice through professional corporations, limited liability partnerships, multi-discipline practices, virtual firms, or through a combination of one or more of these structures" (Fuchs, 2014). This variable was coded according to the offending lawyer's status at the time the misconduct was alleged to have occurred. The lawyer's practice setting was coded as one of eight options: sole practitioner; firms with 2-10 lawyers; firms with 11-25 lawyers; firms with 26-50 lawyers; firms with 51 "plus" lawyers; professional corporations; and foreign legal consultants. These groupings were derived from the *2016 Statistical Report of the Federation of Law Societies of* Canada. If the discipline decision indicated that the lawyer belonged to a law firm, but did not provide details about the firm, a Google search was conducted to ascertain the firm's size.

Principle Area of Law or Legal Activity

Data on the type of legal matters in which ethical violations were committed were captured to ascertain whether certain practice areas are more likely than others to lead to disciplinary problems. This variable was coded according to the legal activities or areas of law in which disciplinary problems occurred, rather than the lawyer's particular area(s) of specialization. Although many lawyers specialize in one or a few areas of law, some practitioners may take cases in areas in which they have little or no experience or

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[47] See *Law Society of Upper Canada v. Gregoropoulos*, 2016 (disciplinary hearing held more than 10 years after fraudulent real estate transactions occurred); *Law Society of Upper Canada v. Durno*, 2015 (investigative and procedural delay of more than 10 years); *Law Society of Upper Canada v. Abbott*, 2015 (delay of more than six years in investigating and prosecuting respondent).

training. These lawyers are more likely to face disciplinary problems (see, for example, Abel, 2011; Hatamyar & Simmons, 2004; Levin, 2004; Maute, 2008). Multiple instances of the same legal activity in a given cases was only coded once, rather than the total number of activities in which the misconduct occurred. For example, if it was reported that the lawyer misappropriated funds while representing multiple clients in separate residential real estate transactions (i.e., more than one ethical violation), the type of legal activity was coded only once.[48] Coding each individual transaction would skew the results. The legal activities or areas of law in which the misconduct occurred emerged from the data and were assigned to one of fifteen different categories: aboriginal; business, civil litigation; corporate; criminal; entertainment; family; immigration and human rights; investment; labour and employment; matrimonial; personal injury; real estate; securities; and wills and estates.

Types of Ethical Violations

Techniques of neutralization were examined for three types of professional misconduct of a financial nature: 1) misappropriation of funds, 2) real estate and mortgage fraud, and 3) conviction for serious criminal offences.

Misappropriation

This category of misconduct includes cases where lawyers were found guilty of professional misconduct relating to the misappropriation, misapplication, or wrongful conversion of funds held in trust for a client or a third party in connection with the lawyer's practice. First, the term "misappropriation" is not defined in any provincial Acts, law society rules, the FLSC's new *Model Code of Professional Conduct*, or in any related regulations. Several attempts have been made to provide a general definition of the term. Although no single definition has gained uniform acceptance, one of the leading authorities is the case of *Law Society of Upper Canada v. Mikitchook* (1998). In that case, the discipline committee endorsed the definition of misappropriation from *Nebraska State Bar Association v. Veith* (1991):

> Misappropriation is 'any unauthorized use ... of clients' funds entrusted to [a lawyer], including not only stealing, but also unauthorized temporary use

[48] The same can be said for a lawyer involved in a fraudulent real estate scheme involving multiple properties or transactions.

> for the lawyer's own purpose, whether or not he derives any personal gain or benefit therefrom'...(an attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation.) Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of a deliberate wrongdoing. (p. 554)

This definition has been cited with approval by law society disciplinary panels on several occasions (see, inter alia, *Law Society of Upper Canada v. Chojnacki*, 2010, para. 6; *Law Society of Upper Canada v. Rein*, 2010, para. 88; *Law Society of Upper Canada v. Van Duffelen*, 2005, para. 61; *Law Society of Ontario v. Wilkins*, 2019, para. 75-76; *Law Society of Alberta v. Thomas*, 2016, para. 73; *Law Society of New Brunswick v. Howes*, 2012, para. 38; *Law Society of Manitoba v. Young*, 2017, para. 123).[49]

Several cases have considered the necessary mental element or *mens rea* required for a finding of misappropriation—specifically whether it must be deliberate (i.e., knowing), the result of willful blindness, recklessness, or negligence. There appears to be two competing lines of jurisprudence which deal with the issue of intent. Some hearing panels have adopted a narrow approach, stating that a finding of misappropriation requires proof of a dishonest intention on the part of the lawyer (see, for example, *Law Society of Upper Canada v. Reiten*, 2007, para. 47; *Law Society of British Columbia v. Burton*, 2001, para. 37; *Law Society of Alberta v. Lutz*, 2015, paras. 41-43; *Law Society of Upper Canada v. Vandor*, 2012 para. 134).

A review of case law in this area, however, demonstrates "a growing trend to approach misappropriation on the basis that any unauthorized use of client trust funds by a lawyer amounts to misappropriation, regardless of the lawyer's subjective intentions" (*Doolan v. Law Society of Manitoba*, 2016, para. 73; see also *Law Society of Upper Canada v. Adams*, 2017, para. 58; *Law Society of British Columbia v. Ali*, 2007, para. 80; *Law Society of British Columbia v. Andres-Auger*, 1994; *Law Society of Upper Canada v. Burns*, 2011, para. 7; *Law Society of Upper Canada v. Chojnacki*, 2010, para.

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[49] In addition, several discipline hearing panels have relied on a comparable definition of misappropriation articulated in *Matter of Sommers* (1989), wherein the Supreme Court of New Jersey said, "Misappropriation is 'any unauthorized use by a lawyer of clients' funds entrusted to him, including not only stealing, but also unauthorized temporary use for lawyer's own purposes, whether or not he derives any personal gain or benefit therefrom'" (p. 221) (see, for example, *Law Society of British Columbia v. Harder*, 2005, para. 56; *Law Society of British Columbia v. Heslin*, 1996; *Law Society of British Columbia v. Kamin*, 1998; *Law Society of British Columbia v. Rothel*, 1996; *Law Society of British Columbia v. Sahota*, 2016, para. 62).

11; *Law Society of British Columbia v. Gellert, 2013, para. 71*; *Law Society of British Columbia v. Harder*, 2005, para. 55; *Law Society of British Columbia v. Kamin*, 1998, para. 55; *Law Society of Alberta v. McGechie*, 2007, para. 15). In *Law Society of British Columbia v. Harder* (2005), for example, the hearing panel held that the degree of *mens rea* required to establish misappropriation "need not be the equivalent of criminal conduct such as dishonestly or fraud. Incompetence or some degree of carelessness may be all that is necessary" (para. 55). Cases were also included for analysis even if the discipline bodies did not define misappropriation, but where the term "misappropriation" appeared in the complaint or citation with a description of the lawyer's conduct.

Black's Law Dictionary defines the term "misapplication" as "the improper or illegal use of funds or property lawfully held." Although the term was not defined in any of the reported discipline cases, the discipline committee in *Law Society of Upper Canada v. Bellefeuille* (1997) held that "the concept of misapplication may be considered as subsumed under the concept of misappropriation. In almost all cases, the evidence required to defend against an allegation of misappropriation would have an a fortiori relevance to an allegation of misapplication" (para. 44). Misapplication involves a lawyer withdrawing money earmarked for one client and paying it to another client (e.g., *Law Society of Upper Canada v. Kwaw*, 2010; *Law Society of Upper Canada v. MacDonald*, 2006). Other examples of misapplication include "borrowing" funds from a client's trust account with the intention of paying it back (*Law Society of Upper Canada v. Peirce*, 2014) and using trust money for purposes other than those for which it was entrusted to the lawyer (*Law Society of Upper Canada v. Solomon*, 1996).

Wrongful conversion of money or other property is also included under the umbrella of misappropriation. Like misappropriation, wrongful conversion involves the unauthorized use of clients' money or property for the lawyer's own use. As noted in *Law Society of Alberta v. Doucette* (2002), "…the difference between misappropriation and wrongful conversion of trust funds is that the former requires proof of intent, whereas the latter can be made out upon proof of recklessness or negligence alone" (para. 55). In some jurisdictions, such as Alberta, cases show a trend towards filing disciplinary charges against lawyers alleging that they misappropriated *or* wrongfully converted client funds, thus leaving open the possibility of finding the lawyer guilty of the offence charged or the lesser included offence (*Law Society of Alberta v. Nickless*, 2010; *Law Society of*

Alberta v. Elliott, 2002). In other cases, however, it appears adjudicators presiding of discipline hearings use the terms “conversion” and “misappropriation” interchangeably (*Law Society of British Columbia v. Hogan*, 1994; *Law Society of British Columbia v. Oldroyd*, 2007). As such, cases alleging wrongful conversion of funds were included in the misappropriation category.

Real Estate and Mortgage Fraud

In recent years, real estate and mortgage-related fraud has emerged as a vast and growing problem in Canada, and continues to be an issue of concern for the legal profession, especially in Ontario.[50] There are many factors that have given rise to mortgage fraud, including the de-personalization of the process for purchasing a residential home, greater access to information about properties and homeowners, increased competition among mortgage lenders, historically low interest rates and availability of financing, rising consumer debt and runaway housing prices, and reduced mortgage application-processing times (Aaron, 2009; Bradshaw, 2007; Johnson-Abbott, 2009; Law Society of Upper Canada, 2005, para. 4; McMahon, 2015; McNeely, 2018).

Mortgage fraud can take many forms. At its core, this type of fraud occurs when someone deliberately falsifies information to obtain mortgage financing that would not otherwise have been granted had the lender known the truth (Canada Mortgage and Housing Corporation, 2017; *Law Society of Upper Canada v. Nguyen*, 2014, para. 8). Fraudulent mortgage scams can be perpetrated by various mortgage industry professionals, including unscrupulous realtors or mortgage brokers. These schemes, however, typically “require the assistance and co-operation of a duped or complicit real estate lawyer” (*Law Society of Upper Canada v. Birdi*, 2010, para. 46).

Real estate and mortgage fraud cases included in this study generally fell into one of two broad categories: value fraud and identity fraud. Although value fraud can take several forms, one variation involves a fraudster purchasing a property from a

[50] Figures from the Law Society of Upper Canada’s 2016 Report of the Chief Executive Officer indicate the regulator received complaints of mortgage fraud allegations at the rate of between two and five lawyers every month (Law Society of Upper Canada, 2016, pp. 5-6). And, according to the Law Society of Upper Canada 2016 Annual Report, since 2001, the Law Society has completed a total of 123 mortgage fraud prosecutions (Law Society of Upper Canada, 2016, p. 41).

legitimate vendor and then reselling or "flipping" it to a complicit buyer[51] at an artificially inflated price (Law Society of British Columbia, 2010; Potts & Selznick, 2004, p. 13; Stowell, Pacini, Keller, & Schmidt, 2014, p. 233).[52] The artificially inflated property value is then used by the purchaser to secure a high-ratio mortgage. Fraudulent appraisals, which may indicate that renovations or repairs were made to the home, may be submitted in support of the mortgage application to reflect the inflated market value of the property (Freddie Mac, 2016; Husa, Reid, & Petersen, 2011, p. 2). The loan amount on the mortgage exceeds the true market value of the property (Financial Crimes Enforcement Network, 2006). Value fraud generally comes to light when the second "purchaser" defaults on the loan, leaving the lender holding a mortgage that is greater than the actual value of the property. The lender is subsequently forced to sell the property for a value less than the amount of the loan (*Law Society of Upper Canada v. Birdi*, 2004, para. 45). The perpetrator, meanwhile, pockets the difference between the initial purchase price of the property and the fraudulently inflated value of the home (*Law Society of Upper Canada v. Poonai*, 2007, para. 3).

Title fraud occurs when a fraudster steals the identity of a registered homeowner and illegally transfers ownership or title of the property to his/her name without the homeowner's knowledge (Real Estate Council of Alberta, 2016). Impersonating the registered owner of the property, the fraudster can then discharge the existing mortgage and register a new mortgage against the title or sell the property out from under the true owner of the home (Husa et al., 2011, p. 3; Law Society of Upper Canada, 2005, pp. 9-10; Myrick, 2013). Once the sale proceeds or mortgage funds have been paid out by the bank, the fraudster disappears. The rightful homeowner remains unaware of the scheme until the fraudulent mortgage goes into default and the lender begins foreclosure or other legal proceedings. A variation of title fraud sees the fraudster illegally gain access to an individual's personal and financial information and then use the unwitting victim's identity

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[51] The fraudster may try to recruit someone to act as a "straw buyer." A straw buyer is an individual who is paid for the use of their "good name" and credit information to obtain a mortgage at the inflated appraised value (Canada Mortgage and Housing Corporation, 2017). The individual(s) orchestrating the fraud takes over the title of the property and agrees to pay the mortgage. Straw buyers, however, can be on the hook if the mortgage fraud scam comes to light. If mortgage payments are not made, the lending institution will turn to the straw buyer who first signed the documents to recover any losses (Richards, 2009, p. B.6).

[52] The indicia or "red flags" of these types of schemes are outlined in *Law Society of Upper Canada v. Yungwirth* (2013) at paragraphs 51-54.

to purchase a home or secure mortgage financing on a property (Johnson, 2015). The identity thief then pockets the money from the mortgage or sale of the property leaving the victim in the lurch.

Conviction for Serious Criminal Offences

A lawyer who is convicted of a criminal offence not only faces penal sanctions but can also be subject to disciplinary proceedings for substantially the same behaviour (Murdoch & Brockman, 2001).[53] This process is referred to as dual proceedings by the regulatory agency and the criminal justice system (Brockman & McEwen, 1990, p. 28). Dual proceedings in respect of the same conduct are justified according to the Supreme Court of Canada because the two systems serve different purposes (see *R. v. Wigglesworth*, 1987). Concurrent disciplinary proceedings are rare. While there is no requirement, generally the law society will wait until criminal proceedings are completed before conducting a disciplinary hearing. An obvious advantage to waiting for the outcome of a criminal prosecution is that the administrative agency does not have to invest significant and often limited resources in the investigation and prosecution of misconduct arising from the same facts (Murdoch & Brockman, 2001, p. 43).[54] Administrative agencies are able to gain access to material information and other

[53] To illustrate in November 2009, Ontario lawyer Stanko Grmovsek was convicted of several Criminal Code offences (fraud, insider trading, and tipping) for his role in an insider trading scheme that netted him and his business partner $9 million. In January 2010, Grmovsek was found guilty of the criminal offence of conspiracy to commit securities fraud by the United States District Court of the Southern District of New York. Then, in April 2011, the Ontario Securities Commission found that Grmovsek had breached the *Securities Act* in respect of the same conduct, and as a result, made a series of regulatory orders against him, including a permanent ban on purchasing and trading in securities and ordering him to disgorge $1 million in illegally obtained investor funds. And in September 2011, Grmovsek licence to practice law was revoked after he was found guilty of conduct unbecoming a licensee by the Law Society of Upper Canada for his involvement in criminal offences relating to insider trading (see *Law Society of Upper Canada v. Grmovsek*, 2011).

[54] In recent years, the Law Society of Upper Canada has increased funding to investigate and prosecute real estate fraud cases. According to the 2008 *Annual Report*, the investigation and prosecution of mortgage fraud matters accounted for a large proportion of the Law Society's total expenditures (Law Society of Upper Canada, 2008, p. 28). According to the regulator, "mortgage fraud cases take longer to investigate due to the number of transactions involved, the volume of factual information and the complexity of the issues" (Law Society of Upper Canada, 2012, p. 6).

evidence disclosed during trial. Furthermore, some legislation allows SROs to discipline their members based on a criminal conviction without holding a hearing.[55]

This category of misconduct includes cases where the lawyer was convicted of one or more indictable offences that involved theft, fraud, breach of trust, and other serious financial wrongdoing. If the case summary indicated that the member was found guilty of conduct unbecoming a barrister and solicitor on the basis of his/her criminal conviction(s), it was coded as under this category of offence. In some instances, however, the underlying conduct could be classified in more than one category of discipline violation. For example, in *Law Society of New Brunswick v. [M.M.]* (2006), the Notice of Complaint included four charges of misappropriation, as well as a criminal conviction for fraud contrary to section 380(1)(a) of the *Criminal Code* of Canada. Where this was the case, a decision was made to code the ethical violation as a criminal conviction, based on the underlying facts and the hearing panel's reasons for decision.

Types of Sanctions Imposed

The categories used to classify or describe the types of sanctions imposed by the law societies were derived from provincial legislation as well as the ethical and professional rules governing the conduct of lawyers (and other legal professionals) in that jurisdiction. The possible sanctions that may be imposed for professional misconduct were coded into one of the following five categories: disbarment; permission to resign; suspension;[56] reprimand; fine; and costs.[57] Because the regulation of legal professionals in Canada falls under provincial jurisdiction, some law societies have different classifications or descriptions for what is essentially the same sanction.

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[55] In British Columbia, for example, section 36(h) of the *Legal Profession Act* allows the hearing panel to "summarily suspend or disbar a lawyer convicted of an offence that was proceeded with by way of indictment…"

[56] If the lawyer was suspended from the practice of law for specified period, the length of the suspension (in months) was recorded. This metric did not include any interim suspension pending final disposition of the underlying disciplinary matter. If the sanction imposed was an indefinite period of suspension, it was coded as such.

[57] A law society can an order the lawyer to pay all or part of the costs of the investigation and/or proceedings following a finding of professional miscount or conduct unbecoming (see, for example, s. 72(1)(e) of the *Legal Profession Act* of Manitoba).

Table 3-2 Conditions or restrictions imposed on lawyer's practice

Conditions on lawyer's practice	Restrictions on lawyer's practice
Undertake treatment or counselling for addiction or other mental illness	Restrict or prohibit scope of practice in one or more areas of law
Provide evidence of successful rehabilitation from chemical dependency or successful treatment for mental health problems	Restrict the legal services that a lawyer may provide
Abstain from drugs or alcohol and submit to random drug testing	Practice law only under the supervision of another lawyer
Seek medical care or treatment for physical ailment, condition or other health problem	Supervision and monitoring of practice and/or accounting procedures
Satisfactory completion of remedial education courses or other training to improve professional competence	Prohibit the lawyer from maintaining or operating any trust accounts
Order the lawyer to submit to an assessment or examination	Accept co-signing controls on the lawyer's trust accounts
Submit to periodic inspection of the lawyer's practice and/or trust accounts	
Pay restitution to the Compensation Fund or any party who incurred losses as a result of misconduct	
Pay to the law society any expenses incurred in connection with the investigation and hearing	
Provide monthly trust reconciliations, trust bank statements, and client trust listings	
Participate in a practice review and implementing any recommendations resulting therefrom	

Take, for example, the penalty of disbarment. In Ontario, the legislation provides that the hearing tribunal can make and order "revoking the licencee's licence,"[58] while in Prince Edward Island, the disciplinary panel may "cancel the registration as a member and strike the name of the member from the rolls" upon a finding that the lawyer has engaged in professional misconduct or conduct unbecoming.[59] Although the wording of these provisions varies, both sanctions are the functional equivalent to disbarment in that the lawyer's membership in the Law Society is terminated and he/she is no longer permitted to practice law. Thus, to ensure consistency, all disciplinary penalties were coded according to one of the above corresponding categories.

In addition to traditional disciplinary measures, the study was also interested in the types of corrective or remedial orders imposed on lawyers following an adverse finding. A total of 17 categories were developed to code restrictions or conditions

[58] See (ON) *Law Society Act*, R.S.O. 1990, c. L.8, s. 1, s. 35(1).

[59] See (PE) *Legal Profession Act*, R.S.P.E.I. 1988, c. L-6.1, s. 38(1)(a).

imposed on disciplined lawyers following a review of the provincial legislation, law society rules, and case law. These categories are presented in Table 3-2 (above).

Chapter 4.

Results

This chapter presents a summary of descriptive statistical information on 393 reported disciplinary actions taken against lawyers and paralegals by the provincial law societies in eight Canadian provinces between 1990 and 2017. The first section examines the social and demographic characteristics of the lawyers in the study, including gender, age and experience, practice settings, and the type of case in which the ethics violation was committed. The next section describes the overall characteristics of the misconduct cases included in the study, such as the type of offence and geographic location. The final section reviews the types of sanctions imposed against lawyers found guilty of engaging in misconduct, followed by a review of how lawyers were disciplined for the different types of ethical violations examined in this study (misappropriation, mortgage fraud, and criminal conduct). These findings inform the second phase of the study (Chapter 5), which explores the various methods used by lawyers to justify their misconduct, and the degree to which mitigating factors (in the form of neutralization) influence adjudicator decision-making when imposing sanctions.

Demographic Characteristics

Gender

Figure 4-1 presents the distribution of lawyers by gender. Findings show that female lawyers were disciplined at a much lower rate than their male counterparts, accounting for only nine percent of the disciplined lawyers in this study. Although this study is limited to disciplinary cases where wrongdoing lawyers used techniques of neutralization to rationalize their professional lapses, these results point to the underrepresentation of women in lawyer discipline cases.[60] Although the gender

[60] As noted in Chapter 3, a search of the legal research databases returned a total of 525 reported discipline decisions involving serious professional misconduct. A total of 132 cases were eliminated from the study because the wrongdoing lawyer did not invoke techniques of neutralization during the proceedings. If we consider this entire population of cases (n=525), the proportion of women lawyers who were disciplined for serious fraud-like behaviour remains the same at nine percent.

composition of the legal profession in Canada has fluctuated over the period of this study, according to statistics compiled by the FLSC, women comprised roughly 30 percent of the total number of practicing lawyers in 1998 (the first year for which data are available), and this figure jumped to 43% in 2016 (the most current report). Studies conducted in other jurisdictions, including the United States and Australia, have also reported that women are under-represented among disciplined lawyers (Arnold, 1991; Arnold & Hagan, 1992; Bartlett, 2008; Curtis & Kaufman, 2004; Haller, 2001; Haller & Green 2007; Hatamyar & Simmons, 2004; Payne, et al., 2005; Woolley, 2012a).[61]

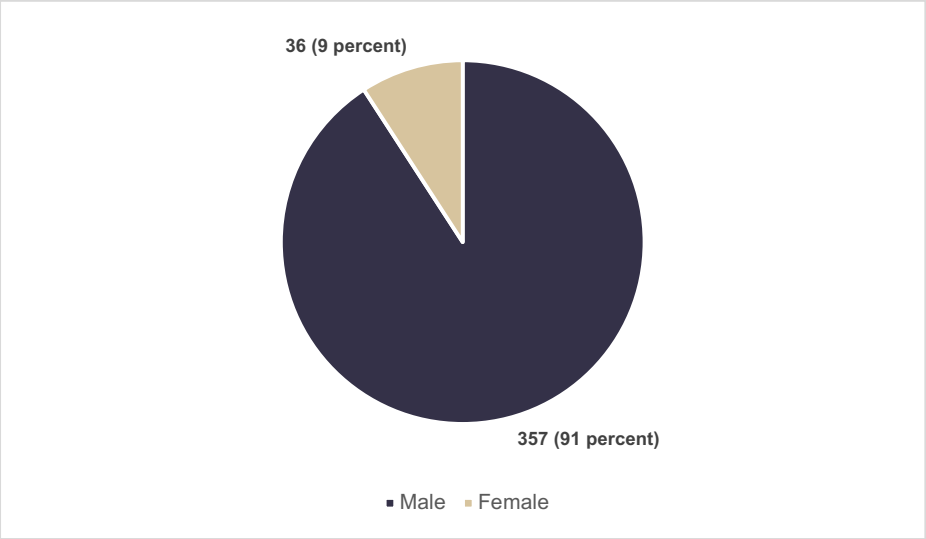

Figure 4-1 Disciplined lawyers by gender

Though it is beyond the scope of this study to explain why women are under-represented among disciplined lawyers, there are a number of factors that could explain this phenomenon. For example, fewer complaints are made against female lawyers than their male counterparts, in part due to their junior status and limited experience (Bartlett, 2008; Curtis & Kaufman, 2004; Haller, 2001; Haller & Green, 2007; Hatamyar & Simmons, 2004; Levin, Zozula, & Siegelman, 2013; Patton, 2005).[62] The likelihood that lawyers will face complaints or malpractice claims generally increases with years of experience in practice. Therefore, newly admitted lawyers are disciplined at a much lower rate than more experienced practitioners. And, given that these more experienced

[61] Brockman (2010) found similar trends among discipline rates in the medical profession.

[62] According to the FLSC, in 2016, more than half (54 percent) of lawyers who have been in practice five years or less are women (Federation of Law Societies of Canada, 2016).

lawyers are men, this demographic is at increased risk for being disciplined (Curtis & Kaufman, 2004, p. 693).

Newly hired lawyers often begin their careers as associates and work under the supervision of more experienced lawyers. These junior employees lack opportunities to interact with clients personally, and, therefore, are subject to far fewer complaints than lawyers who occupy more senior positions (Bartlett, 2008, p. 308). Another possible explanation for why female lawyers are less likely to be the subject of complaints or discipline is that women tend to demonstrate greater risk aversion than men (Byrnes, Miller, & Shafer, 1999), including taking legal and moral risks for money (Furnham & Okamura, 1999, p. 1173).

The under-representation of women in the legal profession could also be attributed to the tendency of female lawyers to specialize in practice areas that attract fewer complaints (e.g., family law) (Haller & Green, 2007, p. 8), and the notion that "women are more socialized to communicate, which may result in better client communications than those of male attorneys" (Curtis & Kaufman, 2004, p. 695). While female lawyers remain under-represented in complaints and formal discipline, further research is needed to explore gender disparity in the disciplinary system for lawyers.

Age and Experience

The mean age of disciplined lawyers in the study was 52.3, with a median age of 52 years (see Table 4-1).[63] According to the Canadian Bar Association (2013), the median age for Canadian lawyers in 2013 was 45.6 years (p. 25).[64] The finding that disciplined lawyers were older than the national average is consistent with studies of lawyer discipline in other jurisdictions (Hatamyar & Simmons, 2004). It is interesting to note that nearly 60 percent of disciplined lawyers were 51 years of age or older, the majority of whom were first time offenders. As noted earlier, white-collar offenders are

[63] The lawyer's age was available in only 34 percent (n=132) of the disciplinary cases in the study.

[64] The average age of lawyers in Canada was difficult to determine, because demographic information on age is maintained by provincial regulators, and the FLSC does not report statistics on age. However, in 1996, Statistics Canada reported that the median age of legal professionals—which included, lawyers, notaries, paralegals, and legal secretaries—was 40 years (Goudreau, 2002, p. 3).

generally older, and tend to begin their offending later in life, when compared to conventional offenders (Benson & Kerley, 2000; Shover & Hochstetler, 2006; Weisburd et al., 1991; Weisburd & Waring, 2001). One possible explanation for this phenomenon is that occupational offenders "are presented with greater opportunity and ability to commit white-collar offences e.g. through a greater understanding of institutional working practices" as they age (Hunter, 2015, p. 25).

Table 4-1 Distribution of respondent lawyers by age

Age	Frequency	Percent
21-30 years	1	.75%
31-40 years	10	7.5%
41-50 years	43	32.5%
51-60	40	30%
60 years or older	38	29%
Total	132	100

Lawyers included in this study had an average of 15.8 years of practice experience, with a median of 15 years in practice at the time of misconduct. [65] Notably, new members of the bar (i.e., equal or less than 5 years in practice), as well as those who had been practicing for between 16 and 20 years, recorded the highest proportion of disciplinary sanctions over the period of study (see Figure 4-2). Although inexperienced lawyers had one of the highest rates of discipline among lawyers in the sample, they accounted for only 20 percent of all sanctioned lawyers in the sample. Nearly two thirds of disciplinary cases (63%) involved older and more experienced members of the Bar who had been practicing for more than 10 years, and those with more than 15 years of experience accounted for more than half of the total sample (56%).[66]

[65] The lawyer's experience in the practice of law was reported in 83 percent (n=325) of the disciplinary cases examined in the study.

[66] When compared with the most recent FLSC statistics from 2016, lawyers who had been practicing for between 16 and 25 years appear to be disproportionately represented in disciplinary hearings over the period of study. According to FLSC figures, lawyers with 16 to 20 years of experience constitute 10.5 percent of the profession but were the subject of 19 percent of disciplinary hearings. Members of the Bar who have been in practice for between 20 to 25 years account for slightly less of the total membership at 10.2 percent, yet this group appeared in 14 percent of the disciplinary hearings (Federation of Law Societies of Canada, 2016).

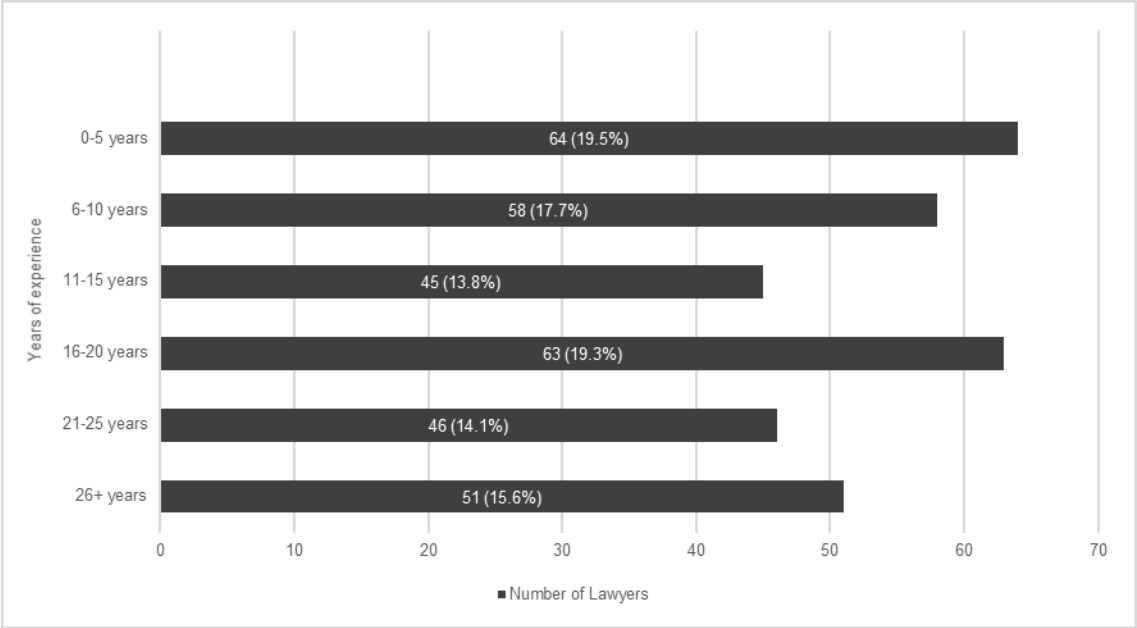

Figure 4-2 Years of experience in practice of law

Studies from across different jurisdictions have produced similar results. A study of 1,274 Ontario lawyers accused of misconduct between 1979 and 1986 found that the average length of experience among those members was 13.9 years (Arnold, 1991, p. 90). Linda Haller's (2001) study of lawyer discipline in Queensland reported that the average number of years of experience of solicitors involved in disciplinary hearings was 14 years. Hatamyar and Simmons (2004) analyzed data from all publicly reported attorney discipline cases in the U.S. in the year 2000. Study findings indicate that a disproportionate number of disciplined lawyers had been in practice more than 25 years (p. 832). Curtis and Kaufman's (2004) survey of disciplinary reports published by the Florida Bar found that the majority of complaints (66 percent in 2001 and 70 percent in 2002) were made against lawyers who had between 10 and 30 years of experience in the practice of law (p. 694). And Abel's (1989) study of malpractice claims against California lawyers revealed that "lawyers with more than ten years of experience constitute 57.7 percent of the profession but are the object of 65.5 percent of claims" (p. 154). As discussed in Chapter 5, both senior and less experienced lawyers draw on their relative experience as a mitigation strategy when facing discipline for serious misconduct.

There are differing accounts in the literature as to why older lawyers are more likely to face discipline than their younger counterparts. Younger lawyers, for example, are more likely to start out as associated in mid- and large-size law firms, which are underrepresented in disciplinary hearings (Abel, 2011; Haller & Green, 2007; Rhode, 1985b; Schneyer, 1991). Also, many of the larger firms have instituted supervision and mentoring programs for new lawyers. And given their junior status, newly called lawyers are likely to have less contact with clients, thereby reducing the likelihood of being the subject of complaints (Curtis & Kaufman, 2004, p. 693).[67] By contrast, older, more experienced lawyers are more likely to be working in independent practice and may be more likely to engage in risk-taking behaviour when confronted by ethical challenges (Haller, 2001, p. 14), especially those lawyers who find themselves in morally or financially difficult situations. Lastly, studies have found a correlation between disciplinary problems and substance misuse and other mental health problems, particularly among lawyers who have been in practice for more than 20 years (Arthurs, 1970; Benjamin, Darling, & Sales, 1990; Goodliffe, 1994; Marx, 1999). The prevalence of mental health and substance use problems among disciplined lawyers is discussed in greater detail in Chapter 5.

Type of Legal Practice

Figure 4-3 shows that sole practitioners and those at smaller firms were more likely to be the subject of professional discipline than lawyers in large-sized law firms.[68] Eighty percent of disciplined lawyers in the study were sole practitioners, while 18 percent practiced in firms of 10 or fewer lawyers. Of those in small firms, 61 percent were partners, whereas the remainder were employed as associates or staff lawyers. Only two percent of lawyers were working for firms with 11 or more members at the time they engaged in misconduct. Together, solo and small firm lawyers represented over 98 percent of all lawyers subject to disciplinary action over the period of study.[69] This echoes the findings of previous studies showing that solo practitioners and those in

[67] Conversely, the lack of adequate training and supervision may help to explain why some inexperienced lawyers are at a greater risk for being disciplined (Levin, 2012, pp. 359-360).

[68] Data related to the lawyer's practice setting were available in 78 percent (n=305) of disciplinary cases.

[69] FLSC figures for 2016 show that sole practitioners made up 14 percent of all lawyers in private practice nationally, yet in this study they accounted for over 80 percent of disciplinary cases.

small firms or partnerships are disproportionately represented in disciplinary cases (Abel, 2008; Arnold & Hagan, 1992; Arnold & Kay, 1995; Arthurs, 1970; Carlin, 1966; Hall, 2013; Haller, 2001; Haller & Green, 2007; Hansen, 2003; Hatamyar & Simmons, 2004; Levin, 2004; Piquero et al., 2016; Reiter, 1978; Woolley, 2012a; Tisher et al., 1977; Schneyer, 1991, 2013; Zacharias, 2001).

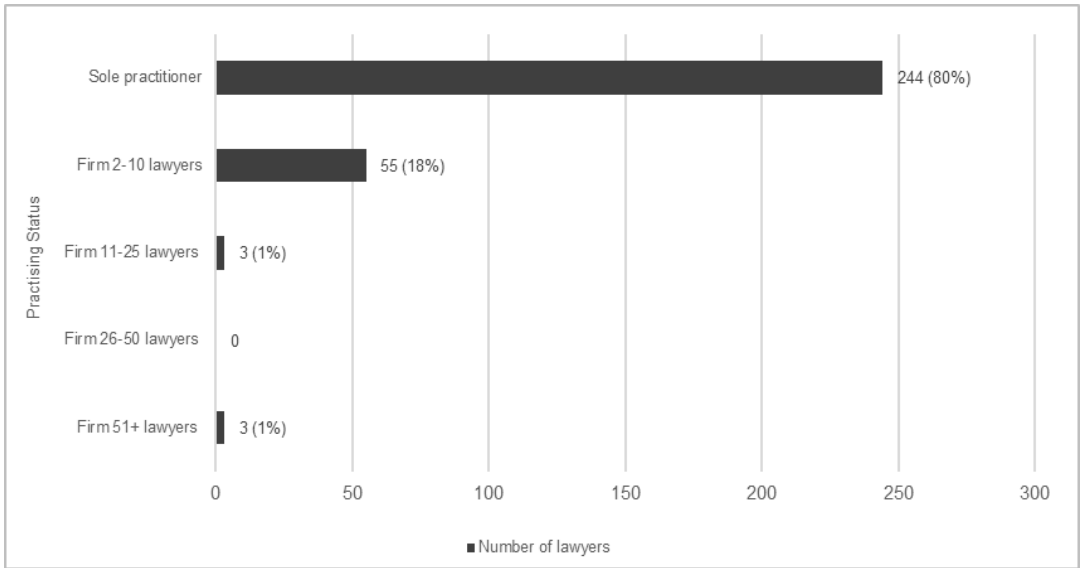

Figure 4-3 Practicing status of lawyers at time of misconduct

Research has sought to understand how and why sole practitioners and those in small partnerships are disciplined more often than lawyers from larger firms or other practice settings. Some observers suggest the higher rate of prosecution and sanction stems not from an unethical or dishonest disposition on the part of these lawyers, but rather, from challenges specific to small-scale practice (Brown & Wolfe, 2012, p. 260; Levin, 2001, p. 847-8; Schneyer, 1991, p. 7). Lawyers in small firms and solo practice often are “boxed in by the lethal combination of case overload, insufficient office support, financial pressure and emotional isolation” (Couric, 1986, p. 68). Many solo and small-firm lawyers find themselves at the margins of the profession. They are confronted by economic pressures, which may make them more likely to engage in misconduct, such as stealing money from clients or other financial misconduct (Levin, 1998, p. 62, note 274). Cash flow problems may also compel these lawyers to accept cases in areas in which they have little or no experience or training, which makes them more vulnerable to complaints. And, in a similar vein, solo and small firm lawyers generally have fewer resources to defend themselves against complaints of misconduct (Levin, 2004, p. 314).

Financial pressures and lack of experience figure prominently in this study as excuses or motivations for lawyer misconduct. Chapter 5 explores in greater detail the use of neutralization techniques by lawyers to rationalize their unethical and illegal behaviour.

In addition, sole practitioners and small firm lawyers often are engaged in the types of legal practice that generate more disciplinary complaints, such as divorce, criminal, tort, wills, personal injury, and real estate (Hatamyar & Simmons, 2004, p. 829; Mather & Levin, 2012, p. 13). Conversely, large-firm lawyers primarily represent large business corporations and specialize in areas such as corporate and commercial law, taxation, securities law, and commercial litigation (Chapman, 2013, p. 613). Individual clients with personal plight problems (often "one-shot players") may be more likely to invoke the disciplinary process to resolve grievances, whereas corporate clients (longstanding institutional or business clients) have a number of other means at their disposal to seek redress from larger firms, such as negotiating reduced fees, malpractice litigation, or taking their business to another firm (Wilkins, 1992, pp. 828-9; Mather, 2011, p. 111; Schneyer, 1991, p. 7). Also, lawyers in solo practice do not have ready access to mentoring networks, peer support, and office management systems that are typically available to large firm lawyers (State Bar of California, 2001, p. 17). In this regard, lawyers who work in larger firms or corporations are seemingly insulated from the disciplinary process because law firms usually have internal procedures for reporting and resolving ethical problems (Taddese, 2014, p. 4). Financial transgressions, for example, may be mitigated by the fact that larger firms tend to have institutional protections in place, such as internal audit personnel or a requirement of two signatures on trust cheques, to detect this type of misconduct (Chapman, 2013, p. 619).

Lastly, commentators have noted that it may be easier to prosecute cases against solo and small firm practitioners, as compared to large firm lawyers because, even when a firm has committed wrongdoing, "courts may have difficulty, as an evidentiary matter, in assigning blame to particular lawyers, each of whom has an incentive to shift responsibility for an ethical breach onto others in the firm" (Schneyer, 1991, p. 8). The team-based nature of work in a large law firm obscures the identity of individuals, making it difficult for both complainants and disciplinary agencies to identify precisely which lawyers(s) in the firm committed misconduct.

Ethical Violations by Year and Jurisdiction

As can be seen from Figure 4-4, the number of financial misconduct cases fluctuated and then increased steadily between 1998 and 2017. The rise in the number of mortgage fraud cases accounted for some of the recent increase.

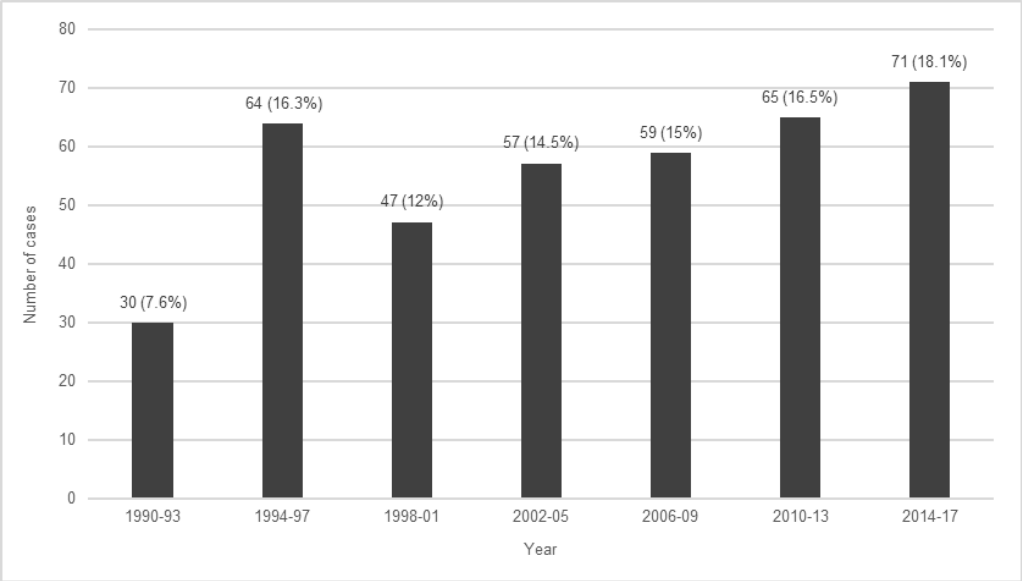

Figure 4-4 Number of cases heard by year

Figure 4-5 presents the type and frequency of ethical violations by province. More than two thirds (n=264) of the disciplinary cases adjudicated by the law societies over the period of study involved the misappropriation or conversion of client funds. Mortgage fraud was the second most frequent reason for discipline, accounting for 27 percent (n=104) of all the disciplinary sanctions imposed. And, six percent (n=25) of cases studied here included successful criminal convictions for offences involving some form of financial malfeasance. As illustrated in the Figure below, the province of Ontario was overrepresented among all categories of misconduct.

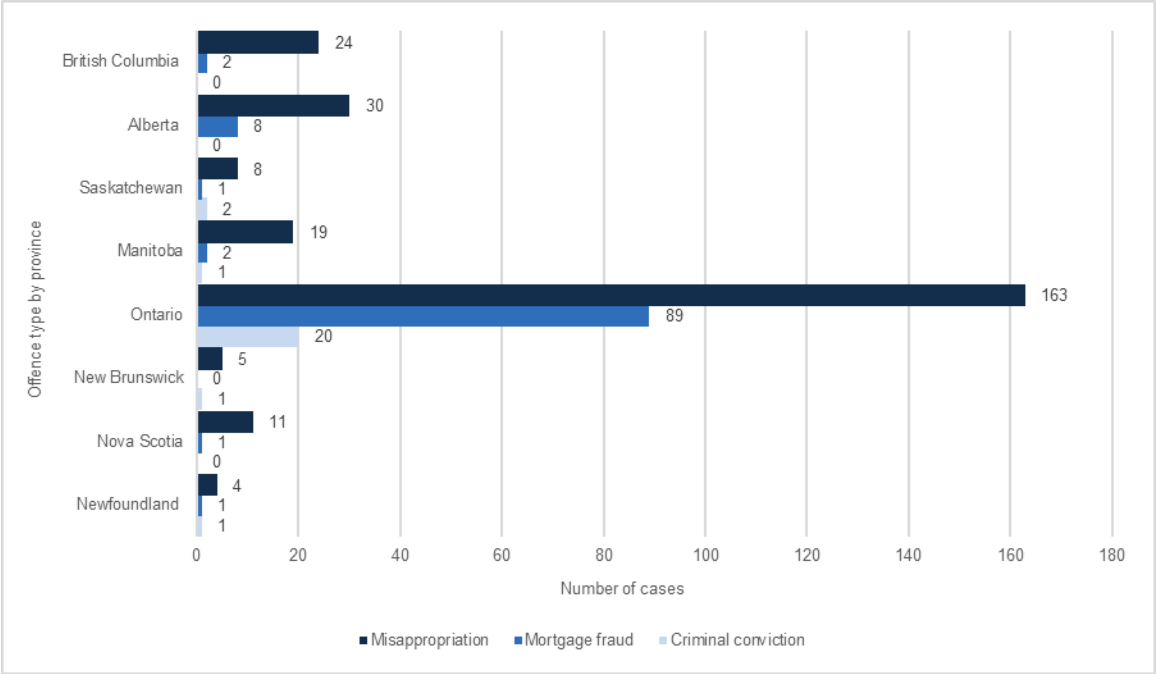

Figure 4-5 Geographic location and type of misconduct by jurisdiction

The study also tracked the province or jurisdiction where the disciplined lawyer practiced. The highest number of disciplinary actions against lawyers occurred in Ontario (69 percent), followed at a very distant second by Alberta (10 percent), and British Columbia (6 percent).[70] This result should not be surprising given that the Law Society of Upper Canada has the largest membership among provincial law societies, receives the highest number of complaints, and imposes more formal disciplinary sanctions than any other province or territory.[71] Another possible explanation for the higher proportion of disciplined lawyers in Ontario may reside in the categories of misconduct chosen for analysis. A recent Equifax Canada study found that fraudulent mortgage activity is on the rise in Canada. The report noted a 52 percent increase in suspected fraudulent mortgage applications since 2013, with 67 percent of the flagged applications originating in Ontario (Equifax Canada, 2017). Roughly 86 percent of mortgage fraud cases examined in this study were concentrated in Ontario.

[70] According to the *2016 Statistical Report of the Federation of Law Societies of Canada*, practicing lawyers in Ontario accounted for 41 percent of all practicing lawyers in Canada.

[71] See the latest membership and discipline statistics in the 2016 Statistical Report of the Federation of Law Societies of Canada.

Legal Activity or Area of Law

The areas of law in which misconduct occurs are also important factors in determining whether a lawyer may be subject to disciplinary action. Previous research shows that disciplined lawyers tend to work in "personal plight" areas of law such as, personal injury, divorce, real estate, and criminal defence (Abel, 2011; Bartlett, 2008; Campbell & Kollman, 1999; Hatamyar & Simmons, 2004; Jeffreys, 2002; Levin, 2004; Levin & Mather, 2012; Maute, 2008; Reiter, 1976; Steele & Nimmer, 1976). Similar results were found in the present study. Figure 4-6 shows the types of legal matters in which ethical violations were most often found. Real estate matters accounted for more than half of all enforcement actions, followed by wills and estates, divorce/family law, personal injury, criminal law, and civil litigation.

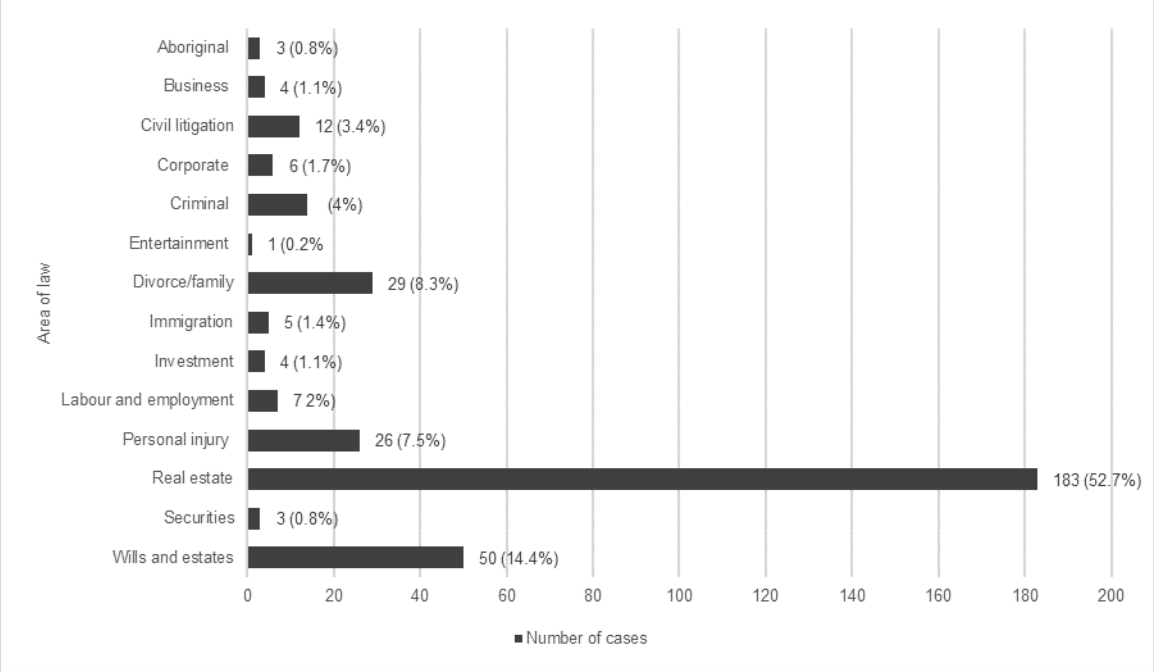

Figure 4-6 Type of legal matter in which disciplinary offence occurred

It should be noted, however, that it is not possible to determine whether any particular legal activity or area of law generated a disproportionate number of complaints or disciplinary sanctions, because the FLSC does not collect such information.[72] A

[72] A select number of law societies do collect information on areas of legal practice. According to the *Law Society of British Columbia 2017 Annual Report on Performance*, the leading areas of practice in British Columbia are civil litigation, corporate, administrative, family, and real estate

possible explanation for the high proportion of disciplinary violations in personal plight cases is that lawyers who practice in these areas often deal with emotional and vulnerable clients (Levin & Mather, 2012, p. 18). Individual clients may view the disciplinary process as the only recourse available to them. Moreover, as noted above, lawyers who take on personal plight cases usually work in solo or small firm practice settings and therefore lack the collegial supports and controls typically associated with larger firm settings (Mather, 2011, p. 119). These lawyers often struggle to maintain a marginal practice, which can lead to unethical behaviour (Miller, 1990; Stager & Arthurs, 1990; Reiter, 1976).

Types of Disciplinary Actions Imposed

In all cases there was a finding that the respondent lawyer had engaged in serious misconduct, which resulted in the imposition of one or more disciplinary sanctions. Table 4-2 reports the total number of disciplinary actions and the types of penalties imposed by the law societies from 1990 to 2017 for each offence type. Figures show that the most frequently used sanction was disbarment accounting for almost half of all penalties, followed by suspension from practice, permission to resign, fine, and reprimand. Almost two thirds (64 percent) of all discipline cases resulted in termination of licence, either through revocation or resignation. From 2004 onward, there was a fairly consistent number of termination orders, particularly in mortgage fraud cases. This trend may be attributed to increased screening of complaints of lawyer misconduct, as well as the number of mortgage fraud prosecutions completed in Ontario between 2001 and 2016.[73]

Since the misconduct categories under study are more likely to result in serious discipline,[74] one might have expected the number of termination orders to be higher,

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law (Law Society of British Columbia, 2017c, p. 16). A review of past annual reports dating back to 1999, indicates these figures have remained relatively consistent.

[73] According to the *Law Society of Upper Canada 2016 Annual Report*, since 2001, the Law Society had completed a total of 123 mortgage fraud prosecutions, resulting in 45 revocation orders and another 20 lawyers permitted to resign from the Law Society (Law Society of Upper Canada, 2016b, p. 41).

[74] There are three categories of misconduct for which the most serious penalty of revocation is the presumptive discipline, namely, cases of misappropriation, mortgage fraud, and conviction for serious criminal offences (*Law Society of Upper Canada v. Bharadwaj*, 2012, para. 61). The general rule in misappropriation cases is that save unusual circumstances, disbarment is the

given these types of misconduct carry the presumption of disbarment. The most notable differences can be observed in cases of misappropriation. Misappropriation of client trust funds is considered one of the most serious breaches of professional ethics that a lawyer can commit and, in the absence of significant mitigating factors, typically results in disbarment (*Law Society of British Columbia v. Tak*, 2014, para. 35). As can be seen in Table 4-2, more than half (51.3 percent) of the lawyers disciplined for misappropriation or conversion of funds were disbarred. A suspension from practice was the second most commonly imposed sanction, accounting for 28 percent of all disciplinary actions taken against lawyers for this type of misconduct. In 23 of these cases, a disciplinary suspension was accompanied by specific remedial measures, such as conditions or restrictions on the lawyers' practice.

Table 4-2 Types of penalties imposed in all cases of misconduct

Penalty imposed	**Type of disciplinary offence**			**Total**
	Misappropriation	Mortgage Fraud	Criminal Conviction	Total
Revocation	139 (51.5%)	35 (32.7%)	21 (84%)	195 (48.5%)
Resignation	45 (16.7%)	15 (14%)	3 (12%)	63 (15.7%)
Suspension	75 (27.8%)	52 (48.6%)	1 (4%)	128 (31.9%)
Reprimand	4 (1.5%)	1 (1%)	-	5 (1.2%)
Fine	7 (2.6%)	4 (3.7%)	-	11 (2.7%)
Total	270 (100.1%)	10 (100%)	25 (100%)	402 (100%)

Note: The total number of sanctions imposed is 402, while the total number of cases is only 393 because eight cases included more than one sanction.
Note: Percentages do not equal 100% due to rounding.

In what can be described as an isolated case, the law society only imposed a fine on a lawyer found guilty of misappropriating client funds. In *Law Society of British Columbia v. Andres-Auger* (1994), the lawyer withdrew funds from trust on several occasions to pay for fees and disbursements, but without delivering a bill to her clients. The hearing panel drew a distinction between knowing misappropriation and a technical

presumptive sanction (see inter alia, *Law Society of Upper Canada v. Cooper*, 1991; *Law Society of Manitoba v. Fisher*, 2012; *Law Society of British Columbia v. Ogilvie*, 1999). The case law also makes clear that revocation is the ordinary or presumptive disposition for knowing participation in real estate or mortgage fraud (*Law Society of Upper Canada v. Mucha*, 2008; *Law Society of Upper Canada v. Abbott*, 2017; *Bishop v. Law Society of Upper Canada*, 2014). And in in *Law Society of Upper Canada v. Cwalino* (2015) the hearing panel noted, "[i]n a case in which there has been a criminal conviction for a serious offence, the presumptive penalty, absent mitigating circumstances, is revocation" (para. 7). Similarly, MacKenzie (2001) notes, "[m]ost non-misappropriation cases in which lawyers have been disbarred have involved convictions for serious criminal offences" (p. 26-17).

violation of the Law Society's accounting rules. The three-member panel concluded that the lawyer did not act dishonestly or fraudulently, but that she "demonstrated an unacceptable degree of inattention, even willful neglect, of her trust obligations" (para. 77). The member was ordered to pay a $1,750 fine and the costs of the discipline proceedings. She was also required to undergo a credentials hearing prior to reinstatement and complete a remedial studies program in law office accounting procedures after her reinstatement. The Panel noted that this level of discipline was appropriate because of her "unique personal circumstances" and the length of time she had been out of practice (para. 102).

As Table 4-3 illustrates, suspension occurred in 128 cases, either as a sole penalty or combined with other disciplinary sanctions. The length of suspension ranged from 21 days to 36 months, with an average of 9.4 months and a median duration of 6 months. Ten percent of all suspension cases resulted in the lawyer being suspended from practice for a definite period and indefinitely thereafter until one or more conditions were met, such as making restitution or demonstrating rehabilitation from alcohol or drug addiction. In one case, an Alberta decision, the discipline committee ordered that the lawyer be suspended indefinitely and that his eligibility for reinstatement be conditional upon the member satisfying the statutory requirements for reinstatement set out in the *Legal Profession Act* (see *Law Society of Alberta v. Sondermann*, 2005). The majority decision cited emotional distress as the main cause of the lawyer's discipline problems.

More than half (56.4%) of the suspensions were for six months or less. The imposition of a lengthy suspension (12 months or greater) as punishment appears to be less prevalent, accounting for only 38% of disciplinary proceedings where a suspension was imposed. These figures are skewed, at least in part, due to the number of "dupe" mortgage fraud cases, which, according to the law society hearing panels, involve a lesser degree of culpability and a correspondingly lesser penalty than knowing participation in mortgage fraud (described in greater detail below). When the dupe cases (n=65) are excluded from the analysis, the mean suspension length increases to 12 months, with a median of 12 months.

Table 4-3 Length of suspension imposed in all cases of misconduct

Length of Suspension	Frequency
21 days	1 (0.8%)
1 month (30 days)	15 (11.60)
2 months (60 days)	12 (9.3%)
75 days	2 (1.6%)
3 months (90 days)	18 (14%)
4 months	8 (6.2%)
5 months	2 (1.6%)
6 months	14 (10.9%)
9 months	7 (5.4%)
10 months	1 (0.8%)
12 months	14 (10.9%)
14 months	1 (0.8%)
15 months	1 (0.8%)
16 months	1 (0.8%)
18 months	11 (8.5%)
20 months	2 (1.6%)
21 months	1 (0.8%)
24 months	14 (10.9%)
34 months	1 (0.8%)
36 months	2 (1.6%)
Other*	1 (0.8%)
Total	129 (100.5%)

* Indefinite suspension imposed following a finding that the conduct of the member arose from incompetence.
Note: Percentage total does not equal 100% due to rounding.

Only five of the disciplined lawyers in the study were given a public reprimand for serious ethics violations. In three cases, the law societies imposed a reprimand together with other forms of discipline, such as a fine and/or suspension. And there were two cases in which only a reprimand was ordered where the lawyer was found to have committed professional misconduct, both cases occurring during what might be characterized as “kinder gentler days” (*Law Society of British Columbia v. Hammond*, 2004, para. 26). This result should not be surprising given that reprimands are usually reserved for cases involving minor ethical breaches, and the study was focused on cases involving serious misconduct.

Table 4-4 Types of rehabilitative sanctions imposed in disciplinary proceedings

Conditions and restrictions on law practice	Frequency	Percent
Practice only in association with a supervising lawyer	46	19.4%
Trust account restrictions (e.g., supervision and monitoring of trust accounts, accounting procedures, co-signing controls, or prohibition from operating trust account)	42	17.7%
Undergo or continue treatment/counselling for substance abuse, chemical dependency, or mental disorder	30	12.2%
Participate in practice review program	28	11.8%
Completion of continuing legal education programs or seminars in specified areas	24	10.1%
Restricting area(s) of practice and/or legal services lawyer may provide	17	7.2%
Demonstrate competence or psychological fitness as condition of reinstatement (e.g., review by practice standards committee)	16	6.8%
Provide monthly reconciliation reports	11	4.6%
Abstain from use of drugs or alcohol and/or submit to random periodic testing	9	3.8%
Agree to periodic trust account audits	9	3.8%
Ensure books, records, and accounts are current and comply with law society regulations	6	2.5%
Total	238	99.9%

Note: Percentages do not equal 100% due to rounding

As noted earlier, the law societies can impose monetary penalties, such fines, restitution, and administrative costs, for breaches of the rules of professional conduct. Fines represented a very small proportion of all disciplinary penalties imposed by the law societies over the period of study. Eleven lawyers were fined from $1,000 to $15,000 (an average of $5,688 and a median of 5,875). Restitution orders were imposed in a total of 55 cases (14 percent). Forty-two lawyers were ordered to repay client compensation funds[75] more than $16 million in funds paid out to claimants for losses resulting from the lawyer's dishonesty (a median of $65,500).[76] Another thirteen lawyers were ordered by

[75] In Canada, the law societies have established a lawyers' fund for client compensation to reimburse clients who have suffered losses due to a lawyer's dishonesty. Each of the compensation funds is financed through fees paid by members as part of their annual dues. The amount of compensation payable to claimants varies by province. In British Columbia, for example, the maximum amount of compensation available to each claimant is capped at $300,000 (Law Society of British Columbia, 2018a). In Ontario, the limit on individual claims is set at $500,000 for claims involving funds given to a lawyer on or after September 22, 2016. Payouts for losses originating prior to this date are subject to the maximum per claimant limit in place at the time the funds were advanced (Law Society of Upper Canada, 2018). The law societies in New Brunswick and Nova Scotia do not set any limits on individual claims (Law Society of New Brunswick, 2018; Nova Scotia Barristers' Society, 2018).

[76] The amount of funds the lawyer was ordered to repay was not reported in seven cases.

the law societies to pay restitution directly to former clients. The range of these restitution orders was from $300 to more than $76,000.[77] And in 234 cases (sixty percent), the lawyer was ordered to pay the costs of the disciplinary proceedings ranging from $500 to $277,205 (a mean of $25,606 and a median of $10,000). All three types of financial penalties were frequently imposed together with other traditional disciplinary sanctions, such as disbarment, permission to resign, suspension, or reprimand. Although fines represent a small portion of the total penalties imposed on lawyers found guilty of serious professional misconduct, some authors suggest that fines may be a greater deterrent than more traditional sanctions (Hall & Green, 2007; Levin, 1998).

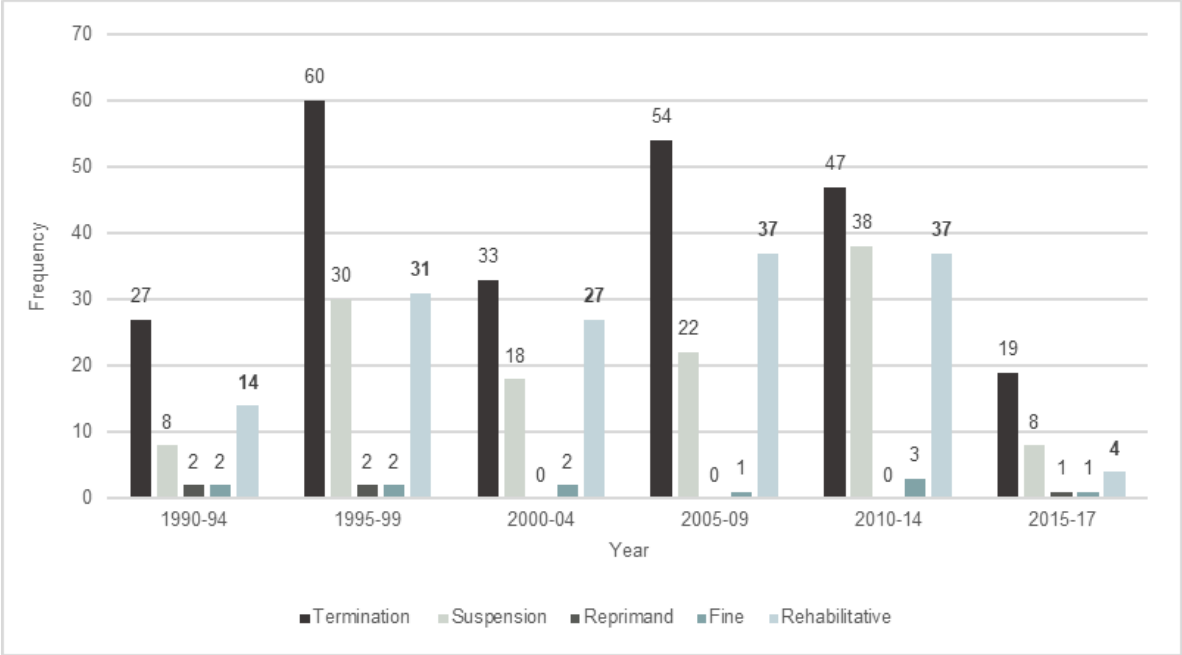

Figure 4-7 Types of disciplinary sanctions imposed over the period of study

Data also suggest there has been an increased understanding and recognition among law society hearing panels about the role of rehabilitative theory in lawyer discipline (see Table 4-4, Figure 4-7). The imposition of rehabilitative sanctions is consistent with the above-stated purposes of lawyer discipline, and these measures "increase the possibility that the underlying problem which led to misconduct or poor service will be addressed" (Haller & Green, 2007, p. 16). There has been a general

[77] Data indicating the amount of restitution paid by the lawyer to former clients were not reported in three cases.

increase in the use of rehabilitative orders by the law societies over the period of study. A total of 98 lawyers received sanctions that were oriented towards rehabilitation.

The most frequent types of orders involved placing conditions, restrictions, or monitoring requirements on the lawyer's practice, such as working only under the supervision of another lawyer for a specified period, trust account restrictions, seeking treatment for substance use disorders or mental health problems, participating in a practice management review, completion of specified remedial education courses, and restricting practice to certain areas or types of legal services (see Table 4-4). Most often these measures were imposed concurrently with some other penalty, such as a reprimand or suspension. In some cases, an order of suspension included a requirement that the lawyer establish and prove rehabilitation as a condition of reinstatement.

There was also evidence that mental health problems and substance use disorders among lawyers figured prominently in decisions to impose a less severe sanction. When combined, orders requiring the lawyer to undergo treatment (30) and demonstrate successful rehabilitation and fitness to resume the practice of law (16), accounted for the highest proportion of all rehabilitative orders made by the law societies over the study period. What's more, about 60 percent of the lawyers in this study claimed their discipline problems were in some way caused by substance abuse problems, psychological problems, or severe emotional distress. An in-depth examination of these factors and the extent to which they can influence lawyer sanctioning decisions follows in Chapter 5.

There appears to be general support for the use of rehabilitative sanctions in lawyer disciplinary systems in other jurisdictions as well. Haller and Green (2007) describe how legislative changes in Australia, for example, have encouraged greater use of restitutive and rehabilitative orders by the tribunals when imposing discipline. Haller and Green's study of professional disciplinary proceedings against Queensland solicitors—an update to Haller's (2001) comprehensive 70-year study—found that rehabilitative sanctions were imposed in about 42 percent of cases heard during the period of 2001 to 2005. The authors note that the use of rehabilitation-focused sanctions generally has increased over time.

Similarly, in several U.S. jurisdictions, lawyers can be placed on probation and subject to conditions as part of a disciplinary action, which may also include a period of suspension (see Standard 2.7 and Standard 2.8 of the ABA Standards for Imposing Lawyer Sanctions). Although the terms of probation may vary, requirements can include supervision by another member of the bar, undergoing a psychological or psychiatric evaluation, completing legal education courses, making restitution, writing and passing a professional responsibility exam, periodic trust account audits, and paying restitution to clients (see, for example, Section 3(a) of Rule XI of the District of Columbia Bar Rules; see also Levin, 1998, p. 24; Wernz, 1987). Studies of bar discipline processes in the United States show how lawyer discipline emphasizes rehabilitation and treatment where possible, especially when the lawyer's misconduct is caused by alcoholism, drug addiction, or mental illness (Guttenberg, 1994; Kelly, 1988; Levin, Zozula, & Siegelman, 2015; Luty, 2004; Rush, 2011, p. 924; Schneyer, 1991; Stone, 2009).

And the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (NZLCDT)—the independent statutory body which is administered by the Ministry of Justice and hears the most serious complaints against practitioners—also has discretion to provide for rehabilitation in appropriate cases. In addition to an order such as striking off or suspension, the Tribunal can impose rehabilitative sanctions if it finds that there has been unsatisfactory conduct or misconduct, such as requiring ongoing training or legal education, practicing under stringent conditions, practice management assistance, ordering of apologies, paying compensation to clients, payment of costs, periodic reporting, and inspection of the solicitor's practice (Buckingham, 2012, p. 331; Moore, Buckingham, & Diesfeld, 2015, p. 654). By contrast, disciplinary tribunals in the United Kingdom are not permitted to make rehabilitative type orders when imposing discipline (Haller, 2010, p. 96). While a full analysis lies beyond the scope of this study, the shift in emphasis in lawyer discipline cases towards rehabilitation can be attributed, at least in part, to a growing recognition of the pressures of modern legal practice, as well as a better understanding of mental health and substance abuse problems within the legal profession (Abel, 2008; Allan, 2009; Arnold & Hagan, 1992; Beck, Sales, & Benjamin, 1995; Langford, 2005; Levin, 1998; Rush, 2011; Seto, 2012; Stone, 2009; Zacharias, 2003, 2009).

Penalties for Different Forms of Misconduct

As noted previously, the case law arising out of lawyer discipline has established presumptive sanctions for certain categories of ethical misconduct, namely cases of misappropriation, mortgage fraud, or conviction for serious criminal offences (*Law Society of Upper Canada v. Bharadwaj*, 2012, para. 6). The jurisprudence, however, also recognizes that each case must be analyzed on its own merits, and the appropriate disciplinary action is determined by the benchers on an individualized or case-by-case basis (*Law Society of Saskatchewan v. Armitage*, 2009, para. 5; *Law Society of British Columbia v. Hordal*, 2004, para. 22; *Law Society of Upper Canada v. Kazman*, 2005, para. 270; *Law Society of Alberta v. Randhawa*, 2005, para. 35). The presence of varying combinations of mitigating factors may, in some cases, justify the imposition of less serious sanctions (*Law Society of Upper Canada v. Rosenthal*, 1999, para. 48). The next section summarizes law society case disposition data according to the types of misconduct.

Misappropriation

Notable differences in sanctions were observed in cases of misappropriation. Certain mitigating factors, such as lawyer impairment may explain, at least in part, the variation in disciplinary sanctions for this category of misconduct. Impaired lawyers may suffer from a range of conditions, including psychiatric illnesses, such as depression and anxiety disorders, personality disorders, emotional problems, alcohol and substance use disorders, and problem gambling (Goren & Smith, 2001; Moore et al., 2015; Rush, 2011; Stone, 2009). Although impairment ordinarily does not provide a complete defence to allegations of professional misconduct, it may be considered as mitigation when determining an appropriate punishment (see *Law Society of Upper Canada v. Simpson*, 2008, para. 16). The main types of impairment cited as an explanation for misappropriation include, stress caused by personal problems (e.g., marital difficulties, family problems) (n=88), mental disorder (e.g., depression, anxiety, gambling) (n=61), and substance abuse problems (n=36). I return to lawyer impairment as a mitigating factor in in Chapter 5.

Other factors influencing the imposition of a less serious sanction include the quantum and duration of the misconduct, as well as the target or victim of the lawyer's

misappropriation. Regarding the amount and duration over which the misappropriations took place, the discipline committee in *Law Society of Upper Canada v. Bruce* (1997) held that "petty dabbling into trust accounts is every bit as damaging to the integrity of the profession as the misappropriation of large amounts to satisfy greed" (para. 110) (cited with approval *in Law Society of Upper Canada v. Dyer*, 2004, para. 11; see also *Law Society of Upper Canada v. Lewarne*, 2006, para. 34). Yet this study identified several decisions that run contrary to this principle. In *Law Society of Upper Canada v. Horman* (1994), for example, the lawyer was suspended for 6 months with related conditions for misappropriating $3,200 from his clients' mixed trust account, as well as other less serious disciplinary violations. The decision of Convocation noted that the amounts involved were relatively small, the funds had been taken over a short period of time, and the money was repaid with no loss to clients. Similarly, in the *Biderman* (1991) case, the lawyer was suspended for 18 months with conditions for misappropriating a relatively small amount of money. The discipline committee concluded that the lawyer's admission of wrongdoing, cooperation, and candour were sufficient mitigating factors to impose a penalty less than disbarment.

An interesting finding that emerged from the analysis was that the law societies treated lawyers who were found guilty of misappropriating law firm funds with unusual leniency, compared to those who were found to have misappropriated client funds. There appears to be case law to support this principle. In *Law Society of Upper Canada v. Schauble* (2009), for example, the hearing panel observed that "misappropriation of funds from a firm has been held to be slightly less serious than misappropriation of a client's funds" (para. 28) (see also *Law Society of Upper Canada v. Frishette*, 2005a, para. 56). There were 18 cases in which the law societies disciplined lawyers who defrauded their partners or law firms. In terms of penalties, only five cases resulted in the lawyer's disbarment. These five cases involved multiple instances of professional misconduct, theft of both client *and* firm funds, or disciplinary infractions involving dishonesty. Moreover, evidence led in mitigation of penalty in these cases was insufficient to justify a reduced sanction (see, for example, *Law Society of Upper Canada v. Cooper*, 1991).

In the remaining 13 cases the disciplined lawyer was suspended from practice for periods ranging from 3 to 24 months. In *Law Society of Upper Canada v. Benaiah* (1993), the lawyer was suspended for three months for misappropriating $5,600 in funds

belonging to the law firm where he was employed. The misconduct in this case did not involve any improper dealings with clients. In *Law Society of Upper Canada v. Porter* (1997), the member was found guilty of professional misconduct for misappropriating more than $75,000 in client and firm funds and was suspended for a period of 12 months. The member had been involved in a motor vehicle accident, which resulted in significant intellectual and brain-related impairment. There was also evidence in mitigation of penalty that was received in camera due to the sensitive and highly personal nature of the material. The panel's decision to impose a lesser penalty was also influenced by the fact that the lawyer cooperated with the law society, made complete restitution of the misappropriated funds at great personal expense, and no client suffered financial loss or was put at risk by the lawyer's misconduct. And in *Law Society of Upper Canada v. MacKay* (1995), the lawyer received a two-year suspension with related conditions for misappropriating $35,000 in funds due to his law firm, and for preparing false articles of dissolution. The discipline committee found that MacKay was impaired by alcoholism at the material time and that his addiction caused his misconduct. In addition, there were mitigating factors arising from an admission of wrongdoing by the lawyer, lack of dishonest intent, and the fact that he had entered a treatment program for his addiction and was committed to recovery.

While the disciplinary jurisprudence in Canada draws a distinction between the misappropriation of client and firm or partnership funds, U.S. courts have held that a lawyer owes an equivalent fiduciary responsibility to his/her partners or law firm. To illustrate, in *Siegel* (1993), a decision of the New Jersey Supreme Court, the lawyer was disbarred for misappropriating more than $25,000 in funds from a law firm in which he was a partner. In determining the appropriate discipline, the Court stated, "[w]e see no ethical distinction between a lawyer who for personal gain willfully defrauds a client and one who for the same untoward purpose defrauds his or her partners" (p 167). The Court extended the application of the Wilson rule,[78] holding that that the theft of law firm funds by a lawyer will almost always result in disbarment. The Court's ruling confirmed that stealing from a lawyer's own firm undermines public trust and confidence in the bar in

[78] In *Wilson* (1979), the New Jersey Supreme Court held that, in the absence of compelling mitigating factors, the presumptive sanction for misappropriating client funds is disbarment.

the same way as the misappropriation of client funds. The approach taken in *Siegel* (1993) was reinforced in the Supreme Court of Wisconsin ruling in *Casey* (1993).[79]

Real Estate and Mortgage Fraud

The type and severity of penalties meted out to lawyers involved in mortgage fraud may vary widely depending on the seriousness of the misconduct and the level of complicity on the part of the lawyer. However, as the hearing panel noted in *Law Society of Upper Canada v. Mason* (2012b), "[d]ue to the manner in which the system is structured, it is difficult if not impossible to commit mortgage fraud without the complicity and assistance of a lawyer" (para. 14). The mental element required for a finding of professional misconduct arising out of a lawyer's involvement in mortgage fraud can be viewed along a spectrum, ranging from the minimum threshold of negligence, to recklessness, willful blindness and actual knowledge (*Law Society of Upper Canada v. Kazman*, 2005, para. 5). On that basis, the case law distinguishes between two distinct categories of professional misconduct: (1) knowing participation or assistance in mortgage fraud and (2) "abdication of professional responsibility" and "dupe" cases. A detailed examination of the meaning of fraud and its application to lawyer disciplinary proceedings is beyond the scope of this study. However, some general observations can be made.

In *Zaretsky v. Law Society of Upper Canada* (2013), the hearing panel observed that the jurisprudence relating to knowing participation or assistance in fraud is "well-developed and derives from the criminal law of fraud" (para. 184). A review of the extant case law in this area reveals two categories of knowledge that are necessary to support a finding of knowing participation or assistance in fraud: actual knowledge and imputed knowledge, which includes a willful blindness and recklessness (*Law Society of Upper Canada v. Hatcher*, 2012, para. 112; *Law Society of Upper Canada v. Kazman*, 2008, para. 43; *Law Society of Upper Canada v. Purewal*, 2009, paras. 29-32). Actual knowledge of fraud is demonstrated by showing that the lawyer knew that what he or

[79] The Court stated, "we take this opportunity to put members of the bar on notice that in the future the court will treat an attorney's misappropriation of funds belonging to another lawyer, associate or firm in practice with that lawyer no differently than it treats misappropriation of funds belonging to a lawyer's client. In each case, the lawyer violates the basic professional duty of trust, not only as attorney but also as fiduciary, and a refusal to fulfill that responsibility will be disciplined severely" (pp. 341-342).

she is doing is wrong, and that the act could result in actual harm or a foreseeable risk of harm (*Law Society of Upper Canada v. Purewal*, 2009, para. 30). Willful blindness arises when the lawyer suspects illicit activity and is aware of the need for inquiry, "but deliberately refrains from making further inquiries for fear of confirming those suspicions" (para. 32). Recklessness occurs where the lawyer is aware of a risk but proceeds despite that awareness (para. 33). As stated in *Purewal* (2009), recklessness and willful blindness represent a high level of culpability and are tantamount to actual knowledge. These two states of mind "serve as proxies for actual knowledge" (para. 31) because the lawyer "either actually suspects fraud and deliberately refrains from confirming it or sees the danger that this is fraud but takes the chance and proceeds anyway" (para. 33).

Professional misconduct falling short of knowing participation or assistance in fraud is commonly referred to as "abdicating professional responsibility," and as "failing to guard against becoming the tool or dupe of an unscrupulous client or individual" (see *Law Society of Upper Canada v. Cunningham*, 2012, para. 16). A lawyer who unwittingly becomes involved in a client's criminal or fraudulent activities generally is less morally blameworthy than one who has actual knowledge of wrongdoing. As stated in *Law Society of Upper Canada v. Fazio* (2009) "[a]n unwitting dupe is guilty of professional misconduct where he or she has facilitated or potentially facilitated his or her client's unscrupulous and often criminal conduct through carelessness, inattention or other neglect or abdication of professional responsibilities" (para. 83).

The presumptive penalty for knowing participation or assistance in fraud is revocation, absent exceptional mitigating circumstances (*Law Society of Upper Canada v. Mucha*, 2008, para. 23). This principle has been cited with approval in several law society discipline decisions (see, inter alia, *Law Society of Upper Canada v. Baksh*, 2012; *Law Society of Upper Canada v. Chin, 2017*; *Law Society of Upper Canada v. Hatcher*, 2012; *Law Society of Upper Canada v. Pachai*, 2011; *Purewal v. Law Society of Upper Canada*, 2009). The *Mucha* principle was also been upheld by the Ontario Divisional Court in *Bishop v. Law Society of Upper Canada* (2014) and the Ontario Court of Appeal in *Law Society of Upper Canada v. Abbott* (2017). Many of the "abdication" and "dupe" cases, on the other hand, tend to attract less severe penalties. A lawyer who is unwittingly duped into facilitating a client's criminality is less morally blameworthy than one who has actual knowledge of the dishonest or fraudulent conduct; hence, there is no

presumption that the lawyer's licence should be revoked (see, for example, *Law Society of Upper Canada v. McGee*, 2013, para. 2).

A total of 104 lawyers were found guilty of professional misconduct for their involvement in real estate and mortgage-related fraud. Several noteworthy findings emerged when comparing disciplinary sanctions across this category of misconduct. The types of sanctions imposed in mortgage fraud cases over the period of study are reported in Table 4-5. Suspension from practice was the most common disciplinary action, imposed in just under half (49 percent) of all mortgage fraud cases, followed by disbarment (33 percent) and permission to resign (14 percent). Much of the variation in sanctions can be explained by the disciplined lawyer's level or intent or knowledge. In 37 cases (36 percent), there was a finding of knowing participation or assistance in fraud or illegal activity. In 69 cases (64 percent), the law societies found violations of practice standards but could not find sufficient evidence to establish that the lawyer had knowingly assisted in dishonest or fraudulent conduct. These lawyers were convicted of the lesser offence of "failing to be on guard against being duped" or of abdicated professional responsibility.

If one considers cases where there was a finding that the lawyer committed professional misconduct by knowingly participating or assisting in mortgage fraud, a strong and consistent pattern emerges. All thirty-seven cases resulted in a resignation or license revocation. All but one of these cases were decided by the Law Society of Upper Canada. The figures reported in Table 4-5 indicate that the Law Society has taken a "get tough" approach in dealing with mortgage fraud. The regulator's hardline approach to disciplining lawyers involved in mortgage fraud may be due to the growing problem of mortgage fraud generally and the increase in suspected mortgage fraud cases in Ontario over the past decade and a half.

The range of penalties imposed in cases where the lawyer was found to be a "tool or dupe of unscrupulous persons" varied considerably. Two lawyers received only a modest fine. In one case, the hearing committee imposed a fine of $5,000, because of a seven-year delay by the law society in its investigation and prosecution of the lawyer (*Law Society of Alberta v. McConnell*, 2014). In another case, the lawyer was ordered to pay a fine of $5,000 and $10,000 in costs. The lawyer agreed to retire from the practice

of law and not apply for readmission for at least two years (*Law Society of Manitoba v. Wawrykow*, 2013).

Table 4-5 Sanctions imposed in real estate and mortgage fraud cases

	Lawyer's mental state		
Disciplinary action	**Knowing participation**	**Dupe or abdication**	**Total**
Revocation	32 (86%)	2 (2.9%)	34 (32.1%)
Resignation	5 (14%)	10 (14.5%)	15 (14.2%)
Suspension	-	52 (75.4%)	52 (49.1%)
Reprimand	-	1 (1.4%)	1 (0.9%)
Fine	-	4 (5.8%)	4 (3.7%)
Total	37 (100%)	69 (100%)	106 (100%)

Note: The number of sanctions (n=106) is greater than the total number of mortgage fraud cases (n=104) because, in two cases, the law society imposed more than one sanction in respect of the same offence.

A suspension from practice was the preferred sanction in many of these mortgage fraud cases. Fifty-two lawyers were suspended for one to twenty-four months (a mean of 5.3 months and a median of 3 months). The Appeal Panel in the case of *Law Society of Upper Canada v. Fazio* (2009) delineated a non-exhaustive list of considerations that should inform the appropriate penalty in "abdication" and "dupe" cases.[80] Relatively short suspensions were imposed for conduct characterized as by the tribunal as "unwitting" (*Law Society of Upper Canada v. Badley*, 2006; *Law Society of Upper Canada v. D'Agostino*, 2008; *Law Society of Upper Canada v. McKerrow*, 2002), or where misconduct could be attributed to factors such as naïveté, inexperience, and lack of mentorship (*Law Society of Upper Canada v. Benjamin*, 2011; *Law Society of Upper Canada v. Mason*, 2012a; *Law Society of Upper Canada v. Ola*, 2007). Suspensions at the higher end of the spectrum reflected the seriousness of the lawyer's misconduct, including the level of abdication, the lawyer's role in facilitating illegal

[80] The Appeal Panel stated the following: "[t]he level of moral blameworthiness of an unwitting dupe will be informed by various considerations, such as: the extent to which the licensee neglected or abdicated his or her professional responsibilities, the duration of such neglect or abdication, whether it was accompanied by other ethical breaches, its importance in facilitating the client's criminality and the extent to which the licensee personally benefitted from the subject transaction(s). Of course, these are not the only determinants of penalty; others include, but are not limited to, the impact of the misconduct or facilitated criminality on clients or victims, the size or quantum of the facilitated criminality, the extent of remorse, whether the misconduct is admitted and the need for proof obviated, and whether the misconduct was out of character or isolated or explained, in whole or in part, by medical factors" (para. 83). The Appeal Panel in *Law Society of Upper Canada v. Cunningham* (2012) extended the *Fazio* framework by adding two additional considerations, including the steps taken to alert the profession about the dangers of (mortgage) fraud, and the lawyer's level of experience (paras. 28-33).

activity, as well as the presence of aggravating factors, such as the lawyer's experience and failure to heed warnings from the profession about the dangers of mortgage fraud (*Law Society of Upper Canada v. Cunningham*, 2012; *Law Society of Upper Canada v. Lang*, 2008; *Law Society of Upper Canada v. Puskas*, 2013; *Law Society of Upper Canada v. Yungwirth*, 2003).

Two of the sixty-seven "unknowing dupe" cases resulted in the lawyer's licence being terminated, either through revocation or resignation. In one case, the lawyer failed to supervise his real estate practice and abdicated his professional responsibilities to law clerks resulting in a series of mortgage frauds. There were several aggravating factors in this case. The lawyer had had a significant discipline history and most of the frauds occurred after the lawyer had agreed to co-operate with a practice review and had accepted a plan of supervision resulting from an unrelated matter. The hearing panel concluded that revocation was the appropriate penalty (*Law Society of Upper Canada v. Mattis*, 2009). In a subsequent case, *Law Society of Upper Canada v. McSween*, 2012, the lawyer was found to have abdicated his professional responsibilities when he delegated complete control over his real estate practice to an unscrupulous law clerk. While failing to maintain oversight of his law practice, McSween's clerk orchestrated a series of fraudulent real estate transactions over the course of several months. Although the lawyer's neglect of his real estate practice facilitated his employee's criminal activities, the appeal panel imposed a penalty on the basis that the lawyer was an unknowing participant in the frauds. Given his lack of real estate experience and absence of a prior discipline record, the lawyer was permitted to surrender his licence.

Conviction for Serious Criminal Offences

Sanctioning trends similar to those described for mortgage fraud cases can be noted for lawyers found guilty of criminal offences. Twenty-five lawyers faced professional discipline because they were convicted of a crime involving moral turpitude, such as fraud or dishonesty. In all but one case, the criminal conviction arose out of conduct committed by a lawyer within the practice of law. In examining the types of sanctions imposed, the vast majority of these cases resulted in either disbarment (n=21) or permission to resign from the bar (n=3). In one case, the law society imposed a 34-month suspension for misconduct arising from convictions for multiple criminal offences, with reinstatement conditioned upon the lawyer demonstrating proof of successful

rehabilitation. Both the discipline committee and Convocation found that there was a clear nexus between the lawyer's drug addiction and his misconduct (see *Law Society of Upper Canada v. Rosenthal*, 1999).

This chapter presented descriptive statistics and some elaboration on the cases included in the study. It reported case outcome and sanctioning outcomes both within and across the various categories of lawyer misconduct. These data not only paint an overall picture of the reported disciplinary cases, but inform the second phase of the study, which examines the underlying psychological processes used by lawyers to rationalize and justify their unethical or criminal behaviour, and the extent to which these neutralizations are considered by adjudicators when imposing discipline. These findings are presented in the next chapter.

Chapter 5.

The Use of Neutralizations by Lawyers in Discipline Proceedings

This chapter examines the different ways in which lawyers justify and rationalize their professional misconduct by applying various techniques of neutralization. I explore how these techniques are used in the context of lawyer discipline proceedings. The chapter also considers the extent to which law society panels evaluate and respond to lawyer neutralizations in determining sanctions. That is, do they reject these neutralizations, or accept them as mitigating factors justifying the imposition of less serious sanctions? The hearing panel's inquiry into a lawyer's motivations and rationalizations may provide adjudicators with a more complete understanding of the defendant's conduct, possibly mitigating behaviour that would have otherwise attracted a harsher penalty.

The Nature and Extent of Neutralization in Lawyer Discipline Cases

Not all the techniques presented in Chapter 2 were present in the disciplinary cases, and some featured more prominently than others depending on the type of offence and other circumstances. This finding is consistent with prior studies showing that the use of neutralization techniques is both offense- and context-specific (Agnew 1994; Benson, 1985; Bryant et al., 2018; Copes, 2003; Hollinger, 1991; Landsheer, et.al, 1994; McCarthy & Stewart 1998; Mitchell & Dodder 1983; Sykes & Matza, 1957). Almost 70 percent of the lawyers in this study invoked multiple techniques when accounting for their wrongdoing. This finding is similar to prior research that finds that white-collar offenders tend to employ multiple techniques of neutralization in respect of the same offence (Benson, 1985; Copes et al., 2007; Copes & Vieraitis, 2009b; Evans & Porche, 2005; Gauthier, 2001; Haugh, 2014; Hollinger, 1991; Jesilow et al., 1993; Piquero, et al., 2005; Shover, Coffey, & Hobbs, 2003).

At a more general level, the most common techniques of neutralization lawyers used to account for their misconduct include denial of responsibility (77%), metaphor of

the ledger (75%), denial of victim/injury (30%), and the defense of necessity (17%) (see Figure 5-1). To a lesser extent, these lawyers employed the claim of entitlement (6%), appealed to higher loyalties (4%), and condemned their condemners (4%) in excusing or justifying their actions.

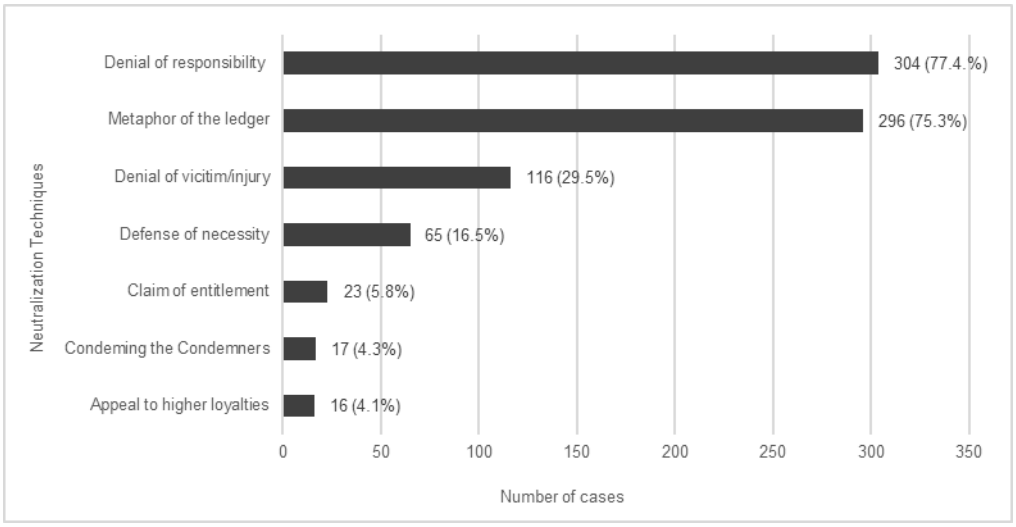

Figure 5-1 Number of cases in which lawyers used neutralization techniques

Further analysis revealed one or more variations within some of these techniques. For example, many lawyers denied responsibility for the actions by claiming their misconduct was the result of mental health or substance abuse problems, a mistake or accident, or by scapegoating others. Table 5-1 below provides greater detail on these techniques of neutralization and insight into whether law society hearing panels credit lawyer neutralizations as mitigating factors or reject them when imposing discipline against their members.

Table 5-1 Law society hearing panel's inquiry into lawyer neutralizations

Neutralizations	Subcategories	Accepted	Rejected	Unknown	Total
Denial of responsibility	Substance abuse and mental health problems	75	69	1	144
	Personal and emotional problems (e.g., divorce, family illness, child custody, stress)	45	39	1	85
	Physical impairment (e.g., medical condition, disability, illness, or disease)	25	25	-	50
	Inadvertence, mistake, technical breach, or inexperience	46	39	2	87
	Scapegoating or blaming others	9	44	2	55
Subtotal					**421**
Metaphor of the ledger	Good character evidence	109	39	6	154
	Cooperation with law society	126	17	6	149
	Absence of a discipline history	122	10	20	152
	Self-report misconduct	18	5	-	23
	Rehabilitative or remedial efforts	37	4	1	42
Subtotal					**520**
Denial of injury/victim	Restitution to clients whose funds were wrongly taken	58	26	1	85
	No one harmed by the misconduct	29	9	1	39
	"Borrowing" client money	6	13	-	19
Subtotal					**143**
Defense of necessity		9	56		65
Claim of entitlement		2	23	-	25
Condemning condemners		0	17	-	17
Appeal to higher loyalties		5	12	-	17

Denial of Responsibility

The most common neutralization technique lawyers used was denial of responsibility (used by 77 percent of the lawyers (see Figure 5-1) and variations on the technique appeared 421 times in the database (Table 5-1)). The data show that the denial of responsibility neutralization in its various forms can have a considerable impact on the sanctioning decision, even in cases where revocation is the presumptive penalty. In this study, lawyers attempted to deny responsibility by claiming their misconduct was

due to physical or mental incapacity, inexperience, error, or mistake, and by attributing blame elsewhere. Each of these excuses are elaborated below.

Lawyer Impairment

Almost half of all lawyers (n=193) subject to disciplinary action alleged they were impaired by psychological, emotional, or other medical problems, or some combination thereof at the time of misconduct. Table 5-2 provides a breakdown of the main types of impairment identified in the disciplinary cases.

Mental Health Conditions and Substance Misuse

Nearly thirty-seven percent (n=144) of disciplined lawyers cited a mental health condition or substance use problem as a defence or explanation for their professional misconduct. The main types of impairment in these cases were depression (n=79), anxiety (n=23), and gambling disorder (n=9), with six percent of lawyers alleging co-occurring psychiatric disorders.[81] Other types of psychiatric impairment, such as schizophrenia and bipolar disorder, accounted for only a small segment of the cases. Drug and/or alcohol dependence problems also featured prominently in the disciplinary cases. Roughly 10 percent of lawyers in the study (n=39) reported problematic alcohol use as the reason for their misconduct, and two percent (n=9) reported that abuse of drugs played a role in their disciplinary problems. And, nearly ten percent of lawyers (n=38) showed evidence of comorbid conditions, such as mood, anxiety, and substance use disorders.

[81] The details of the impairment were not reported in 21 discipline decisions. In many cases, reference was made to a psychological or psychiatric report received *in camera*, but that the evidence was subject to a non-publication order (see *Law Society of Upper Canada v. Jemmott*, 2008). In other cases, the hearing panel indicated that the lawyer had been experiencing "psychological difficulties" during the relevant period (see *Law Society of Upper Canada v. Amorim*, 1998), or noted that the lawyer had been undergoing psychological counselling or treatment for a pre-existing mental health condition, with no further information provided (see *Law Society of Manitoba v. Gorlick*, 2015). Although data on specific mental impairments were missing, these cases were nevertheless included in the analysis because the hearing panel considered the lawyer's impairment when imposing disciplinary sanctions.

Table 5-2 Physical and mental impairments identified in 193 disciplinary cases

Psychiatric impairment	Substance misuse	Emotional distress	Physical impairment
Depression (79)	Problem drinking (39)	Marital/relationship difficulties (33)	Heart disease or other cardiac problem (19)
Anxiety (23)	Cocaine (9)	Death, illness, or caring for a loved one (29)	Cancer (9)
Gambling disorder (9)	Prescription drugs (2)	Heavy workload, time constraints (19)	Old age/infirmity (6)
Personality disorder (3)	Methamphetamine (1)	Other (4)	Head injury (4)
Bipolar (4)	Marijuana (1)		Hypoglycemia (3)
Attention Deficit disorder (4)			Degenerative disorder (3)
Other (4)			Cognitive disorder (3)
Unknown (21)[82]			Blood disorder (2)
			Mobility impairment (2)
			Poor general health (3)
			Other (3)
			Unknown (6)

Note: The 193 cases involving claims of impairment generated 347 indications of physical or mental impairment.

Studies have shown that substance use and other mental health concerns are involved in a large percentage of lawyer disciplinary cases and malpractice claims (see, for example, Allan, 1997; Benjamin, Darling, & Sales, 1990; Elwork, 2007; Klingen, 2002; Krill, Johnson, & Albert, 2016; Moore et al., 2015; Ramos, 1994; Reddy & Woodruff, 1992; Rhode, 2002; Rush, 2011; Seto, 2012). These factors are often raised in defence or as mitigating factor in discipline cases. Mental impairment,[83] though not generally considered a defence to a charge of professional misconduct, is material to the assessment of penalty in cases where there is proof of a causal connection between the lawyer's condition or problem and the misconduct being considered (MacKenzie, 2001, p. 26-44; see also *Law Society of Alberta v. Fletcher*, 1996; *Law Society of Manitoba v.*

[82] In 21 cases, the hearing panel noted that the lawyer was suffering from impairment, however, the specific condition or illness was not reported by the law society. In most of these cases, the hearing panel reviewed material on the lawyer's mental health in camera. The underlying condition was described as a "psychological problem," "mental illness," "psychiatric illness," and "mental health issues" (see, for example, *Law Society of Upper Canada v. Parsons*, 1996).

[83] For the purposes of this study, the term "mental impairment" is used to refer collectively to mental illness, chemical dependency including alcohol or drug abuse, emotional problems, neurological disorders or diseases, or any other illness or condition that interferes with a lawyer's ability to carry out his/her professional duties (see Bernard & Gibson, 2004, footnote 1, p. 619).

MacIver, 2003; *Law Society of Upper Canada v. Mucha*, 2008; *Law Society of Upper Canada v. Reilly*, 1995; *Law Society of Upper Canada v. Rosenthal*, 1999).[84] That is, the evidence must address why the misconduct occurred, that the lawyer's actions are out of character, and is unlikely to be repeated should the member be permitted to resume practice (*Law Society of Upper Canada v. Mucha*, para. 28).

Impairment proved to be a key factor in deciding whether to impose a penalty other than revocation in cases involving serious financial misconduct. In just over half (52 percent) of disciplinary cases that involved alcohol, drug, or psychiatric impairment, the hearing panel found a sufficient nexus between the lawyer's condition and the acts committed, meeting the threshold of "exceptional circumstances" essential to imposing a lesser penalty.

As Table 5-3 illustrates, discipline panels were harsher on psychiatric impairment (54 percent disbarred) compared to substance misuse (38 percent), emotional stress (44 percent) and physical impairment (44 percent).

Table 5-3 Breakdown of disciplinary actions by types of impairment

Disciplinary Action	Types of Impairment				Total
	Psychiatric impairment	Substance misuse	Emotional distress	Physical impairment	
Disbarment	53 (53.5%)	17 (37.8%)	37 (43.5%)	22 (44.0%)	129 (46.3%)
Resignation	18 (18.2%)	8 (17.8%)	20 (23.5%)	16 (32.0%)	62 (22.2%)
Suspension	26 (26.3%)	18 (40.0%)	26 (30.6%)	11 (22.0%)	81 (29.0%)
Other	2 (2.0%)	2 (4.4%)	2 (2.4%)	1 (2.0%)	7 (2.5%)
Total	99 (100%)	45 (100%)	85 (100%)	50 (100%)	279 (100%)

Medical evidence was a key factor in ascertaining whether the impairment explained or caused the alleged misconduct. To illustrate, in *MacKay* (1995), the lawyer admitted to misappropriating $35,000 in funds from his law firm as well as attempting to deceive a client by providing the client with falsified documents. Although the lawyer's actions presented a *prima facie* case for disbarment, the discipline committee recommended a lesser punishment, noting that the lawyer's alcoholism was a "major cause" of his wrongdoing. Upon reviewing the medical evidence, the discipline

[84] In some jurisdictions, such as Alberta, the causal connection requirement has been described as the "but for" test (*Law Society of Alberta v. Anderson*, 1996).

committee held that MacKay's alcoholism constituted a disability that rendered him incapable of fulfilling his professional obligations. The benchers noted that MacKay had "suffered true alcoholic blackouts occasionally and suffered from seriously impaired judgment persistently, at the time of the misconduct" (para. 60) and that the acts of misconduct "were completely out of character and quite irrational" (para. 62). The report to Convocation also noted that the lawyer had entered into an addiction treatment program to facilitate his rehabilitation. Convocation adopted the Committee's recommendation of a two-year suspension and attached practice restrictions and conditions, including a requirement that lawyer maintain his involvement in Alcoholics Anonymous.

The case of *Law Society of Upper Canada v. Lachapelle* (1999) is also illustrative. The lawyer in this case was accused of misappropriating $71,000 from the estate of his late great aunt, for which he was the trustee. Lachapelle's apparent motive for making the unauthorized withdrawals was to finance his cocaine addiction. Although the hearing panel noted that the presumptive discipline in cases of intentional misappropriation is revocation, it found that the member's cocaine addiction effectively caused his misconduct, and that the misappropriations would not have occurred but for the addiction. The evidence also established that the lawyer had successfully completed a course of treatment prior the discovery of the misconduct, demonstrated an extended period of recovery without relapse, and was regularly attending support meetings. A review of the jurisprudence established that the period of suspension imposed in previous cases of misappropriation by addicted lawyers fell within the range of 12 to 24 months. In this case, however, the panel imposed a suspension of two months (with the option of either consecutive or non-consecutive months) and ordered the lawyer to enter into a monitoring agreement with the Law Society, which included attending a self-help support group, abstaining from illegal drugs and alcohol, undergoing monthly urinalysis and blood testing, and participating in other treatment initiatives to facilitate his rehabilitation. The panel said that the lawyer's case was exceptional "partly because of the addiction but also because of his conduct since admitting his addiction and his obvious dedication to recovery" (para. 16). In February 2017, Lachapelle was arrested following an international drug trafficking investigation by the Royal Canadian Mounted Police and charged with multiple drug-related offences, including conspiracy to import, traffic, and possess cocaine for the purpose of trafficking (Royal Canadian Mounted

Police, 2017). And in March 2019, Lachapelle was sentenced to a seven-year prison term after pleading guilty to conspiracy to traffic ("Baddeck man gets federal sentence", 2019).

And in *Law Society of Upper Canada v. Pennell* (1998), Convocation adopted the report of the discipline committee in which the panel recommended the lawyer be permitted to resign in light of a psychiatric disorder. The lawyer misappropriated $60,700 from an elderly client who had given the lawyer power of attorney over her bank accounts and financial affairs. He used the money to pay his personal debts and to fund the operation of his law practice. The lawyer told the panel his ethical failings were induced by mental health and personal difficulties. Pennell was diagnosed as suffering from dysthymia, or persistent depression disorder, with superimposed major depressive disorder ("double depression"[85]). A report from the lawyer's treating psychiatrist indicated that the lawyer was experiencing a major depressive episode during the relevant period. The psychiatrist also stated that Pennell's use of alcohol, in conjunction with his psychiatric disorder, impaired his judgment and was likely "a contributor to his current social and professional imbroglio" (para. 42). The hearing panel also heard that the lawyer was experiencing several personal issues at the time of his misconduct, including caring for his severely physically and mentally disabled son and the breakdown of his marriage. The panel found that the lawyer's impairment, coupled with the stress in his personal life, were significant factors mitigating against his disbarment. Other factors weighing in favour of a lesser penalty included an expression of remorse, full cooperation with the law society, and a voluntary undertaking not to practice law until the final disposition of the proceedings. For reasons never explained, panel members concluded that Pennell's behaviour was out of character, despite the member's extensive discipline history.

The case of *Murtha* (2007) provides an example of the hearing panel exercising discretion in allowing a lawyer to resign despite the absence of evidence correlating the psychiatric impairment with numerous acts of misconduct. Murtha admitted numerous acts of misconduct, including misappropriating nearly $200,000, billing for services not rendered, arranging high-interest loans for clients without their knowledge or consent, and misleading clients about the status of their personal injury cases and receipt of

[85] See Keller and Shapiro (1982) for a discussion of this disorder.

insurance settlement funds. Murtha, a highly decorated and discharged veteran, attributed his conduct to longstanding post-traumatic stress disorder dating back to his experiences during the Vietnam War where he served as a Corporal with the United States Marine Corp. He was also diagnosed as suffering from major depressive disorder ahead of his discipline hearing. The hearing committee considered two psychiatric reports in its deliberations and accepted without reservation the medical diagnosis and signs of impairment, but the benchers were "not convinced that the deliberate and orchestrated deceptions of Mr. Murtha inflicted upon his many clients are explained in full by the depression and disorder which he so evidently suffers" (para. 23). The committee's consideration of the appropriate penalty was clearly influenced by the personal background and circumstances of the lawyer. In determining whether the mitigating factors were sufficiently exceptional to justify the penalty of permission to resign, the panel noted:

> …[I]t is appropriate to accept the joint recommendations, based upon the rather unique factual circumstances of this case. It does so without an intention to create a precedent whereby diagnostic medical labels are readily available as grounds for avoiding disbarment. During a time in our political history when Canadians are reflecting daily on the sacrifices that are being made by those who agree to serve our Country and offer up the ultimate sacrifice to public service, there is an empathy and willingness within this Committee to show compassion and permit resignation. (para. 30)

In a unanimous decision, the committee accepted the parties' joint submission that the lawyer be permitted to resign his membership in the Law Society on the condition that he not apply for readmission for a period of 5 years, and that he reimburse the Lawyers' Fund for Client Compensation and pay the costs the investigation and proceedings prior to an application for readmission.

Not every case of a lawyer asserting mental illness or chemical dependency as an explanation for their conduct was successful in meeting the threshold of extraordinary or exceptional circumstances necessary to justify imposing a lesser penalty.[86] In 69

[86] As noted in *Law Society of Ontario v. Ejidike* (2018), exceptional circumstances "are not clearly defined in the jurisprudence, which allows flexibility in the types of circumstances that may be considered" (para. 35). In general, evidence of exceptional circumstances addresses *why* the offences were committed and that it is out of character and unlikely to be repeated (*Law Society of Upper Canada v. Mucha*, 2008, para. 28).

cases, the discipline panels considered but ultimately rejected the lawyer's proffered rationalizations for his/her conduct because the respondent lawyer either failed to establish 1) the existence of an illness or condition, 2) a nexus between the medical condition and the misconduct, 3) a record of treatment and/or rehabilitation and the unlikelihood of recurrence, or 4) the misconduct was so egregious as to preclude any deviation from the presumptive sanction, regardless of impairment of the errant lawyer.

To illustrate, in *Law Society of Upper Canada v. Barker* (2014), the member admitted that he misappropriated more than $125,000 entrusted to him on multiple occasions and used these funds to cover the operating expenses of his law practice. In support of his position that permission to resign was the appropriate disposition, Barker told the hearing panel he had been struggling with undiagnosed mental health problems, including depression and suicidal ideation, when the misconduct occurred. Although he had never been diagnosed with a mental disorder, Barker indicated that he contacted the Ontario Lawyer Assistance Plan (OLAP) for help. The lawyer testified that the OLAP case manager had described his misconduct as akin to a gambling addiction, although no evidence was tendered to substantiate that the case manager was a medical professional qualified to offer such a diagnosis. Barker further explained that his family physician had referred him to a mental health counsellor, whom the lawyer had only met twice before the start of the hearing.

The hearing panel was of the view that these meetings were "woefully insufficient to constitute evidence of a diagnosis of a recognized mental illness by a member of the medical profession" (para. 43). Moreover, neither expert testified at the hearing or submitted a report on the lawyer's behalf that he had a recognized mental illness during the period of misconduct. After reviewing the evidence and submissions on penalty, the panel concluded "[t]here was insufficient evidence to substantiate that Mr. Barker had a confirmed mental disorder that could in any way be linked to his repeated misappropriations…" (para. 56). The benchers agreed and revoked Barker's licence and ordered that he pay costs of $30,000.

The *Campbell* (2005) decision offers an example of the law society considering but ultimately rejecting evidence of mental illness as an excuse for a lawyer's misconduct. The solicitor in this case admitted that he misappropriated on ten occasions amounts totaling more than $1.25 million, along with multiple other counts of

professional misconduct. He attributed his misconduct to mental illness and other medical issues, which he said impaired his judgment. The hearing panel received a medical report from the lawyer's treating psychiatrist, which provided a diagnosis of hypomanic episodes. At the hearing, however, the psychiatrist conceded the diagnosis was based on subjective information received from the lawyer and was therefore incorrect. Furthermore, the psychiatrist was unable to relate the lawyer's behavioural changes to the period in which the misconduct occurred. In addition, the lawyer provided a letter from his physician, which indicated Campbell had suffered a heart attack and had undergone an angioplasty and triple bypass surgery. The letter also noted that, prior to these events, the lawyer suffered from chronic fatigue, which had been treated with antidepressant medication. The hearing panel, however, found the letter to be of little value in establishing a causal connection between the medical problems and the lawyer's misconduct. Upon a review of the medical evidence submitted by the lawyer, the hearing panel was of the view that it "failed to establish a direct causal link to the member's misconduct essential to imposing a lesser penalty" (para. 22). The panel unanimously concluded that the appropriate penalty in the circumstances was revocation of the lawyer's licence.

And in *Law Society of Upper Canada v. McLellan* (2009), a case involving multiple instances of misappropriation and other misconduct, the lawyer attributed his conduct to a longstanding mood disorder and urged the hearing panel to impose a two-year suspension with terms and conditions. McLellan presented medical evidence which established that his depression was a causal factor in his misconduct. A medical report from McLellan's psychiatrist indicated the lawyer "suffered from cyclical episodes of clinical depression, interspersed with sub-syndromal episodes of dysthymia, (less severe depression)" (para. 6) and that a nexus had been established between the mental illness and the professional misconduct (para. 7). Notwithstanding the causal connection between the lawyer's mental health condition and his misconduct, the medical evidence provided by McLellan's treating psychiatrist indicated that the lawyer's non-compliance with the prescribed course of treatment accentuated the risk of relapse, and therefore, a risk to the public. In addition, the lawyer had a prior discipline history for similar misconduct. The hearing panel ultimately determined that McLellan had presented insufficient evidence of rehabilitation and therefore declined to impose a penalty other than revocation.

There were a few notable cases where the law society discipline panels exercised discretion in granting leniency for members who were unable to demonstrate a nexus between their impairment and the underlying misconduct. In *Law Society of Upper Canada v. Bruce* (1997), for example, the respondent was disciplined by the law society for misappropriating client funds and other professional misconduct. The lawyer cited alcoholism, depression, and marital difficulties as the motivations underlying his misconduct. The discipline committee "was concerned about the virtual absence of evidence concerning the Solicitor's depression and alcohol abuse," yet it was "prepared to accept those factors when reaching [a] decision on penalty" (para. 108). Although committee members were sympathetic to the lawyer's circumstances, they were not persuaded that the facts of the case were sufficient to justify granting the lawyer permission to resign. The discipline committee recommended that the lawyer be disbarred. Convocation, however, granted the lawyer permission to resign, without giving reasons. This decision raises questions about the consistency of sanctions and whether comparable cases ought to receive similar treatment.

Another notable finding in the reported discipline cases was the way in which lawyers suffering from problem and pathological gambling were treated compared to those with other physical and mental health conditions. Although problem gambling is a recognized psychiatric disorder,[87] the hearing panels appeared reluctant to consider a lawyer's gambling addiction as a mitigating circumstance when imposing disciplinary sanctions. In seven of nine cases where problem gambling was presented as either an explanation or justification for misconduct, the respondent lawyer was disbarred, while

[87] The American Psychiatric Association (APA) first recognized gambling addiction as a mental disorder in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) (Temcheff, Derevensky, & Paskus, 2011, p. 213). The condition was originally termed "pathological gambling" and classified as an impulse control disorder. Subsequent revisions of the DSM (DSM-III-R, 1987; DSM-IV, 1994) contained minor changes, largely to the diagnostic criteria of pathological gambling (Petry, 2006, pp. 153-155). In the fourth edition (DSM-IV), the diagnostic criteria of pathological gambling were revised to reflect the condition's similarity to substance dependence, although it remained grouped with other impulse control disorders (Reilly & Smith, 2014, p. 2). The fifth edition of the DSM (DSM-5) includes significant revisions related to the diagnosis of gambling problems. Among these changes, pathological gambling was renamed as "gambling disorder" and the condition was reclassified as behavioural addiction (Petry, Blanco, Stinchfield, & Volberg, 2013). In addition, committing illegal acts was removed from the list of diagnostic criteria, and the threshold for diagnosis was reduced to four instead of five symptoms (Weinstock & Rash, 2014). These revisions reflect a growing body scientific literature showing that problem gambling closely resembles addiction to alcohol and other drugs (American Psychiatric Association, 2015; Grant, Potenza, Weinstein, & Gorelick, 2010; Petry, Zajac, & Ginley, 2018).

two cases recognized the lawyer's illness as a mitigating factor when deciding on a disciplinary penalty. In the two latter cases, the law societies held that termination of the lawyer's licence by way of permission to resign, rather than disbarment, was the appropriate disposition. It should be noted that both lawyers suffered from more than one impairment. In one case, the lawyer's misconduct resulted from a combination of depression, addiction to gambling, and marital difficulties (*Law Society of Alberta v. Frohlich*, 2014), while the other lawyer was suffering from a neurological disorder in addition to his gambling problem and had voluntarily undertaken to cease practice (*Law Society of Upper Canada v. Pollitt*, 2004).

Personal or Emotional Problems

Twenty-two percent (n=85) of the disciplined lawyers claimed they were experiencing severe personal or emotional problems (short of mental illness) at the time of their misconduct (Table 5-1). The specific types of emotional problems presented in mitigation included marital or relationship difficulties, custody issues, medical or other condition of a close family member, the lawyer's family situation, the sudden death of a loved one, financial stress, and professional burnout (e.g., heavy caseloads and time constraints). Forty-six lawyers indicated they were also struggling with substance use problems and other mental health concerns, in addition to suffering from emotional distress. These mitigation strategies, however, were typically presented independently of one another and therefore were treated as separate mitigating circumstances.

The case law indicates that evidence of severe emotional stress is material to the assessment of penalty in cases where there is a sufficient nexus between the asserted problem and the misconduct being considered, and evidence indicates the emotional problems have been satisfactorily resolved or are under control (see, for example, *Nova Scotia Barristers' Society v. Steele*, 1995). In particular, the law societies appeared to display an overly sympathetic attitude toward lawyers whose misconduct stemmed from stressful family circumstances. To illustrate, in *Law Society of Upper Canada v. Clarke* (2004), the hearing panel imposed a one-month suspension with conditions for professional misconduct arising from several instances of misappropriation and misapplication of trust funds. The member said his behaviour was precipitated by the emotional stress and responsibilities arising in his personal life. Panel members concluded that the unique personal circumstances of the lawyer, which included extreme

and ongoing financial pressures of raising a child diagnosed with autism, justified the very low penalty.

The *Findlay* (2001) decision is also illustrative. Findlay misappropriated trust funds on four occasions totaling more than $79,000. He admitted wrongdoing at a hearing before a Law Society of Upper Canada hearing panel but explained that his judgment was clouded by emotional factors. Findlay said that he experienced a number of family problems during the time of the misconduct: his seven-year-old daughter was diagnosed with leukemia; dealing with his ex-wife and her new spouse as a result of his daughter's illness; the responsibility of having to provide for two families and the economic stress associated with his daughter's illness; the dissolution of his law partnership with his brother; and the sudden death of his father in-law (para. 25). Also, a psychological report indicated that Findlay suffered from an acute stress disorder, but that he "had no propensity to re-offend" and "was not likely to repeat the misconduct" (para. 25). Both the hearing panel and counsel for the law society had a great deal of sympathy for the lawyer in respect of his problems and found that his life events constituted exceptional mitigating circumstances. In addition, the panel noted that the lawyer admitted the facts, was remorseful, and made complete restitution of the misappropriated funds. The law society imposed a two-year suspension from practice, with conditions on reinstatement.

At least 19 discipline cases highlighted the stressful and demanding nature of legal practice and the potential mitigating effect of stress and burnout. The hearing panel in *Law Society of Upper Canada v. Aguirre* (2009), for example, accepted the lawyer's evidence that his misconduct stemmed from an inability to cope with the stressors of an increasingly busy practice and complex workload. Panel members found that the lawyer, a sole practitioner, was completely overwhelmed by stress and that his practice was "severely compromised" as a result (para. 40). Aguirre's actions were further mitigated by the fact that he accepted the retainer funds in good faith and did not intentionally set out to steal money belonging to his clients. The panel found that the high levels of stress confronting the member at the relevant times, together with the absence of a dishonest motive, constituted an exceptional mitigating circumstance. After considering the evidence led in mitigation of penalty, the panel concluded that "[t]his is one of the rare instances when we believe permission to surrender…will both protect the public interest, and public confidence in the legal profession, and allow the Lawyer to pursue a

productive career in another field of endeavor" (para. 50). As a condition, the lawyer agreed not to seek readmission to the practice of law.

Similarly, the *Shah* (2016) case provides an example of a lawyer suffering great stress and anxiety as a result of family problems and taking on too much work and working outside of one's area of expertise. The lawyer, a recent immigrant to Canada, practiced abroad in the areas of family, criminal and civil law for ten years. The hearing panel heard that Shah struggled to find employment after his call to the bar and subsequently started a sole practice, doing mainly real estate work. He did not have adequate experience, knowledge, or mentorship in real estate law. The lawyer's practice expanded rapidly, and he was unable to keep up with the demands of his burgeoning practice. As a result, he became involved in a series of fraudulent real estate transactions.

Shah explained that he came under a great deal of stress in his practice at the time of the fraudulent transactions, which brought on anxiety, depression, and severe headaches. He said he faced additional stresses arising from several personal matters, including financial and family crises. The hearing panel found that the multiple stressors confronting the lawyer, coupled with his inexperience in real estate law, contributed to Shah becoming the dupe of unscrupulous clients. Other mitigating circumstances included the lawyer's expression of remorse, his understanding of the consequences of his actions, his cooperation with the law society's investigation, and his subsequent efforts to rehabilitate himself and to make amends for his conduct. In addition to a suspension from practice, the lawyer was required to undergo two practice reviews and undertake continuing professional development in real estate law and practice management.

Notwithstanding the recognition and general acceptance of personal and emotional stress as a mitigating circumstance, the data also suggest an element of disparate treatment with respect to techniques of neutralization involving evidence of emotional stress factors in cases of serious misconduct. There were multiple decisions imposing disbarment, despite evidence of acute and severe stress experienced by the lawyer. To illustrate, in *Poulakis* (2008), a case involving misappropriation of funds and other ethical violations, the lawyer attempted to excuse his conduct by claiming he was under extreme financial and emotional stress arising from acute family problems,

including caring for a parent suffering from Alzheimer's disease; a stepson with a serious behaviour disorder; his wife's post-partum depression, substance abuse, and attempted suicides; and the lawyer having to shoulder the responsibility of caring for two children with psychological and behavioural problems (para. 16). These events caused the lawyer to become depressed and anxious, which resulted in "decreased cognitive and executive functioning" and "a decrease in the standards of his work" (para. 18). In light of these circumstances, Poulakis urged the committee to allow him to resign. The hearing panel was "extremely sympathetic to the horrendous life events which have befallen the Lawyer in recent years" but concluded that permission to resign was not an appropriate disposition for the misappropriation of trust funds (para. 26). The lawyer was disbarred.

The law societies also appeared reluctant to consider emotional distress resulting from marital problems in mitigation of penalty in the disciplinary cases under study. In *Hogan* (1994), the member's licence was revoked after a Law Society of British Columbia panel found him guilty of professional misconduct for intentional misappropriation of client trust funds. The hearing panel rejected the lawyer's claim that his conduct was due to the breakdown of his marriage, as well as the acrimonious divorce that followed. The benchers noted that the lawyer had been under a great deal of personal stress at the relevant time but found that the turmoil in his personal life could not excuse the fundamental breach of trust demonstrated by his conversion of client funds to his own use.

Similarly, in *Law Society of Saskatchewan v. Nolin* (2008), the lawyer was found to have misappropriated a total of $2,800 in funds belonging to the law firm where he was employed, and that he concealed the thefts by preparing false accounting records, cheques, and trust statements. Nolin downplayed the nature of his conduct by characterizing the misappropriations as fees owed to the firm for work completed but not deposited to the firm's trust account. He insisted no client was at risk of losing any money and he ultimately repaid the firm. The lawyer suggested in his evidence and submissions that his conduct was precipitated by extreme emotional and personal stress resulting from marital separation and his firm's discovery of the thefts. As a result of his personal circumstances, Nolin said "his state of mind involved a state of diminished responsibility" when the violations occurred, and that this should mitigate in his favour on the question of penalty (para. 84). In support of his position, Nolin argued his conduct was an aberration rather than a reflection of his true character. The discipline committee,

however, found that the lawyer had not demonstrated the necessary causal connection between his personal problems and his misconduct. It noted, "[t]his was not a singular impulsive theft borne of fortuitous opportunity. Instead, it was a scheme devised to avoid detection, using the trust of his employer and the trust or naivety of his clients as providing the opportunity for concealment" (para. 94). Ultimately, the mitigating factors advanced by the member were not sufficient to overcome the presumption of disbarment for the misappropriation of funds.

Although Nolin's extensive cover-up efforts were considered an aggravating factor, the penalty imposed in this case appears unusually harsh given the relatively small amounts taken, the fact that the misconduct involved firm funds, no clients were suffered a loss, the funds were replaced, and the lawyer self-reported his misconduct to the Law Society and cooperated with the investigation and prosecution of the complaint. In 2011, a hearing panel of the Admissions and Education Committee allowed Nolin's application for reinstatement subject to a number of conditions (*Law Society of Saskatchewan v. Nolin*, 2014).

Physical Health Condition or Illness

Thirteen percent (n=50) of disciplined lawyers cited a physical health condition or illness as an explanation for their misconduct, some citing more than one issue. As shown in Table 5-1, the most common conditions included cardiovascular disease and other heart problems, cancer, old age/infirmity, and cognitive impairment. Like the approach taken to mental health and emotional problems, the discipline hearing panels also extended compassion and leniency to lawyers establishing a nexus or causal relationship between their health problems and the alleged misconduct.

In *Law Society of Upper Canada v. Pollitt* (2004), for example, the lawyer admitted to professional misconduct, which included misappropriating client funds and continuing to practice while under an administrative suspension. The evidence clearly established that the misconduct in question was directly attributed to the lawyer's medical condition. In 1993, the accused lawyer, in his early fifties, had been diagnosed with Parkinson's disease. The hearing panel noted that, prior to the misconduct and diagnosis, Pollitt enjoyed a long and exemplary career and reputation practicing law. As the disease progressed, however, Pollitt exhibited signs of impaired judgment and changes in his personality, and he was suffering from serious physical limitations. It was

clear that the lawyer's medical condition served as the catalyst for his ethical failures. Based on all the evidence received, and the fact that the lawyer was medically incapable of returning to practice, the hearing panel accepted the joint submission of the parties that the member be permitted to surrender his licence.

In the case of *Stone* (2012), the member escaped disbarment by virtue of his advanced age and infirmity. A disciplinary panel of the Law Society of Upper Canada found that the lawyer was a knowing participant in a series of mortgage frauds totaling more than $3 million. Following a contested hearing, the lawyer, through his counsel, accepted responsibility for his actions and expressed profound regret that he had failed to represent his clients. Stone, who was 77 years old at the time, cited his overall poor health as the underlying cause of his unethical behaviour. The lawyer suffered a series of strokes and had been out of practice for four years as a result. He also blamed others for his wrongdoing, including the bank for not vetting the subject mortgage transactions, members of his staff, and other parties involved in the transactions. Stone told the hearing panel he had no intention of reapplying to practice law in the future and asked if he could "bow out 'with grace'" (para. 30). Notwithstanding the presence of several aggravating factors—including the fact that some of the transactions occurred before the lawyer suffered his first stroke—the panel was persuaded that the circumstances arising from the lawyer's precarious health supported a deviation from the presumptive penalty of revocation.

In a number of other cases, panel members refused to consider a lawyer's ill health as an explanation or justification for misconduct. Exemplified in *Law Society of Manitoba Cherrett* (2015), the lawyer was found to have knowingly misappropriated client funds totalling $20,000 and of misleading his client with respect to the status of those funds. Cherrett's position was that he had not acted intentionally and that his conduct was triggered by a series of compromising physical and mental health issues, rather than an inherent flaw in his character. The medical evidence indicated that Cherrett was suffering from several medical ailments, including "sleep apnea, type II diabetes, prostate cancer, depression, past history of pulmonary embolism and osteoarthritis of both knees" (para. 8). Several letters of reference written on Cherrett's behalf also spoke to the lawyer's health challenges. On the issue of penalty, the lawyer submitted that it was within the panel's discretion to be "charitable" and impose a penalty other than disbarment (para. 10). In the panel's view, however, the evidence presented

by the lawyer's physician did not establish a causal connection between any underlying medical condition and the alleged misconduct. The panel also rejected Cherrett's claim that he suffered from diminished capacity at the time of the misconduct. Panel members concluded that there were no exceptional mitigating circumstances and ordered that he be disbarred.

Denial of Intent (i.e., Mistake, Inexperience, or Technical Breach of the Rules)

More than one in five (n=87) lawyers facing disciplinary action said their disciplinary problems were the result of inadvertence or careless or negligent practice, rather than dishonest or intentional conduct. They frequently described their offences as honest mistakes, oversights, or technical breaches of the rules. The most common excuses proffered among this group included appealing to inexperience and the lack of supervision or mentorship, poorly trained staff, inattention, and poor law office management and accounting practices, or a combination thereof.

A lawyer's mistake or error in judgment by itself does not necessarily constitute professional misconduct (*Law Society of Upper Canada v. Carey*, 2017, para. 50). The standard required for professional misconduct is whether the facts disclose a marked departure from the conduct expected of a competent lawyer in a similar situation (*Law Society of British Columbia v. Martin*, 2005, para. 171). The question to be determined is whether the lawyer's "behaviour displays culpability which is grounded in a fundamental degree of fault" (para. 154). As noted in Chapter 4, the fault element or *mens rea* can be established by negligence, recklessness, willful blindness, or actual knowledge (*Law Society of Upper Canada v. Kazman*, 2005, para. 5). The following case examples indicate that once misconduct is made out, a lawyer's mental state at the time of the offence is often considered by the hearing panel as a mitigating factor in determining the severity of sanctions.

The lack of early training and supervision may help to explain why some inexperienced lawyers are at a greater risk for being disciplined. Findings show that inexperience in the practice of law, while not excusing a lawyer's misconduct, featured prominently in decisions to impose a less severe penalty. As evidenced in *Law Society of Upper Canada v. Bracewell* (1998), Convocation of the Law Society of Upper Canada

accepted the discipline committee's recommendation that the member be permitted to resign given his inexperience in the practice of law and the absence of a dishonest or selfish motive. The discipline committee was of the view that the penalty of disbarment was inappropriate given that "the Solicitor's problems came about primarily as a result of neglect and inexperience as opposed to wilful misconduct" and that there was no attempt by Bracewell to benefit personally from his conduct (para. 133).

Also in the *Frishette* (2005a) case, a "a junior lawyer of very limited experience" was treated leniently by the Law Society following a finding that she had misappropriated funds belonging to the law firm where she was employed as an associate, in addition to other misconduct. Although Frishette's actions raised doubts about her candour and honesty, the hearing panel accepted the member's evidence and argument that the complaints made against her stemmed from her inexperience and lack of mentorship and supervision. Also, in mitigation, the panel "accepted that there was a distinction between appropriating clients' funds and appropriating funds of a firm, but that the distinction was not very great" (para. 56). The panel imposed a 12-month suspension and ordered that the lawyer complete a professional responsibility course before being readmitted to practice, practice under the supervision of another member, and complete a practice review program. Later that year, the lawyer's licence was revoked after a hearing panel found that she had engaged in professional misconduct with respect to 36 particulars, which included three misappropriations and other financial improprieties (*Law Society of Upper Canada v. Frishette*, 2005b).

New and inexperienced lawyers defending against allegations of mortgage fraud also invoked this strategy to deny their intent and responsibility. When accounting for their actions, these lawyers often admitted to wrongdoing; however, they insisted they were not knowing or willing participants in the schemes, but rather, failed to exercise due diligence and allowed themselves to be duped by fraudsters. Some lawyers claimed they were manipulated or deceived into facilitating dishonest and unlawful conduct. In *Law Society of Upper Canada v. Benjamin* (2011), for example, a newly called lawyer was found to have abdicated the responsibility for his real estate practice to paralegals and failed to exercise adequate supervision over their work. Benjamin's position was that he was duped by skilled fraudsters. He explained that his misconduct was precipitated by his inexperience and lack of supervision and training, rather than setting out to defraud his clients. Benjamin was a young and impressionable sole practitioner who had only

been in practice for about a year when the misconduct occurred. He had entered into an arrangement with an experienced real estate lawyer (who became his mentor), whereby his “paralegals” would operate their conveyancing business within Benjamin’s office. Benjamin did not maintain oversight of his real estate practice. He admitted that numerous real estate transactions took place through his office without his knowledge. The lawyer said he was encouraged by his “mentor” to defer to the paralegals and follow their direction. The hearing panel denounced Benjamin’s conduct as “serious and inexcusable” (para. 22), but considered his relative inexperience in the practice of law as a mitigating factor, noting the following:

> In this case, we are presented with facts that demonstrate that Mr. Benjamin was both inexperienced and had the misfortune of having a bad mentor. While this does not forgive him, these are significant mitigating factors and bring Mr. Benjamin within the category of dupe cases that involved relatively short suspensions. (para. 24)

The fact that the lawyer proactively contacted his lender clients and reported the matter to the law society and the police when he became suspicious of the frauds also weighed in his favour. The panel imposed a one-month suspension together with conditions of supervision and reporting to the Law Society in the event Benjamin chose to practice in the area of real estate law. In 2013, the Law Society lifted the supervision order to allow Benjamin to practice real estate law provided he maintain a mentorship relationship with a more senior lawyer (*Benjamin v. Law Society of Upper Canada*, 2013).

Similarly, in *Law Society of Upper Canada v. Mason* (2012a), the lawyer admitted that she had abdicated her responsibility for her practice and in so doing inadvertently facilitated a property flipping scheme. The lawyer was a relatively new call and sole practitioner with a general practice focusing on real estate law. In her evidence to the panel, the lawyer said she had become overwhelmed in her burgeoning law practice and that she had expanded beyond her capabilities. Mason testified that in her early days in practice, she had taken “anything that came in the door”, but that the bulk of her workload eventually was derived from residential real estate transactions (para. 3). The lawyer explained she had been inundated with a heavy workload and had been working long hours to keep up with the volume of files in her office. In further signs of trouble, Mason was dealing with staff absenteeism and turnover. She also explained that her

lack of focus and attention to her practice was the result of stress arising in her personal life, including giving birth to and caring for a newborn child, her mother was ill, and her husband frequently travelled for work and was away from home. The panel found that the lawyer had made "repeated, egregious errors" and had engaged in a serious dereliction of her professional duties (*Law Society of Upper Canada v. Mason*, 2012b, para. 7). Despite these aggravating factors, the panel concluded that her ethical violations resulted from "inexperience, lack of mentorship, and her misplaced trust in her clients", and that she "was not knowingly complicit in fraud, but was undone by naivety, ignorance, and gross negligence" (para. 8). Also weighing in the lawyer's favour, she co-operated with the Law Society's investigation, enrolled in professional education courses to remediate her lack of knowledge in real estate law, and she made substantive changes to her practice to prevent similar occurrences in the future. After weighing all the relevant considerations, the panel imposed a penalty of six months' suspension and ordered the lawyer to pay $25,000 in costs.

In several other cases, however, the law society hearing panels appear to have taken a hardline approach in dealing with a lawyer's inexperience as an explanation for misconduct. In rejecting a lawyer's level of experience as a potential mitigating circumstance or defence to acts of misconduct, disciplinary authorities have held that lawyers must take reasonable steps to ensure a reasonable and basic standard of competence and diligence. In *Law Society of Upper Canada v. Cunningham* (2012), the appeal panel held that "[a]ll licensees, regardless of their level of experience or lack thereof, are expected to familiarize themselves with their professional responsibilities" (para. 33). This is especially true for ethical lapses involving dishonesty, such as theft from clients and fraud. The rationale is that a lawyer (unless impaired by mental or other condition) is expected to know that stealing and acts of fraud are wrong.

In the *Ali* (2011) case, for example, the lawyer's licence was revoked after a Law Society of Upper Canada hearing panel found he knowingly assisted both vendor and purchaser clients obtain fraudulent mortgage loans in excess of $3 million in connection with 22 different properties. The evidence established that some of the transactions featured numerous red flags or indicia of fraud, which should have been apparent to the lawyer. Nevertheless, he failed to make reasonable inquiries regarding these key features or disclose material facts of the transactions to his lender and purchaser clients. The hearing panel rejected Ali's claims that his professional failures were caused by his

inexperience in the practice of real estate law, lack of a mentor or associate with whom he could review files, or adequately trained non-lawyer staff. In the panel's view, none of the lawyer's arguments excused or explained his repeated misconduct. The judgment noted that "[e]xperience in real estate law, having a mentor, having trained staff, or having an associate would not have informed [Ali] of anything that he did not already know, which was that his misconduct assisted the perpetration of fraud" (para. 16). There were no mitigating circumstances put forward by the lawyer that excused or explained his repeated and serious misconduct.

In *Law Society of Upper Canada v. Mattis* (2009), the lawyer was found to have completely abdicated the responsibility for his real estate practice to two law clerks whom he barely knew resulting in 15 mortgage frauds. Mattis, an employment and human rights lawyer, was called to the bar in 1997 and had been working as a sole practitioner. In 2001, he was approached by a law clerk who offered to start up a real estate practice in his name, using her services and network of contacts. He also engaged the assistance of another clerk in processing transactions through his office. Mattis rationalized his actions by claiming he had no experience in real estate law whatsoever and therefore delegated all real estate tasks and functions to his clerks. He acknowledged that he did not supervise his employees or conduct even a cursory review of their work. The three-Bencher panel rejected the lawyer's claim that his errors in judgment stemmed from his inexperience in real estate law. In a unanimous decision, Bencher Linda R. Rothstein, for the panel, stated:

> …we do not accept that the Lawyer's conduct over these many transactions can be explained by his inexperience or lack of an appropriate mentor. No lawyer needs a mentor to learn that he must directly involve himself in the work that he is asking his clients to pay for or that he knows very little about. We simply do not accept that a lawyer, no matter how long he has been in practice or how much he knows about the particular area of practice in which he thrusts himself, does not know that he must review documents before he signs them and supervise those who are not paralegals, let alone lawyers, and whom by his own account, he does not know well. (para. 36)

Although the admitted facts did not establish knowing participation or assistance in the frauds, the hearing panel, in a rare move, concluded that revocation was the appropriate disposition. The fact that Mattis had engaged in a very serious dereliction of duty was "a grave indictment of his judgment" and also created "a very serious risk to the

public" (para. 34). The panel also noted that the lawyer had a lengthy discipline history with the Law Society and that the misconduct occurred while the lawyer was under a plan of supervision with respect to his family law practice.

In the *Ehrlich* (2008a) case, an experienced real estate practitioner claimed he was coerced into participating in mortgage fraud scheme due to threats made against him. The Law Society of Upper Canada revoked the lawyer's licence after a disciplinary panel found the lawyer was a knowing participant in a series of mortgage frauds. The lawyer did not dispute his dishonest conduct but claimed that he was acting under duress and feared for his life. Ehrlich said "he had fallen into the clutches of what he calls the 'Russian mafia', that he was an innocent victim of their ruthless conduct, and that the same thing could have happened to any other honest Lawyer" (para. 54). During the penalty phase of the proceedings, the lawyer asked that he be given permission to surrender his licence on compassionate grounds, as he was suffering from a terminal illness. The hearing panel was sympathetic to Ehrlich's precarious health but noted that his illness was incidental to the offences and that there was no explanation from the solicitor addressing why the misconduct occurred, other than his claim of duress. The benchers did not believe the lawyer's evidence that he was coerced into participating in the scheme. They found the lawyer's explanation "to be wholly lacking in credibility", noting that he declined several opportunities to cut ties with the fraudsters (*Law Society of Upper Canada v. Ehrlich*, 2008b, para. 18). Several aggravating factors had also been established, particularly losses to clients, no offer of an apology or attempt at restitution, and the lawyer's prior discipline history. The hearing panel concluded that the appropriate penalty in the circumstances was revocation of the member's licence.

This neutralization technique was also used in cases involving misappropriation or conversion of client funds. At least fourteen lawyers attempted to downplay their misconduct by claiming they lacked intent. Those who denied responsibility in this way often reframed their conduct as "mistakes" or technical breaches of the rules resulting from carelessness, negligence, poor law office management and accounting practices, or a combination of factors. The law society hearing panels overwhelmingly ruled that inadequate bookkeeping procedures do not excuse a lawyer's misappropriation of client funds nor is it considered a mitigating factor on penalty. Illustrated in *Law Society of Upper Canada v. Cairns* (2017), the paralegal admitted he misappropriated $5,000 from a client and misled the client as to the whereabouts of the funds in question. During its

investigation, the Law Society also found an unexplained shortfall of more than $4,100 in respect of another client account. Cairns testified during the penalty phase of the hearing that his misconduct was due to poor bookkeeping practices and that he should be permitted to continue to practice with restrictions. The hearing panel rejected Cairns' argument, noting that "[h]orrible bookkeeping is not an exceptional circumstance justifying a lesser penalty…" (para. 56). The panel therefore ordered that the paralegal's licence be revoked and that he pay the costs incurred by the Law Society.

And in the case of *Law Society of New Brunswick v. [G.G.]* (2005), the lawyer was found culpable by a hearing panel of multiple counts of misconduct, including two instances of misappropriating client funds, lying to his clients and providing misleading statements to the Law Society to cover up the thefts, engaging in the unauthorized practice of law, and failing to file trust reports. In his evidence and submissions on penalty, the lawyer admitted he made a series of "mistakes" for which he was sorry. He asked the panel to impose a suspension accompanied by conditions rather than disbarment. The lawyer said he was under extreme personal and financial stress due to a breakdown of his marriage and family life and that his judgment was clouded during the period of misconduct. Although the lawyer apologized at his hearing, the panel expressed concern about the lawyer's apparent lack of remorse and insight into the seriousness of his misconduct, noting:

> …the Respondent declared that he deeply regretted his 'mistakes'. Yet, the theft from his clients…was more than a mistake. His misconduct was a calculated scheme to obtain funds from his clients under false pretences followed by lies to them and misleading statements to the Society to cover up the theft. Each of the misrepresentations and lies he uttered following the queries by his clients and the Society was designed to lead them to believe that the money was missing as a result of an accounting error on the part of somebody else… (para. 29)

The panel also noted that restitution had not made nor attempted by the lawyer. In the end, the panel members "were not satisfied that the considerations in favour of giving the Respondent a second chance were sufficient to outweigh our concern that he would again put his own interests before those of his clients under the inevitable stresses of the practice of law" (para. 33). The lawyer was disbarred. Notwithstanding the relatively small amount of money involved in this case ($1,459.95), the panel concluded that the only appropriate remedy for the lawyer's conduct was disbarment.

And in *Law Society of Upper Canada v. Henderson* (2003), the lawyer misappropriated more than $39,000 while acting as executor of a client's estate. At his disciplinary hearing, Henderson admitted to wrongdoing but insisted that it was not his intention to permanently deprive the estate of funds. Henderson was entitled to executor's compensation and legal fees for work completed, but he withdrew significantly more money than he had earned. The lawyer said he was unaware he had overdrawn on the account and that he stopped as soon as his accountant advised him of the deficiency. The hearing panel accepted Henderson's explanation for his misconduct and found that the misappropriations were inadvertent and unintentional. The benchers were satisfied that a short suspension was merited since there was no element of dishonest intent on the part of the lawyer. They also took into account several other mitigating factors, including the lawyer's impeccable character and excellent reputation in his community; he had practiced in Ontario for forty-five years without any discipline history; his wife had been sick for a number of years, causing the member a great deal of stress; he professed his contrition and cooperated fully with the investigation; and the fact that he made considerable efforts to repay the estate and had made almost complete restitution. In the circumstances, the hearing panel concluded that a four-month suspension, followed by co-signing controls, would adequately protect the public.

Externalizing Blame

White-collar offenders are also prone to scapegoating and externalizing blame rather than accepting responsibility for their actions (see Benson, 1985; Evans & Porche, 2005; Gottschalk, 2017; Kieffer & Sloan, 2009; Klenowski, 2012; Stadler & Benson, 2012). It is also common for lawyers facing professional discipline proceedings to rationalize unethical behaviour by blaming others for their ethical failings (Levin, 2012, p. 358). Fourteen percent (n=55) of the lawyers studied here rationalized their conduct by shifting the blame to others. Targets for blame often included law clerks, paralegals, bookkeepers, other members of the bar, and spouses or family members. As shown in Table 5-1, the disciplinary tribunals rejected this claim in 80 percent of the cases where it was raised. The apparent rationale is that once misconduct is established, continued denials and externalization suggest the offender lacks insight into his/her conduct, an acceptance of responsibility, or an understanding of the effect of the misconduct on others, which are indicators rehabilitation has not occurred (see, for example, *Law*

Society of Upper Canada v. Groia, 2013; *Law Society of Manitoba v. Gutkin*, 1997; *Law Society of British Columbia v. Kierans*, 1999). This reframing strategy was frequently used in cases involving mortgage fraud. In an effort to defend against misconduct charges, lawyers often claimed that the misconduct in question was not their fault. They characterized themselves as victims or scapegoats who were duped into facilitating or participating in a client's unlawful conduct. The following case examples illustrate how respondent lawyers created scapegoats or blamed others for their shortcomings.

In the *Nijhawan* (2009) case, the Law Society of Upper Canada revoked the lawyer's licence after he was found to have knowingly participated in mortgage fraud. The lawyer entered into an agreed statement of facts regarding his involvement in a series of mortgage fraud transactions. He admitted that he had been wilfully blind to his client's conduct but portrayed himself as a victim, claiming he had been "suckered" by a crooked real estate broker (para. 37). The panel was not persuaded by the lawyer's explanation, noting that "[u]nscrupulous clients cannot succeed in their dishonest conduct in transactions of the kind described in these proceedings, without the concurrence of an unscrupulous lawyer" (para. 10). Four years later Nijhawan applied for readmission to the Law Society. The panel found it troubling that Nijhawan continued to blame others for his failings, noting "he still speaks of being 'duped'" (para. 112). It was also concerned by the applicant's lack of planning regarding his future career path and mentoring opportunities, noting that he was at risk of reoffending. For these and other reasons, the application for readmission was dismissed.

In some cases, a lawyer's attempts to cast responsibility for their misconduct onto others was regarded as an aggravating circumstance. As noted earlier, the lawyer in *Stone* (2012) was found to be a knowing participant in a series of mortgage frauds totaling more than $3 million. The benchers considered the lawyer's propensity for blame shifting as one of many aggravating factors relevant to penalty. Throughout the proceedings the member denied wrongdoing altogether and assigned blame to other people and circumstances, including his law clerk, the bank for failing to obtain an independent market appraisal, the province's electronic land registration system, and other parties involved in the fraudulent transactions. Notwithstanding the presence of other aggravating factors, the panel found that the lawyer's failing health was sufficient to grant the lawyer permission to justify giving him permission to surrender his licence.

Several lawyers tried to avoid discipline by shifting blame and responsibility away from themselves and onto their employees. In *Law Society of Upper Canada v. Barna* (2004), the hearing panel found that the lawyer had engaged in multiple acts of professional misconduct, including misappropriation and misapplication of funds. The member admitted his misconduct by way of an agreed statement of facts but lacked insight into the reasons leading to the misconduct. He "blamed a succession of six or seven inept or dilatory bookkeepers, over a period of approximately four years, for all of his failures…" (para. 16). The panel members were of the unanimous view that revocation was the appropriate penalty (affirmed on appeal, see *Law Society of Upper Canada v. Barna*, 2006). Similarly, the lawyer in the *Harder* (2005) case was found to have intentionally misappropriated client funds for his own personal use. Throughout the proceedings, the member denied responsibility for the trust shortages and attempted to attribute his misconduct to an inexperienced and untrained bookkeeper. A Law Society of British Columbia hearing panel did not find the Harder's explanations to be credible, noting that "[i]t is indeed regrettable that the Respondent found it necessary to identify [his bookkeeper] as the cause of his difficulties when indeed the Respondent was the sole author of his misfortunes and ought to have taken responsibility for the same" (para. 69). The lawyer also cited his depression as a factor contributing to his misconduct. The panel also rejected that explanation and concluded that there was no evidence of exceptional circumstances and that disbarment was the only suitable penalty for misappropriation of client funds.

In *Law Society of Alberta v. Scott* (2003), there was a finding that the lawyer breached trust fund accounting rules, and that he misappropriated firm funds by withdrawing money as payment towards legal fees for services that had not been provided. Regarding the more serious charge, Scott attempted to deflect accusations of misconduct by asserting his bookkeeper of 30 years, who was also his wife, made the withdrawals from the firm's trust account without his knowledge. The hearing committee found that the lawyer's actions were not entirely blameless noting, "[a]lthough Mr. Scott maintained that he had no knowledge that this was occurring and no intention to improperly take money from trust, the committee finds that Mr. Scott was wilfully blind to the problems with his trust account that were created by his wife" (para. 20). Although the committee indicated that wrongful taking or conversion of funds carries a presumptively serious penalty, having regard to the mitigating circumstances, it imposed

a fine of $7,500 for this disciplinary citation and a fine of $2,500 for breaching the law society accounting rules. The mitigating factors in this case included the fact that the member had no discipline history in 41 years of practice, restitution was made promptly, and no one suffered any financial loss. The committee also noted that the lawyer's wife was largely responsible for the misappropriations and that she had been experiencing serious personal difficulties, which had seriously affected her work and concentration.

And in one case, the lawyer attempted to neutralize his misconduct by placing the blame on another lawyer with whom he had entered into a partnership agreement. In *Law Society of British Columbia v. Schauble* (2009), there was a finding of professional misconduct arising from the misappropriation of funds of a law firm. The misconduct stemmed from an agreement between the lawyer and another firm to merge their respective law practices. In cross-examination, the member showed no remorse or acceptance of responsibility for his actions. Schauble asserted that it was his belief that he was entitled to retain all of the fees from client files he opened while he was practicing with the firm, rather than sharing the funds with the firm. In the alternative, the member asserted the defence of provocation as a justification for taking the money. Schauble testified he was induced to move his practice to join the law firm by an unkept promise of being referred all of the firm's personal injury work. As a result, Schauble took the position that he was entitled to those funds to offset losses he estimated were owed to him as a result of the breach of the agreement by the firm's principal. Through his counsel, the lawyer said his conduct was out of character and "was an unfortunate over-reaction to provocative misconduct by [the firm's principal]" (para. 14). In determining the appropriate sanction, the hearing panel noted, "[w]hile provocation does not justify the Respondent's actions, it does mitigate the penalty" (para. 29). The panel also considered 65 letters of reference and the testimony of a former partner of the firm who spoke on his behalf. In the end, the law society handed the lawyer a three-month suspension and ordered him to pay the costs of the proceedings.

Metaphor of the Ledger

The results described below show that lawyers found guilty of serious misconduct often sought to minimize the consequences of their offending through a combination of moral licensing and impression management techniques. Three quarters (n=296) of the disciplined lawyers in this study used various combinations of impression

management techniques in an attempt to salvage their tarnished identities, create a favourable impression with the hearing panel, and reduce or mitigate the degree of punishment. The following five impression management tactics emerged from the analysis: (1) evidence of past good character or reputation; (2) cooperation in the investigation and prosecution of the case; (3) the absence of a prior discipline history; (4) self-reporting misconduct; and (5) post-offence conduct, including proactive remediation, successful treatment, ongoing recovery, or other evidence of rehabilitation. As shown in Table 5-1, these extensions of the metaphor of the ledger were frequently treated as mitigating factors when imposing disciplinary sanctions, although the precise weight or value attributed to any given factor was not always apparent.

Evidence of Good Character or Reputation

When accounting for their crimes, white-collar offenders often describe their actions as “isolated,” “uncharacteristic,” or “aberrational,” and not indicative of their true character (Benson, 1985; Haugh, 2014). They tend to portray themselves as heretofore law-abiding individuals in an effort to convey a favourable impression and receive lenient treatment from the courts. This dissonance-reducing strategy is facilitated through the use of the metaphor of the ledger. At sentencing, white-collar offenders adduce evidence emphasizing their prior good works, reputation, and standing in the community. In addition, these individuals contend they have “suffered enough” as a result of the stigma attached to a criminal conviction (Benson & Cullen, 1988, p. 208).

Sentencing studies have shown that defendants convicted of white-collar offences as a general rule benefit from sympathetic consideration by judges (Benson, 1989; Bureau of National Affairs, 1976; Coleman, 1985; Conklin, 1977; Haugh, 2014; Saxon, 1980; Van Slyke & Bales, 2012). In particular, the defendant’s social background and prior conduct (i.e., impeccable reputation) operate as a “status shield” and are seen as protecting white-collar and corporate offenders from the harsh sentences meted out to lower class offenders (Rosoff, Pontell, & Tillman, 2003, p. 413; see also Hagan, Nagel, & Albonetti, 1980; Mann, Wheeler, & Sarat, 1980; Rosoff, 1989; Tillman & Pontell, 1992; Wheeler & Rothman, 1982; Wheeler, Mann, & Sarat, 1988; Wheeler, Weisburd, & Bode, 1982; Wiggins, Dill, & Schwartz, 1965). It is believed that, because of their privileged status, judges more easily identify with defendants who come from similar backgrounds, and therefore are prone to leniency.

Character and reputation evidence is also common in lawyer disciplinary proceedings and can be a persuasive mitigating factor on penalty (Kelly, 1988, p. 504; MacKenzie, 2001, p. 26-45; Levin, 1998, p. 56; Reiter, 1978, p. 78).[88] Approximately forty percent (n=154) of the lawyers in this study introduced evidence attesting to their good character, standing, and professional reputation, during the penalty phase, ostensibly as a means of inducing sympathy and leniency from the panel. These lawyers described their misconduct as isolated, aberrational, and uncharacteristic. They buttressed their claims by introducing evidence of their current and past virtues, including their contributions to the profession (e.g., mentorship, pro bono, clinic, or academic work); public and volunteer service record; military service; charitable activities; awards; humanitarian work; and family background. It is also noteworthy that many lawyers emphasized their religious devotion and contributions to their religious communities as evidence of their positive character traits or qualities.

Evidence highlighting the lawyer's prior good conduct and character was adduced in the form of reference letters or testimony from witnesses—including community leaders, family members, clients, and members of the bench or bar, and other professionals—attesting to the lawyer's impeccable character and reputation. In a great number of cases, the disciplined lawyer's good character was bolstered further by the absence of a prior disciplinary record—an interrelated aspect of the metaphor of the ledger, which his discussed below.

Table 5-1 shows that the disciplinary panels were more likely to consider evidence of a lawyer's good character as a mitigating factor (n=109) than not (n=39), although the weight given to this factor varied considerably depending on the circumstances of each case. The cases made clear, however, that such a factor is treated as mitigating only if it is clear that the testimonials have come from individuals who are fully aware of the nature and extent of the lawyer's misconduct, and still consider him or her to be a person of integrity despite the misconduct (*Law Society of Upper Canada v. Durno*, 2015; *Law Society of Upper Canada v. McLellan*, 2009). The

[88] An empirical study of 290 misappropriation cases in several jurisdictions in the United States found that evidence of prior good character is one of the variables predicting that a lawyer who converts client funds will not be disbarred (see Kelly, 1988, p. 504).

following two case examples provide an illustration of how character evidence can have a powerful and persuasive effect on the sanctioning decision.

In *Law Society of Upper Canada v. Berns* (2014), the member admitted he committed professional misconduct by delegating responsibility for his real estate practice to his law clerk, resulting in several mortgage frauds. The lawyer explained that, during the time of the misconduct, he was attending to his family law practice, which had become increasingly demanding. Evidence was presented during the penalty phase demonstrating the member's exemplary character and background, including his commitment to improving access to justice and to providing legal services to vulnerable persons. The hearing panel noted that "[t]he Lawyer represents the poor and the marginalized in family cases, especially child protection cases. He does this work on Legal Aid certificates. By all accounts, he does his work well and is dedicated to his clients. He mentors young lawyers who are working in this field. A senior lawyer dedicated to this clientele is difficult to find" (para. 42). The panel also considered an array of favourable character letters filed on behalf the lawyer, noting:

> There has been an outpouring of support for the Lawyer from family, friends, clients and well-respected colleagues. The letters attest to his dedication to his clients and the profession, his honesty and compassion, and the knowledge and skill he brings to his work…He is described as 'ethical, honest, respectful, and fair.' Each person who wrote a letter was aware of the admissions contained in the Agreed Statement of Facts. It is clear from the letters, including one from a psychotherapist, that the Lawyer has learned from this experience and would be vigilant in any real estate matters in the future. The panel was impressed by the character evidence and feels it accurately depicts the Lawyer's character. (para. 41)

The Panel was of the unanimous view that the lawyer's conduct was an isolated incident and out of character, and that it was unlikely to be repeated. The lawyer was suspended for five months and subject to a supervision order following his return to practice.

In *Law Society of Upper Canada v. Rosenthal* (1999), the lawyer admitted that he engaged in conduct unbecoming a licensee in that he was convicted of several criminal offences, including fraud, forgery, and obstruction of justice. He was also found to have committed professional misconduct for offences that included failing to respond to the law society, breaching undertakings, and misusing escrow funds. The discipline committee heard a total of five complaints against the member. The Law Society was

seeking a penalty of disbarment on the basis of ungovernability. The majority of the discipline committee, however, found that the lawyer's problems were connected to his depression and addiction to heroin, which came about following the death of his brother. The lawyer tendered several character letters and *viva voce* evidence at the penalty phase of the hearing. The committee heard from Rosenthal's father, his peers, medical professionals, and other members of the community, all of whom were unwavering in their support of the member. All of the character witnesses made clear that prior to his heroin addiction, "the Solicitor was an extremely able, competent and intelligent lawyer who was, as well, compassionate to others" (para. 14), and that "the Member was an excellent lawyer, a highly intelligent individual who had much to offer and was a great asset to the profession" (para. 74).

The majority of the discipline committee recommended that the lawyer be suspended for 18 months, with reinstatement conditional upon proving his fitness to resume practice, together with other conditions. A Special Convocation met to consider the report and recommendations of the discipline committee. The majority of Convocation agreed that "the character and medical evidence heard by the Committee establishes 'significant mitigating circumstances' that justify imposing a lesser penalty than termination of membership – the penalty Mr. Rosenthal's misconduct would otherwise most certainly attract" (para. 77). Convocation lengthened the suspension to a period of 34 months, and imposed conditions relating to the lawyer's continued medical treatment and random drug testing.

Although evidence of a lawyer's prior good character is a relevant consideration in penalty hearings, the existing penalty jurisprudence indicates that character evidence, by itself, is not sufficient to vary the penalty for serious conduct that might otherwise result in disbarment (*Law Society of Upper Canada v. Benevides*, 1996; *Law Society of Upper Canada v. Bishop*, 2013, para. 23; *Law Society of Upper Canada v. Clarke*, 2011, para. 38; *Law Society of Upper Canada v. Greenglass*, 2006, para. 57; *Law Society of Upper Canada v. Mott-Trille*, 1997, para. 345; *Law Society of Upper Canada v. Mucha*, 2008, para. 29; *Law Society of Upper Canada v. Toneguzzi*, 1998, para. 43). The preceding analysis, however, revealed one case where the discipline hearing panel invoked a limited exception to this general rule.

In *Mott-Trille* (1997), the Law Society of Upper Canada found the lawyer guilty of professional misconduct for the misappropriation of nearly $1 million in client funds. The discipline committee concluded that the lawyer's conduct was inconsistent with his continued membership in the law society but recommended to Convocation that the lawyer be given permission to resign his membership in the Law Society. The committee acknowledged the general rule that evidence of prior good character would not in itself mitigate the presumptive sanction of disbarment where a lawyer knowingly converts client funds. In this case, however, the panel considered the character evidence it received on the Solicitor's behalf to be "exceptional" and stated:

> Over the course of his entire career, the Solicitor has contributed selflessly and generously to the well-being of those whom he has been able to assist…the Solicitor epitomized the tradition of public service in which the legal profession rightly takes pride. His contributions throughout his career…have been commendable and exceptional, and the Panel believes that well-informed members of the public would accept that though Convocation's duty to the public requires it to terminate the Solicitor's right to practise law, to spare him the indignity of disbarment would entail no violation of Convocation's duty to the public. (para. 345)

Convocation accepted the committee's recommendation that the lawyer be granted permission to resign. The member, however, did not file his resignation within the allotted time and subsequently was disbarred.

In a number of the observed cases, the hearing panels considered evidence of good character as a mitigating factor, but ultimately ruled that the evidence was insufficient to overcome the cumulative weight of the discipline violations, together with the aggravating factors presented. To illustrate, in *Law Society of Alberta v. Coultry* (2007), the lawyer was disbarred after a hearing committee found him guilty of numerous incidents of professional misconduct, including the misappropriation of client funds and attempting to conceal the misconduct. In mitigation, the hearing committee noted that the lawyer had no prior discipline record, made restitution of the stolen funds, appeared remorseful, and had a record of humanitarian aid and assistance to his local community (para. 15). Notwithstanding the character evidence, the lawyer's conduct was marked by acts of deliberate dishonesty and deception, including lying to the Law Society investigator, asking a client to lie on his behalf, and forging documents to cover up his activities. In the circumstances, the committee concluded that disbarment was necessary to maintain public confidence in the integrity of the legal profession.

The panel in *Law Society of Upper Canada v. Drabinsky* (2014) reached a similar conclusion concerning the weighing of the mitigating and aggravating factors. In this case, the member, a well-known entertainment and media lawyer, was subject to professional discipline arising from criminal convictions for fraud and forgery in connection with the collapse of a publicly traded theatre production company that he co-founded and led. The lawyer and his business partner planned and executed a large-scale accounting fraud by manipulating the company's financial records and statements to hoodwink potential investors. During the penalty phase of the proceedings, the lawyer admitted to the hearing panel that his conduct in relation to the frauds was unbecoming of a licensee. Drabinsky asked for a suspension and significant restrictions on his practice. In his evidence in mitigation of penalty, the lawyer submitted character letters authored by distinguished members of the bench and the bar and other prominent individuals, including former Prime Minister Brian Mulroney, retired Supreme Court justice Frank Iacobucci, former CBC boss Richard Stursberg, entertainment lawyer Michael Levine, and actor Albert Schultz. The three-member panel was undoubtedly impressed by the uncontradicted evidence, but noted it was insufficient to overcome the seriousness of the fraud the lawyer was found to have committed. The hearing panel concluded, "[a]lthough we recognize the contributions the Lawyer has made to the entertainment industry in Canada and the high esteem in which he is held by those who provided character references, the criminal offences he committed are inconsistent with continuing to hold a licence to practise law" (para. 62). The lawyer's licence to practice law was revoked.

And in *Law Society of Manitoba v. Anhang* (2002), the lawyer was disbarred after a law society investigation found he overcharged clients and intentionally misappropriated for his own benefit money which he was holding in trust on behalf of his investor clients. In an effort to draw sympathy from the panel, Anhang introduced more than a dozen character references from members of the profession and 49 other people, including several religious leaders, former clients, and members of the local community in which he volunteered. The panel assessed the character evidence and found it to be credible and consistent, noting the following:

> This panel recognizes that Mr. Anhang was a fine lawyer who gave a lot of time back to his profession and to his community. There does not appear to have been a pattern to his conduct. Indeed, his career, for 37 years, was distinguished and unblemished. This Panel was particularly

> impressed with the quality of the testimonials presented on behalf of Mr. Anhang. There is no question but that during the past 37 years, Mr. Anhang conducted himself as a man of integrity and honesty. He was caring and ethical. As was said by one of the people who provided the testimonials he 'exemplified the highest moral and ethical standards'. (para. 39)

Notwithstanding the lawyer's previous exemplary character and his contributions to the community, the committee said that Anhang's conduct amounted to a serious lapse in his ethics, integrity, and honesty. It also found the lawyer's actions to be "calculated and premeditated" (para. 42). The panel members were unanimously of the view that there were no mitigating or exceptional circumstances to vary the presumptive penalty of disbarment.[89]

In thirty-nine discipline decisions, the hearing panels accorded little or no mitigating weight to favourable character evidence tendered on the lawyer's behalf. In most cases, panel members refused to consider evidence of the respondent lawyer's character and background in mitigation, because the individuals who had written letters or testified at the hearing were not fully aware of the findings of misconduct made against the lawyer.

Illustrated in *Law Society of Manitoba v. Nadeau* (2013), the lawyer was ordered disbarred after he was found guilty of fifty-four charges of professional misconduct. Among the most serious discipline violations uncovered during a compliance audit, Nadeau misappropriated retainer funds from three clients on four separate occasions for his own purposes, he misled the Law Society's auditor during the course of the investigation, and he falsified records in an attempt to cover up his wrongdoing. Twenty of the particulars involved a breach of the lawyer's professional duty to act with integrity. Several letters of support were tendered at the penalty hearing from the lawyer's friends, clients, and colleagues, all attesting to his reputation as a highly respected member of

[89] In 2011, Anhang applied for reinstatement as a member of the Law Society. When asked to describe the circumstances that led to his disbarment in 2002, Anhang minimized his actions by saying "he got sloppy" and "made a big mistake" (*Law Society of Manitoba v. Anhang*, 2013, para. 27). He told the panel he was experiencing stress at the time due to his law practice and work in the community. The panel was concerned about the applicant's lack of insight into his conduct and determined that he had not fully accepted responsibility for what he had done. Anhang's application for reinstatement was dismissed. He then unsuccessfully applied for judicial review of the Law Society's decision not to reinstate him (*Anhang v. Law Society of Manitoba*, 2014).

the community in which he resided and practiced. The testimonials emphasized the Nadeau's "sensitivity, awareness and concern for Aboriginal issues and people" and encouraged an outcome that would eventually see the lawyer returning to practice (p. 12). The panel, however, was not influenced by the favourable character evidence, noting the following:

> Unfortunately, there is nothing in those letters which would lead us to believe that Nadeau has fully and frankly disclosed to their authors his discipline history and the conduct for which this panel has found him guilty. We do not know what those people might have said had they known all the relevant information. It is not surprising that professionals who have committed disciplinary offences will have some friends and supporters. A panel must always consider whether the character references have sufficient weight to overcome the need to provide the public with protection and maintain the reputation of the legal profession. Unfortunately, these letters do not meet that burden. (p. 12)

The panel also noted Nadeau had a lengthy discipline record dating back to 2005. In light of his discipline history, and the nature of the misconduct charges in the instant case, the hearing panel concluded that the lawyer was ungovernable and would likely reoffend if allowed to return to practice. It ordered that the lawyer be disbarred and pay costs in the amount of $20,000.00.

In *Law Society of Upper Canada v. Chin* (2015), a disciplinary panel found the lawyer was a knowing participant in six mortgage frauds. Several character witnesses provided evidence on behalf of Chin at the penalty hearing. All of the witnesses described the member as a person of considerable integrity and honesty. They testified about their personal knowledge of Chin's background and the challenges she faced as a recent immigrant and single parent. The hearing panel, however, determined that the testimonials were of little value in mitigation of the penalty because none of the witnesses were aware of the factual circumstances surrounding the lawyer's misconduct. The character witnesses were aware that Chin had committed professional misconduct, but generally understood her wrongdoing "as mistakes caused by her over-trusting others, or neglect in looking after details of documentation" (para. 8). The panel described the effects of the inadequate disclosure to the character witnesses as follows:

> At the penalty hearing, it became clear that Ms. Chin had not advised her character witnesses of the full extent of our findings about dishonesty . . . None of the witnesses had read our decision, nor were they aware that

> we found that Ms. Chin had lied under oath and had engaged in other instances of dishonesty. All of the witnesses were credible and well-meaning, but their testimony regarding Ms. Chin's good character was of limited assistance in view of their lack of detailed and adequate information about her misconduct. (para. 33).

And, although the character witnesses advised the panel that Chin was remorseful for her conduct, the lawyer herself did not accept responsibility for her actions. In weighing all the relevant factors, the hearing panel found that there were no mitigating or extenuating circumstances justifying a penalty other than revocation.

Cooperation with Disciplinary Authorities

Every lawyer has an affirmative duty to cooperate with a law society investigation, audit, or other inquiry, by all available means.[90] In *Law Society of Upper Canada v. Baker* (2006), the hearing panel explained the significance of this core obligation to protecting the public and preserving the public's confidence in the Law Society's ability to regulate itself as follows:

> It is of paramount importance that members of the Law Society co-operate with investigations and promptly and substantively respond to communications from the Law Society in order that it may fulfill its statutory mandate of governing the profession in the public interest. Members' failure to do so delays investigations, jeopardizes the collection of evidence including the recollection of witnesses, results in a backlog of investigations and can lead to an erosion of public confidence in the self-regulatory authority of the Law Society. (para. 6)

Failure to cooperate in an investigation—either by failing to respond to communications from the law society or by failing to produce information or records related to the complaint—is often regarded as an aggravating factor on penalty. Failing to cooperate in a disciplinary investigation or proceeding is also a separate disciplinary offence.

Although the law society rules and codes of conduct contain explicit provisions mandating cooperation, doing so may be seen as a mitigating factor on penalty. A lawyer's cooperation in the discipline process is often seen as a mitigating factor on

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[90] In British Columbia, for example, Rules 3-5(6) and (6.1) of the Law Society Rules, and Chapter 7, Rule 7.1-1 of the *Code of Professional Conduct for British Columbia*, require a lawyer to cooperate fully with a Law Society investigation into alleged misconduct.

penalty. In the present study, a total of 149 cases reported that the lawyer cooperated with the regulator throughout the disciplinary process. In eighty-five percent of these cases, adjudicators considered the lawyer's candour and cooperation as mitigating (see Table 5-1).[91] The mitigating value attributed to this factor was dependent upon both the timing and degree of co-operation of the lawyer. The decision to impose a lesser penalty for serious misconduct was more likely where multiple other mitigating factors were present, including an expression of remorse, acceptance of responsibility, making restitution to injured parties, any character evidence, and lack of any prior discipline. The following case examples offer insights into how a lawyer's cooperation with disciplinary authorities factored in the hearing panel's decision on penalty.

In *Elston* (2010), a Law Society of Upper Canada hearing panel found the lawyer had committed professional misconduct by misappropriating more than $60,000 in client funds. The panel noted that the lawyer's conduct warranted the penalty of revocation, but they carefully considered a number of significant mitigating factors in the lawyer's favour. Elston cooperated fully throughout the Law Society's investigation. When the lawyer was contacted by the Society's Spot Audit Program, he immediately informed them that his books were not current and within days hired an accounting firm who brought his books and records up to date. The panel was impressed that Elston "shared the [firm's] findings with the Law Society, which significantly shortened the investigation and readily admitted his misconduct" (para. 26). Also, the member reimbursed the trust shortage with no loss to clients. And the medical evidence established that the lawyer was suffered from an undiagnosed mental disorder and was abusing alcohol when these events occurred. After reviewing all the relevant mitigating considerations, the hearing panel reduced the sanction from revocation down to a four-month suspension and imposed specific conditions of supervision, monitoring, and reporting, noting that this penalty would adequately protect the public and allow the lawyer to continue his course of rehabilitation (para. 32).

In *Law Society of Upper Canada v. Verbeek* (2007), the lawyer was disciplined for his role in a mortgage fraud scheme, which was initiated and orchestrated by another member of the bar. The hearing panel found no evidence of recklessness or willful

[91] Cooperating with law society investigators during an investigation may cover a wide range of activities, including the production of files, documents, and other records; attending interviews and answering questions; admitting particulars; and entering into an agreed statement of facts.

blindness but noted that the lawyer's practice was in many respects "sloppy". The lawyer readily admitted professional misconduct and that his actions facilitated the frauds. In considering penalty, the panel regarded the lawyer's cooperation with disciplinary authorities as a mitigating factor, noting the following:

> The Panel was impressed with the candour of the licensee and his complete co-operation with the Law Society in its investigation. The Law Society investigators attended at the licensee's office on four separate occasions and were provided with all files and full access to his practice. Later he, at the Law Society's request, made readily available further files and records. He attended without counsel at the Law Society…and participated in a frank and full interview lasting four hours. His statements in this interview were not challenged at the hearing. He was extraordinarily co-operative. (para. 8)

Panel members concluded that a suspension of three months, together with lawyer's participation in a practice review program, would be an appropriate penalty in the circumstances.

No case could be found where a lawyer's cooperation with the disciplinary process justified a lesser penalty in cases involving serious professional misconduct. This mitigating factor, however, has been recognized in other ways, namely, on the issue of costs (see, for example, *Law Society of Upper Canada v. Shaw*, 2005, para. 8). In the *Winton* (2008) case, for example, the member admitted to misappropriating more than $225,000 in client funds and improperly borrowing money from clients of the law firm, of which he was a member. The lawyer stated that his misconduct was the result of serious "errors in judgment" and that he used the money to pay off his personal debt. In its decision on penalty and costs, the hearing panel recognized the lawyer's candour and cooperation as a mitigating factor. Winton provided full cooperation with the Law Society and entered into an agreed statement of facts, saving the time and considerable expense of a contested hearing. He also used his equity in the law firm to replace the bulk of the trust shortages, with outstanding sums owing subsumed in the lawyer's bankruptcy. The ruling, however, noted that the mitigating factors did not justify a deviation from the usual and presumptive penalty of revocation for knowing misappropriation of client funds. The lawyer's cooperation was found to be a relevant consideration in determining costs. The panel found that Winton's full cooperation "expedited the hearing and determination of this matter" (para. 28). Having regard to the

lawyer's cooperation with the proceedings, and his financial circumstances, the panel exercised its discretion not to award costs against Winton.

In 17 of the reported cases, the hearing panels considered in mitigation evidence of the lawyer's cooperation with the disciplinary process, but ultimately gave this factor little or no weight when imposing disciplinary sanctions. In the case of *Law Society of Upper Canada v. Kelly* (2011), for example, the lawyer asked the hearing panel to consider the fact that he admitted the facts and agreed to findings of professional misconduct as evidence of his cooperation in expediting the proceedings. The hearing panel, however, was not persuaded by the member's arguments, noting that the lawyer's cooperation with the complaint investigation was "somewhat illusory" and that "the agreed facts were essentially those that the Law Society set out in the Request to Admit; there never was an interview or any volunteering of information through the investigation procedure" (para. 16). The panel concluded that the aggravating factors in this case far outweighed any mitigating considerations.

Similarly, in *Law Society of Upper Canada v. McLellan* (2009), a misappropriation case, the lawyer claimed that various mitigating factors, including his cooperation in the Law Society, justified a lengthy suspension as opposed to surrender or revocation. The lawyer indicated he signed an agreed statement of facts and admitted his misconduct, thereby obviating the need for a full hearing on the merits. The hearing panel rejected the lawyer's submission. Adjudicators found that the lawyer's entering into an agreed statement of facts was not significant evidence of co-operation, or a strong mitigating factor, because he did so on the date of the hearing. As a result, "the Law Society had to prepare itself and 13 witnesses for the hearing. There was considerable inconvenience to the witnesses, and significant cost to the Law Society…The co-operation in entering into the Agreed Statement of Facts was too little, too late" (para. 21). In the panel's view, none of the mitigating factors relied upon by the lawyer constituted exceptional circumstances to warrant a variation from the usual penalty of revocation.

Lastly, in six of the disciplinary cases, the hearing panels made reference to the lawyer's cooperation with the discipline process, but there was no discussion of the weight attributed to this mitigating circumstance, or any indication as to whether this evidence had factored into the aggravation/mitigation analysis.

Absence of a Prior Disciplinary Record

The absence of a prior discipline history was frequently cited by lawyers as a means to downplay their professional misconduct. Those who invoked this mitigation strategy framed their conduct as an isolated occurrence in an otherwise exemplary and unblemished legal career. Those who invoked this strategy did so in an attempt to create a positive self-image and influence the hearing panel's perceptions and evaluations of them.

The absence of a prior disciplinary record was raised in mitigation of penalty in thirty-nine percent (n=152) of cases (see Table 5-1). However, according to some hearing panels, the lack of prior discipline is not an exceptional circumstance justifying a lesser penalty (*Bishop v. Law Society of Upper Canada*, 2014, paras. 29-31; *Law Society of Upper Canada v. Mucha*, 2008, paras. 19-30; *Law Society of Upper Canada v. Nguyen*, 2018, para. 69). Nevertheless, as shown in Table 5-1, the law society hearing panels overwhelmingly credited the respondent lawyer's heretofore clean disciplinary record as a mitigating factor when imposing discipline. The following case examples illustrate how this evidence, in combination with other mitigating circumstances, factored into the discipline committee's sanctioning decision, ultimately resulting in a more favourable disposition.

In *Law Society of Upper Canada v. Cunningham* (2012), the appeal panel set aside the hearing panel's finding that the lawyer had knowingly assisted in mortgage fraud and instead substituted a finding that the licensee abdicated her professional responsibilities in relation to multiple fraudulent real estate transactions. Upon reviewing the existing penalty jurisprudence, the appeal panel concluded that the lawyer's misconduct fell within the medium to severe range of the spectrum of abdication cases and that the appropriate penalty was a fifteen-month suspension, together with practice restrictions and a supervision order. The benchers also took several mitigating circumstances into account in reaching a decision on penalty, noting, "[t]he appellant's genuine remorse, otherwise exemplary character and lack of disciplinary record served as the most important mitigating factors" (para. 75).

And, in *Law Society of Upper Canada v. Katz* (2006), a Hamilton-area lawyer entered a guilty plea to four counts of professional misconduct, which included the

misapplication of $15,000, charging a client excessive and unreasonable fees, failing to honour an assessment officer's report and certificate, and receiving funds in trust as an undischarged bankrupt. Among the mitigating factors considered by the panel were that the member had no prior record in 28 years of practice in Ontario and he cooperated with the Law Society's investigation. The hearing panel also found it unlikely that the lawyer would repeat his behaviour. The lawyer was ordered to serve a 21-day suspension, cooperate in two practice reviews, and agree to being audited by the spot audit department upon his return to practice.

Some hearing panels considered the lawyer's otherwise unblemished conduct record and distinguished legal career as mitigation, but ultimately found that this factor insufficient to justify a reduced sanction in cases involving serious professional misconduct. Illustrated in *Law Society of Upper Canada v. Leich* (2006), the licensee (and his partner) faced a discipline hearing over their involvement in an advance fee fraud that bilked investors out of $1.5 million. The facts established that the Leich induced unsuspecting entrepreneurs to advance funds ("processing fees") to a sham corporation, which in turn, would grant them access a pool of collateral that would help them obtain startup business loans. The hearing panel found that the lawyer knowingly facilitated the fraud and "was a critical component of the improper conversion of processing fees" (para. 143). During the penalty phase of the proceedings, the lawyer asked the hearing panel to consider his 32 year of practice without a disciplinary record in mitigation of the presumptive penalty. The benchers appeared to give some weight to this mitigating evidence. However, in her ruling, panel chairwoman Bonnie Warkentin noted that "the lack of a discipline history was not sufficient mitigation to warrant a lesser penalty" (par. 167). Moreover, the aggravating factors—including the gravity of the lawyer's conduct and the significant losses to those who participated in the scheme—outweighed any mitigating considerations in this case. The panel concluded that revocation was the only appropriate disposition in the circumstances. The member was also ordered to pay costs to the Law Society and reimburse the Compensation Fund with respect to grants paid out to his former clients.

The absence of a discipline history was rejected as a mitigating factor in 10 of the cases under study. In *Law Society of Upper Canada v. Coady* (2010), for example, the member was involved in a fully contested and lengthy hearing with the Law Society. Ultimately, the hearing panel found that she had committed numerous acts of serious

professional misconduct over a period of 16 years. The evidence against the lawyer was overwhelming. The panel said it "struggled to identify any mitigating factors that might militate against our decision to revoke [the member's licence" (para. 24). Coady did not participate in the penalty phase, but counsel for the Law Society informed the panel that the member had no prior discipline. Despite the absence of any prior disciplinary record, the panel noted, "the evidence of misconduct in this case is staggering and almost without precedent" (para. 24) and that "[f]or 16 years or more, she has engaged in a pattern of misconduct, seemingly with impunity" (para. 29). It concluded that the lawyer was ungovernable and ordered that her licence to practice law be revoked. The member was also ordered to pay the Law Society $198,537.06 in costs, among other damages that were awarded to her former clients.

In twenty (5 percent) of the cases under study, the hearing panels referred to the lack of prior disciplinary history, but there was no indication as to whether this evidence factored in the aggravation/mitigation analysis. In most of these cases, this factor was mentioned when describing the background of the wrongdoing lawyer, was reflected in the agreed statement of facts, or was cited under the heading "Discipline History," without any elaboration or discussion of how it factored in the decision on penalty or recommendation as to the appropriate sanction.

Self-Reporting Professional Misconduct

The act of self-reporting is another compelling defence strategy that emerged from the sampled disciplinary cases. Although self-reporting to the law society does not absolve a lawyer's misconduct, it may be considered as a factor in mitigation of penalty, even where the presumptive sanction is revocation. One possible explanation for why self-reporting is viewed as a mitigating factor is that lawyers who voluntarily disclose their misconduct to authorities seemingly pose less of a threat to the public than those who cover up their wrongdoing (Khan, 2011, p. 22). Self-reporting demonstrates high integrity and professionalism, as well as actively taking ownership and responsibility for one's actions (*Law Society of British Columbia v. Williams*, 2010, para. 24).

Twenty-three lawyers (six percent) self-reported their misconduct to the law society. The hearing panel's inquiry into whether the lawyer's disclosure of wrongdoing constituted a mitigating factor was determined by the following three key factors: 1) the

timing of the disclosure, 2) the extent to which the reporting lawyer accepted responsibility and cooperated with the law society investigation and prosecution, and 3) whether the regulator would have become aware of the misconduct had the lawyer not reported it.

In 18 of these 23 cases, the fact that the lawyer self-reported the matter appeared to directly influence the hearing panel's decision on penalty. As noted earlier, in *Benjamin* (2011), the lawyer admitted that he engaged in a serious dereliction of duty by delegating control over his real estate practice to paralegals resulting in 12 mortgage frauds. The panel found that the lawyer's conduct, when he became suspicious of the frauds, was a significant mitigating factor and weighed in his favour. Benjamin immediately reported matters to authorities, and he cooperated fully with the Law Society and the police. Additionally, he proactively contacted his lender clients to alert them to the potentially fraudulent activity. The panel imposed a one-month suspension, together with supervision and reporting obligations.

Other lawyers demonstrated similar behaviour after becoming aware that their practice was being used to facilitate illegal or fraudulent conduct. In *Law Society of Alberta v. Venkatraman* (2014), for example, the member abdicated his professional responsibilities by failing to supervise one of his employees, which resulted in the lawyer's firm being drawn into a sophisticated large-scale fraud. Once the lawyer became aware that something was amiss, the firm quickly hired experts to determine the scope of the fraudulent activity. A forensic audit of the lawyer's books uncovered evidence of a trust account shortfall of approximately $1.9 million. The lawyer immediately reported the matter to the Law Society, and he and the other lawyers in the firm promptly replaced the missing funds from their personal resources. The lawyer also cooperated with the police, which resulted in criminal charges against those responsible for the fraud.[92] Notwithstanding the gravity of the misconduct committed by the lawyer, the hearing committee "considered as a significantly mitigating fact the swift steps Mr. Venkatraman took to replace funds and to investigate circumstances surrounding the conduct of [his former employee]" (para. 75). Moreover, the committee further noted that the lawyer's "conduct in the immediate aftermath of his discovery of his employee's fraud

[92] The employee was found guilty on 16 counts arising from the fraudulent scheme and was sentenced to a total of six years imprisonment.

reveals the nature of his character. His response was rapid, remedial, and forthright" (para. 86). The fact that the lawyer self-reported his conduct, reimbursed the trust shortages in a timely manner, and cooperated fully with the Law Society and the police were significant mitigating circumstances weighing in the lawyer's favour. The discipline committee handed the lawyer a one-month suspension and ordered him to pay the costs of the hearing.

In *Reiten* (2006), the hearing panel viewed the lawyer's self-reporting to the Law Society as sufficiently mitigating to justify permission to resign in place of revocation in a case of misappropriation and other less serious misconduct. The evidence established that the lawyer misappropriated nearly $45,000 in client funds. The panel was satisfied that Reiten, a new and inexperienced lawyer, did not set out to defraud her clients. Rather, her books and records illustrated that she was inadequately trained and overwhelmed by the demands of her practice. Both the Law Society and the panel placed great emphasis on the fact that the member self-reported the shortages as soon as she recognized that she was in difficulty. In addition, Reiten froze her trust accounts, made restitution, voluntarily closed down her practice, and executed an agreed statement of facts. The panel chair noted that "the member's conduct protected the public once the problems arose, exhibited professional acceptance of responsibility and met the standard of 'exceptional circumstances'" (para. 8). Given the member's exemplary conduct, the panel permitted the lawyer to resign from the Law Society, leaving open the possibility of readmission in the future. The hearing panels in two other cases found that the lawyer's self-report was an exceptional mitigating circumstance (see *Law Society of Upper Canada v. Guthrie*, 2002; *Law Society of Upper Canada v. Shawa*, 2000).

In five cases, the hearing panel considered and ultimately rejected evidence of the lawyer's self-reporting as a mitigating factor on penalty. To illustrate, in *Law Society of Saskatchewan v. Nolin* (2008), the misconduct involved the misappropriation of trust funds, concealed by fraud. The lawyer cited as a mitigating circumstance the fact that he self-reported his misconduct to the Law Society, and that his disclosure was voluntary. The discipline committee attributed little weight to this argument noting that, when first confronted about his misappropriations, "Mr. Nolin denied any wrongdoing and attempted to mislead and conceal his misconduct from his employer. He was ultimately forthcoming, but only in the face of inevitable discovery" (para. 100).

In *Law Society of Upper Canada v. Black* (1993), the discipline committee came to a similar conclusion regarding the circumstances which led the solicitor to report his misconduct to the regulator. The solicitor disclosed to a Law Society examiner, during the Society's investigation of an unrelated matter, that he had misappropriated more than $125,000 from a client's estate. He told the panel members that the meeting with the Law Society representative "was not in any way the cause of the disclosure, but that the disclosure was entirely voluntary" (online). The committee rejected the lawyer's argument, noting the following:

> …when the Solicitor originally took the funds from the estate he intended to treat the funds as his own until he heard from the beneficiaries or otherwise felt required to replace the funds because of an impending meeting with a Law Society representative. In light of this finding, we cannot treat the disclosure by the Solicitor as entirely innocent and voluntary.

Given the timing and motivation of the lawyer's disclosure, the committee unanimously held that the self-reporting was not a particularly significant mitigating factor. After reviewing the evidence, the committee found that the lawyer knew or at least was wilfully blind to the fact that he had improperly taken money from trust without the client's knowledge or consent for his own purposes. The solicitor subsequently was disbarred by order of Convocation.

Rehabilitation and Improved Competence

One of the many purposes of disciplinary sanctions, as reflected in the jurisprudence, is rehabilitation and improved competence of the lawyer (*Law Society of Upper Canada v. Strug*, 2008, para. 8; *Law Society of British Columbia v. Ogilvie*, 1999, para. 10; *Law Society of British Columbia v. Lessing*, 2013, paras. 57-60, 63-68; *Law Society of British Columbia v. Gellert*, 2014, para. 40; *Law Society of Upper Canada v. Rosenthal*, 1999, para. 21; *Law Society of Alberta v. Juneja*, 2014, para. 31; *Nova Scotia Barristers' Society v. Ayre*, 1998). And, as noted earlier in this chapter, most jurisdictions recognize evidence of mental impairment as a mitigating circumstance, provided the problem or disorder explains why the misconduct occurred, that the lawyer's actions were out of character, and that it is unlikely the conduct will be repeated if the lawyer is permitted to resume the practice of law (*Law Society of Upper Canada v. Mucha*, 2008, para. 28). The last factor (i.e., the likelihood of repeating the misconduct) requires

consideration of the rehabilitative efforts undertaken by the lawyer and the success of those efforts.

About 11 percent (n=42) of the disciplined lawyers in this study admitted wrongdoing but claimed in mitigation that they had voluntarily enrolled in a treatment or counseling program or had undertaken other remedial efforts to correct the underlying problem that led to their misconduct. Of the lawyers who invoked this rationalization, roughly sixty percent (n=24) attributed their conduct to psychological, emotional, or other medical problems, or some combination thereof. There has been in recent years an increasing awareness within the legal profession of addiction and mental health problems among lawyers, as well as the relationship of these issues to lawyer discipline (see *Law Society of Upper Canada v. Snidr*, 2014, para. 40; *Law Society of Upper Canada v. Vader*, 2013, para. 67; Legal Profession Assistance Conference, 2010). As the case examples below illustrate, rehabilitative efforts by a lawyer may be considered in mitigation of penalty where the condition or illness giving rise to the misconduct has been addressed (i.e., a history or sustained period of treatment and/or recovery with a favourable prognosis) and the likelihood of recurrence is low.

As Table 5-1 shows, the overwhelming majority of panels credited this neutralization as a mitigating factor when imposing discipline. In at least four cases, evidence of a lawyer's rehabilitation and recovery appeared to be a decisive factor in deciding to impose less serious sanctions. In *Law Society of Upper Canada v. Lachapelle* (1999), discussed earlier, the lawyer was suspended for two months after being found guilty of misappropriating $71,000 from his late great aunt's estate. The lawyer admitted he used the money to fuel his cocaine addiction but also attempted to excuse his actions by saying that he voluntarily sought treatment for his substance abuse problems, and that he had demonstrated a sustained period of recovery from his addiction without relapse. The hearing panel looked favourably on Lachapelle's rehabilitative efforts, saying "the member's case is exceptional partly because of the addiction but also because of his conduct since admitting his addiction and his obvious dedication to recovery" (para. 16). He was described as the "poster boy" for recovering addicts (para. 37). The three-bencher panel concluded that the lawyer's conduct was caused by his cocaine addiction. It determined that Lachapelle was at low risk to re-offend because he had demonstrated a sustained period of abstinence without relapse.

In *Nova Scotia Barristers' Society v. Van Feggelen* (2010), the lawyer pleaded guilty in connection with the misappropriation of approximately $30,000 in client trust funds. During the hearing, the lawyer testified that he had been suffering from undiagnosed and untreated depression at the material time, which he said was exacerbated by severe financial problems. The majority of the hearing committee dismissed Van Feggelen's attempts to rationalize his conduct based on financial stress (i.e., defense of necessity) but accepted evidence that the lawyer was suffering from severe depression and anxiety, and that his illness "caused him to be unable to appreciate the appropriate methods of dealing with his financial difficulties." The lawyer further submitted in mitigation that he sought professional help as soon as he recognized he was in difficulty, and that he had made extensive efforts to "rebuild his practice and his life" (online). The lawyer was diagnosed and treated for depression. The hearing committee noted that, as a result of medical and psychological treatment, "Mr. Van Feggelen finally began to understand that he had been struggling with depression for many years. He now had insight into how his mental illness affected his behaviours" (online). The lawyer's significant efforts to rehabilitate himself figured prominently in the majority's decision to impose a lesser penalty than disbarment. Committee Chair John McFarlane QC, for the majority, praised Van Feggelen's progress and commitment to ongoing treatment, noting that Van Feggelen "understands his illness and the events which trigger it. It is unlikely that his unprofessional conduct will be repeated" (online). At the conclusion of the hearing, the lawyer had already served a nine-month suspension pending a financial audit of his practice and books. The member eventually was reinstated to practice subject to a number of conditions and restrictions. The majority of the discipline committee determined that an additional term of suspension was not necessary in the circumstances but imposed conditions and practice restrictions for a period of two years.

In September 2012, Van Feggelen's practicing certificate was suspended after the law society received a complaint that the lawyer accepted $50,000 from clients respecting a pending property transaction and deposited the funds in his personal bank account, thus breaching conditions imposed in the 2010 discipline decision. During the investigation, the law society received a complaint from one of Van Feggelen clients, alleging that he misappropriated $15,000, which was supposed to be held in trust for a matrimonial settlement. An audit of the lawyer's personal banking records showed he

deposited the money into his personal bank account and that the money was then spent. In 2013, Van Feggelen faced another disciplinary hearing. He consented to being disbarred and was ordered to pay $10,000 in costs. The lawyer also agreed not to apply for readmission to the bar for a period of at least five years.

The study also revealed that the law societies considered remedial measures undertaken by a lawyer to improve professional competency as a mitigating factor. A total of seven lawyers attempted to mitigate their conduct for voluntarily taking remedial measures—such as completing continuing legal education (CLE) courses, self-imposed restrictions on practice and undergoing administrative, operational, and personnel changes—to correct various law practice management issues. In most cases, the hearing panels credited this neutralization as a mitigating factor in cases where the lawyer's misconduct appeared to result from negligence, poor judgment, and/or law practice management issues.

To illustrate, in *Law Society of Upper Canada v. Mason* (2012b), the lawyer admitted she abdicated her professional responsibility and failed to be on guard against becoming the dupe of an unscrupulous persons in relation to multiple fraudulent real estate transactions. The hearing panel found the misconduct in this case to be serious, noting "[t]he abdication of professional responsibilities…reached an egregious or extreme level" (para. 13) and that her negligence "played a key role in facilitating criminality" (para. 14). At her penalty hearing, Mason was remorseful and emphasized the extensive remedial efforts she had undertaken to improve her competency and avoid future misconduct. The panel was impressed with, and looked favourably upon, the lawyer's efforts and commitment to address deficiencies in her practice, noting:

> In addition to expressing extensive personal contrition, the Licensee demonstrated that she had engaged in substantial professional education to remediate her previous lack of knowledge, and that she had dramatically altered her practice protocols in order to ensure that similar problems would not recur (para. 16).
>
> This is a case in which she has demonstrated that her real estate practice no longer evidences the significant deficiencies that resulted in this proceeding. (para. 20)

In light of this mitigating evidence, the panel was of the view that the member did not pose a risk of engaging in similar conduct in the future and concluded that the

appropriate penalty was a suspension of six months. The benchers declined to impose conditions or practice restrictions, noting that the lawyer had practiced for seven years, including real estate law, pending the outcome of the investigation and hearing without further incident, and that her work during that period was “exemplary” (para. 20).

Overall, the findings presented in Table 5-1 provide empirical support for the notion that evidence of voluntary rehabilitation and improved professional competence are important mitigating factors when determining the appropriate discipline for serious professional misconduct. One possible explanation for these results, as noted above, is that these factors are relevant to the panel’s assessment of the risk of future misconduct—an objective of the discipline process—and is therefore inevitably drawn into the hearing panel’s decision on penalty. Unfortunately, it is difficult to quantify the extent to which this neutralization ameliorated the sanction for misconduct. All of the lawyers who cited rehabilitative or remedial efforts employed at least one other neutralization technique, with some using as many as six neutralizations. Nevertheless, the benchers’ statements in the discipline cases reflect a favourable consideration to timely rehabilitative efforts.

Denial of Victim/Injury

More than one third (n=142) of the lawyers in this study sought to minimize the harm or injury caused because of their misconduct. This neutralization often took the form of the offending lawyers accepting responsibility for their actions while simultaneously claiming in mitigation that their clients suffered no financial losses. This technique was frequently used as a means of excusing or justifying misappropriation or wrongful conversion of funds. Two main strategies were used by lawyers to deny the victim and injury associated with their wrongdoing. The first involved lawyers claiming they made restitution to persons whose funds were wrongly taken, while the second saw lawyers rationalize their actions by stating that they were merely “borrowing” the money and had every intention of paying it back later. As some of the case examples below illustrate, these two rationalizations are not mutually exclusive, but instead complementary.

Making Restitution to the Client

Restitution by the lawyer or a plan for restitution may be considered as a mitigating factor in misappropriation cases, particularly in those cases involving large sums of money (*Law Society of Upper Canada v. Kolman*, 2002, para. 29). Table 5-1 shows that this rationalization was cited by wrongdoing lawyers as a mitigating factor in a total of eighty-five cases and accepted in 68 percent of those cases. The weight attributed to this factor was determined by a number of factors including both the timing and motivation of the restitution payment. For example, did the lawyer make restitution voluntarily and in a timely manner, or was it compelled by factors such as a complaint filed with the law society, or after disciplinary proceedings were initiated or threatened? In the latter context, such evidence would receive little, if any, weight in mitigation. Other factors considered included the extent of restitution paid and the amount of money lost by the client(s) as a result of the lawyer's misconduct.

When the law societies accepted restitution as a mitigating factor the lawyer made restitution of all or a substantial portion of the misappropriated funds. It is important to note, however, that in all fifty-eight cases, the defendant offered more than one neutralization in respect of the same disciplinary offence. And in most of these cases, restitution was accompanied by evidence that the lawyer was practicing while impaired by mental illness, addiction, or other medical problems. Consequently, the presence of several neutralizations or mitigating factors sometimes made it difficult to assess how much weight was given to a member's restitution efforts in determining the appropriate level of disciplinary action. There were no cases in the sample where restitution by itself favoured a more lenient disposition.

The disciplinary panel's consideration of a lawyer's prompt payment of restitution as a mitigating factor is illustrated in *Law Society of Upper Canada v. Mallal* (1993). Here, the lawyer was disciplined for misconduct which included misappropriation and misapplication of trust funds. At an uncontested hearing, Mallal admitted his misconduct. He appeared to use denial of victim/injury neutralization technique when discussing his wrongdoing. In mitigation of penalty, he indicated that he had made full restitution to those clients whose funds he misappropriated, and that he repaid all of the money before any law society involvement. The hearing panel appeared to credit the lawyer's efforts to remedy any harm caused by his professional misconduct, noting that "[t]he

amounts misappropriated were relatively small and there was almost immediate restitution of the funds. The evidence included letters of satisfaction and withdrawal of the complaints from the clients whose funds had been taken…" (para. 44). In addition, the medical evidence established that the lawyer was suffering from a concurrent drug and alcohol problem at the time of these events, and that his errors were "substantially if not exclusively caused by the debilitating effects of his addiction" (para. 45). Also weighing in the lawyer's favour, he did not have a discipline history. He self-reported his misconduct, cooperated with the law society during the proceedings, and was making an effort to rehabilitate himself. The discipline committee and Convocation both accepted the joint submission of counsel that the lawyer be given permission to resign from the law society.

The law societies appeared to treat the denial of victim or injury neutralization as a significant mitigating factor, particularly where the lawyer made restitution to clients at great personal expense and sacrifice. In *Law Society of Upper Canada v. Porter* (1997), for example, the discipline committee looked favourably upon the lawyer's efforts to rectify the consequence of her misconduct. The benchers observed that "[t]he Solicitor made complete restitution and did so at a time during which her financial circumstances made it difficult for her to do so" (online). They also noted that "[n]o client suffered any disadvantage or was put at risk, either financially or otherwise, as a result of the Solicitor's misconduct" (online). Similarly, the hearing panel in *Law Society of Upper Canada v. Davies* (1994) remarked that the lawyer had made complete restitution of the misappropriated funds at great personal cost and that "[n]one of the clients are victims and none complain about their treatment. All have been re-paid" (online). And in *Law Society of Upper Canada v. Bredin* (1998), the panel recognized that the lawyer "made full restitution at great personal sacrifice to himself and his family" (para. 7). In all three cases, the panel determined that an underlying disorder or medical condition caused or contributed to the lawyer's misconduct.

In a somewhat comparable case, the panel in *Law Society of Upper Canada v. Mott-Trille* (1997) was unanimously of the view that the lawyer's commitment to making restitution to his victims from personal funds served as mitigation, despite his apparent motivation for doing so. The lawyer proposed a repayment schedule that enabled him to make full restitution to all clients who had lost money as a result of his conduct. He testified that approximately $1.5 million in personal and family assets were made

available to repay his creditors, including the proceeds of the sale of his matrimonial home and divestment from personal and retirement savings. The lawyer indicated that his old age pension and Canada Pension Plan payments were his only sources of income. On the issue of restitution, the unanimous decision states the following:

> The Panel is satisfied that the Solicitor has genuinely attempted to make good his client's losses, and that not only he but also members of his family have been required to divest assets in an attempt to do so. The Panel also accepts that the Solicitor has been required to live in financially straitened circumstances as a result. Although some of the payments that have been made have been the result of actual or threatened legal proceedings brought against him, the Panel nevertheless considers the Solicitor's desire to compensate his clients to be genuine. (para. 340)

In light of the lawyer's significant efforts to make restitution, together with evidence of his otherwise exemplary character, the panel recommended that the solicitor be granted permission to resign. Convocation accepted the committee's recommendation.

In at least five cases, the law societies were sympathetic to lawyers found guilty of unintentional breaches of the accounting rules, and where no client suffered any harm or loss or was put at risk as a result of the misconduct. In virtually all of these cases, the misconduct was identified by a spot audit or other means rather than a client filing a complaint with the regulator. In general, these lawyers attributed their errors to a busy practice, admitted wrongdoing, made complete restitution, and cooperated fully during the investigation. The case of *Law Society of Alberta v. Byron* (2014) is illustrative. In this case, the lawyer and her husband, who were in practice together, both faced discipline for the misappropriation and misapplication of client funds. The improper withdrawals and transfers were uncovered by a spot audit, and apparently were the result of poor accounting practices. The law firm immediately borrowed funds and deposited the money to the trust account to cover the shortage. In mitigation of penalty, the hearing committee noted:

> [Both lawyers] cooperated with the auditors during the LSA audit process and once the trust fund shortages were identified, they replaced those funds and they did so quickly. There have been no client complaints or losses. They worked closely and cooperatively with the LSA to get their accounts in order and they have continued to cooperate with the LSA and undertake the necessary education which has resulted in them being in compliance with the LSA rules for the past four years. Importantly, both

> Ms. and Mr. Byron have taken responsibility for their roles in the circumstances leading to the citations and both expressed great remorse. (para. 117)

The hearing committee accepted the joint submission on sanction. Timothy Byron was handed a two-month suspension, while Ludmilla Byron was suspended for seven months and required to apply for reinstatement. The Hearing Committee also imposed conditions on both lawyers and ordered them to jointly pay costs in the amount of $35,000.

There were twenty-six cases where the panels refused to consider a lawyer's restitution, or the fact that no client suffered any actual loss, as a mitigating factor when imposing discipline for serious misconduct. In *Law Society of Saskatchewan v. Nolin* (2008), for example, the lawyer was disbarred for knowingly misappropriating $2,800 in law firm funds and then concealing his conduct from his employer through fraudulent means. Counsel for the lawyer urged the panel "to regard the theft lightly as Mr. Nolin meant no harm to his clients and the funds were replaced" (para. 71). Since the work for clients had been completed, the lawyer further suggested that this was a matter between the member and his employer "that did not involve the clients or the public and it was therefore not necessary for the Benchers to act further to protect the public" (para. 71). The discipline committee, however, rejected the lawyer's characterization of the events and determined that repayment of the misappropriated funds did not qualify as a mitigation because restitution had been made only after discovery by the firm and the law society. That panel was of the unanimous view that the timing of the restitution was an indication that the member was motivated by the threat of a pending disciplinary complaint, rather than a genuine attempt to rectify the deficiencies.

In *Senjule* (2010), a disciplinary panel of the Law Society of Upper Canada refused to consider the lawyer's willingness and attempts at restitution as mitigation due to the timing of the payments, the source of funds used to repay the deficiencies, and the degree of harm flowing from the payments. The lawyer knowingly participated in 23 mortgage fraudulent mortgage transactions over a period of two and a half years. The licensee's lender clients sustained financial losses as a result of Senjule's misconduct. The only mitigating factor advanced by Senjule at the hearing was that he had repaid some of the amounts outstanding to those institutions. While some restitution was made to the solicitor's lender clients, the panel noted, "[u]nfortunately, Mr. Senjule actually took

money from other clients in order to make his restitution. Furthermore, he made restitution only after the Law Society notified him that they were investigating. The Hearing Panel does not give weight to his partial restitution as a mitigating factor" (para. 6). A unanimous panel held that there was no evidence of any mitigating factors and therefore revocation was the appropriate disposition.

And in *Law Society of Upper Canada v. Ingram* (2012), the disciplinary panel dismissed the lawyer's argument that he made partial restitution as a mitigating factor on penalty after he was found guilty of misapplying more than $3.1 million of his clients' money. The misconduct occurred over a period of two and a half years and involved more than 130 unauthorized transfers. The discipline panel found that Ingram made several unauthorized withdrawals from the firm's trust accounts and transferred the funds to a number of individuals, including family members. The lawyer then moved funds between various other client accounts without their knowledge or authorization to rectify the shortage created by the transfers. Counsel for the lawyer conceded that termination was warranted in the circumstances but suggested there were mitigating circumstances that would justify allowing the member to resign. In support of this submission she noted that Ingram had made partial restitution and that he was determined to repay all of his clients who suffered financial losses as a result of the member's misconduct. The law society found it troubling that "the $24,000 in restitution made to date represents less than one percent of the trust funds that were misapplied" and that Ingram did not attend the hearing to "provide an explanation of how he intended to make further restitution" (para. 18). Over $2 million remained unpaid at the time of the hearing. And, as an aggravating factor, over $2 million had been taken from a charitable foundation. The panel concluded that none of the mitigating factors presented by the lawyer were sufficient to justify a departure from the presumptive sanction of disbarment.

"Borrowing" Client Funds

Disciplinary measures taken against unethical lawyers often result not from the outright theft of client funds by a lawyer, but when lawyers "borrow" funds with a clear intention of repaying the money at a later date (Schneeman, 2008, p. 153). In the current study, 18 lawyers (4.5 percent) rationalized their misconduct by claiming they were merely "borrowing" the money and that they intended to pay back the funds once their

financial situation improved.[93] In most cases, it appears the lawyer acted out of desperation due to real or perceived financial problems, rather than greed or personal gain, and subsequently used the money to pay personal or business debts, or to correct shortages in other clients' trust accounts.

All lawyers know that intentionally taking money without the client's knowledge or authorization is wrong and can lead to serious discipline. The "borrowing" rationalization, however, allows would-be offenders to maintain a positive self-concept (as an ethical lawyer) and serves as the catalyst to the unethical conduct. By reframing the misappropriation in euphemistic terms, such as "borrowing," the lawyer is able to resolve the ethical dilemma posed by the unauthorized use of client funds, because the act is accompanied by a professed intention to pay back the "loan." By the lawyer's estimation, no one will be harmed because the money will be paid back in full once the anticipated money for repayment materializes (e.g., fees from other cases) (see Haugh, 2014, p. 3166).

The degree to which this rationalization operated as a mitigating factor varied among the disciplinary cases studied here. Some jurisdictions have held that a lawyer is guilty of misappropriation whether he/she intended to permanently deprive the client of funds (see, for example, *Law Society of Upper Canada v. Mikitchook*, 1998).[94] In the unreported case involving John Richard Simpson (1992), a Law Society of Manitoba discipline committee noted that misappropriating client funds, even for a short period of time, is no less reprehensible. The panel members stated, "[s]ave in special or exceptional circumstances, disbarment should follow convictions for misappropriation of clients' funds. This should be the case even when the misappropriation has been temporary and where the amount taken has been repaid prior to discovery" (cited in *Law Society of Manitoba v. Laxer*, 2002, para. 12). Similarly, in *Law Society of Upper Canada*

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[93] This figure represents the number of cases in which the lawyer's misconduct was distinctly characterized as "borrowing", although the number of lawyers who misappropriated funds only temporarily and with the intent to repay the money could be higher.

[94] Courts in other jurisdictions, such as the US, have also recognized this principle. In the case of *In Re Wilson* (1979), the New Jersey Supreme Court held that disbarment was the appropriate sanction for a lawyer who misappropriated clients' trust funds by borrowing the money without his client's knowledge or consent, even though the lawyer made full restitution. The Court wrote, "[w]hen restitution is used to support the contention that the lawyer intended to "borrow" rather than steal, it simply cloaks the mistaken premise that the unauthorized use of clients' funds is justifiable when accompanied by an intent to return them" (p. 458).

v. Axler (1992), the discipline committee stated, "[a]t the risk of sounding trite, it bears our stating the obvious: If you misappropriate funds, even if you intend to repay them, you are still a thief, and absent exceptional circumstances, thieves will not be allowed to remain in the profession" (online).

The disciplinary panels refused to consider the lawyer's "borrowing" rationalization as mitigation in more than two thirds (n=13) of disciplinary cases where this technique was invoked, even when the lawyer used the funds only temporarily and paid restitution. Illustrated in *Black* (1993), the lawyer contested a finding that he knowingly misappropriated over $125,000 from an estate for which he was the lawyer and executor. In his submissions, Black said he thought "he was merely an executor borrowing from the estate and that this was permissible" (online). In addition, the lawyer indicated that he always intended to repay the funds he borrowed from the estate, and ultimately did correct the deficiency. On that basis, counsel for the lawyer argued that Black "lacked the necessary intention or mental element for a finding of misappropriation" (online). The discipline committee did not accept counsel's characterization of the lawyer's conduct, noting the following:

> It is our conclusion that a Solicitor who is wilfully blind to (or in other words, so clearly should have known that he must have deliberately ignored) the underlying reality of the circumstances here, is sufficiently morally culpable to require disbarment. A solicitor in the position of Mr. Black who takes funds that reside in his mixed trust account clearly belonging to an estate of which he is the Solicitor cannot escape the ultimate sanction by deliberately ignoring that circumstance and focusing on his being executor of the estate as well and asserting that he thought he was simply borrowing from himself. It must be made clear that such conduct is misappropriation and will, absent extenuating circumstances, attract the most severe sanction that can be imposed. (para. 59)

Also, the panel did not give any weight to the lawyer's restitution as a mitigating circumstance because it appeared the payment was made under the pressure of an impending visit by the Law Society. Convocation accepted the committee's recommendation that the solicitor be disbarred.

A theme common to these cases was that the vast majority of the lawyers intended to pay back the money they had taken in due course; however, most were unable to make restitution because the economic turnaround they had hoped for never came about (see, for example, *Law Society of Upper Canada v. Axler*, 1992; *Law*

Society of Alberta v. Nickless, 2010; *Law Society of British Columbia v. Pomeroy*, 2001). To meet their financial obligations, many of these lawyers engaged in a common scheme known as “lapping” (i.e., “robbing Peter to pay Paul”) whereby the lawyer used funds earmarked for one client to make up for a shortfall in another client’s account. In most cases, the pyramid of peculation continued over the course of several months or even years; the lawyer’s financial difficulties were never resolved, and the money taken was never repaid.

This pattern of misconduct is exemplified in *Law Society of Upper Canada v. Scott* (2013) where the lawyer spent seven months attempting to repay debts created by his initial misappropriation. On the initial misappropriation, the lawyer said “he only needed approximately $50,000 but ‘not being a bookkeeping wizard or an accountant of any kind’ he thought it would look much better if he took the whole amount” (para. 11). Scott (2013) testified that, thereafter, “there were ‘problems and twists that I hadn’t anticipated’ and therefore the misapplication of other clients’ funds ensued” (para. 11). Similarly, in *Law Society of Upper Canada v. Godfrey* (1997), the lawyer said he was “in a panic” after the Law Society discovered a deficit in his trust account after a spot audit. He told the panel he was “desperate for money” and convinced himself that “the only way to get out of his predicament was to make a large amount of money and repay everyone” (online).

Several hearing panels expressed disapprobation for this type of conduct, noting that, as a matter of general deterrence, “other lawyers should be warned that this is a cautionary tale and anyone who decides to start a shell game … stealing from one client to repay what the solicitor stole from another client…will invite a harsh penalty” (*Law Society of Upper Canada v. Madigan*, 1999, para. 17). Some jurisdictions endorsed this approach even where restitution had been made. In *Law Society of Upper Canada v. MacKay* (1995), for example, the panel stated, “we would emphatically reject any suggestion that a solicitor who could afford to repay misappropriated funds should, ipso facto, receive a lesser penalty than one who could not” (online). The Law Society’s dismissal of the “borrowing” rationalization and restitution of funds sends the message to other lawyers that such behaviour cannot be excused and will result in disbarment.

While some disciplinary panels have held that a lawyer’s subjective intent is not a relevant consideration in determining the appropriate discipline in misappropriation

cases, others have found mitigation where there is no intent to permanently deprive the client of funds and where full restitution has been made and there is no actual injury or loss. In the case of *Tokar* (2001), for example, the lawyer was found guilty of misapplying and misappropriating funds belonging to various clients. The lawyer "kited" client funds between trust accounts in order to conceal the shortages. Tokar admitted the allegations made against him and accepted responsibility for his misconduct. The lawyer told the panel he was addicted to cocaine and was confronted by severe financial problems at the time he committed the acts. In mitigation of the presumptive penalty, the panel noted, "he 'didn't steal and run' and he laboured under the misapprehension that "somehow [he] would get the money and…would put it back and everything would be okay" (para. 8). The lawyer was granted permission to surrender his licence.

In *Law Society of Upper Canada v. Lewarne* (2006), the lawyer misappropriated client funds by depositing retainer funds into his personal account, rather than his firm's trust account, and then using the money for purposes other than those specified by the client. The panel denounced the lawyer's conduct, as illustrated in the following passage:

> A finding of misappropriation generally compels termination of a lawyer's ability to practice, most often through disbarment. This is a reflection of the seriousness of any misappropriation, regardless of the amounts or duration. The public interest compels such an approach. The public must be protected from lawyers who are prepared to deal with client funds as their own. Every misappropriation potentially undermines confidence in the profession as a whole. Penalties must also serve to generally deter others who might be like-minded. (para. 34)

After considering the totality of the evidence, however, the panel was prepared to accept the position of the parties that revocation was not required. The medical evidence provided by the lawyer's treating psychiatrist indicated that, in addition to high levels of stress and serious physical health concerns, the lawyer may have been motivated in part by his client's "attempted manipulations and mendacity with him" (para. 30). It was also noted that Lewarne gained no financial or material advantage as a result of his actions. The hearing panel found that "the misconduct was out-of-character and largely explained by significant stresses in the member's life. There was no intention on the member's part to permanently deprive the client of her funds. The member rectified the shortages in the trust account before the matter was reported to the Law Society" (para. 47). The panel

concluded that the appropriate disposition was a suspension for four months followed by significant restrictions upon the lawyer's practice.

Lastly, in *Law Society of Upper Canada v. Lewchuk* (1998), the lawyer misappropriated approximately $113,000 in funds from two estate clients. Having had established a thriving and successful law practice, Lewchuk determined that he could build his dream home. The member, however, suddenly found himself in financial crisis (victim of circumstance) after the economy entered a recession. He was unable to make payments for work done on his home. Instead of selling or refinancing the home, Lewchuk decided to "borrow" money from the two estates he managed. At his discipline hearing, the member asked the law society for permission to resign. In support of his position, Lewchuk explained that he had always intended to repay the estate funds and ultimately did make full restitution. In addition, he voluntarily disclosed what he had done when he was before the Law Society on an unrelated matter. The panel was particularly impressed with the lawyer's self-reporting, because "the accounts were not in his law office trust" and "they could have very well gone undetected" (online). The committee was also sympathetic to the acute financial situation facing the lawyer. Despite the presence of several mitigating circumstances, the panel held that "these factors in the Committee's opinion do not meet the criteria for permission to resign", and recommended the lawyer be disbarred (Ibid). At Convocation, the solicitor was given permission to resign his membership in the Law Society. Although the reasons for decision of Convocation were not provided, one can surmise that the evidence led in mitigation, including the lawyer's motive for taking the money and the ultimate repayment of misappropriated funds, influenced the Law Society's decision to impose a lesser penalty.

Defense of Necessity

Approximately seventeen percent (n=65) of the lawyers in this study invoked the defense of necessity as a justification for their professional lapses. Those using this technique claimed they acted out of desperation because of a severely strained financial

situation.[95] These lawyers perceived their actions as necessary under the circumstances and viewed the misappropriation of funds as the only solution to their cash flow problems. In almost every case the member admitted wrongdoing, however, the specific motivations for the offending behaviour varied. Whereas some lawyers cited financial difficulties, struggling legal practice, or divorce as factors precipitating their misconduct, others rationalized their actions as necessary to provide for their families.

As shown in Table 5-1, eighty-six percent of the disciplinary panels rejected a lawyer's poor financial situation as a mitigating factor or explanation for acts of professional misconduct. Various panels have held that the public interest compels such an approach (*Law Society of Upper Canada v. Byrnes*, 2013, para. 46; *Law Society of Upper Canada v. Kolman*, 2002, para. 37; *Law Society of Upper Canada v. Lubon-Butcher*, 2007, para. 56; *Law Society of Upper Canada v. Scott*, 2013, para. 18). Lawyers are regularly entrusted with large sums of money and "the public must be protected from lawyers who are prepared to deal with client funds as their own" (*Law Society of Upper Canada v. Lewarne*, 2006, para. 34).

Illustrated in the *Clark* (1997) case, the lawyer misappropriated approximately $10,000 paid to him for an infant settlement. The lawyer appeared to be driven by the "fear of falling" (see Chapter 2), as he took these funds out of desperation to help finance his law practice. In his submissions to the panel, Clark portrayed himself as a victim of circumstance. He testified that he was experiencing acute financial problems after he was denied a line of credit by his bank, leaving him with no money to fund his newly established law practice. Convinced he had no other options, the lawyer used the settlement funds to keep his practice going in the hope that he could eventually pay back the money he had taken from his client. The member asked the discipline committee to show compassion in allowing him to resign rather than be disbarred. The panel noted the following:

> As sympathetic as we are to the Solicitor's personal difficulties, the primary obligation of the Law Society is to protect the public. In the Committee' s view, this cannot be done if the Solicitor is allowed to return to practice. Permitting the Solicitor to resign would send the wrong

[95] In *Grim v. State Bar* (1991), a California court noted that "financial difficulties exist in virtually all misappropriation cases for the simple reason that it is usually the attorney's need or desire for money that is the motivation for stealing client funds" (p. 31).

> message to the profession and undermine the confidence of the public in the Law Society.

The discipline committee was unanimous in its view that disbarment was the only appropriate penalty in the circumstances, which was so ordered by Convocation. In 2010, the lawyer's application for readmission to the Law Society of Upper Canada was denied.

Similarly, the lawyer in *Pachai* (2010) justified his misappropriation of client funds as a matter of self-preservation. He framed his misconduct as necessary in a competitive business market. The lawyer was found to have participated in a scheme to defraud an insurance company of $1.5 million, with Pachai receiving $675,000 of that amount. The lawyer conspired with a senior employee of an insurance company client to falsify claims in order to obtain higher settlement awards for personal injury claims. Pachai explained his actions as "highly situational…and effectively beyond his control" (para. 64). The senior employee and architect of the scheme made it clear to the lawyer that he had the authority to assign files to individuals on the "preferred counsel" list. Pachai insisted he was not motivated by personal financial gain, but rather, participated in the suspect transactions out of fear he would lose his livelihood.[96] He urged the panel to consider a lengthy suspension rather than revocation. As noted in the following passage, the hearing panel was not persuaded by the lawyer's explanation:

> …economic need is something that can face any lawyer, and to succumb to economic self-interest by defrauding one's client is hardly a meritorious justification or mitigating circumstance...Economic self-interest, and indeed the desire to keep one's clients, are obviously strong forces which affect any lawyer, and would be present for Mr. Pachai in any resumption of practice. The fact that he betrayed his client in order to secure these advantages does not instil confidence that the same thing would not occur again. (para. 65)

The panel concluded that the defence of economic necessity and other mitigating circumstances presented by Pachai were not sufficient to rebut the presumptive penalty

[96] As Heath (2008) suggests, "[t]he competitiveness of the marketplace, and the workplace…means that if one individual refuses to perform an illegal act, he may simply be replaced by someone else who is" (p. 606). The individual therefore faces competitive pressures and "is thus subject to some sort of metaphysical 'necessity'" (p. 606).

of revocation for misappropriation of funds. The lawyer's appeal against penalty was dismissed by the Law Society.

Financial Stress and Mental Health

It is perhaps not surprising that financial hardship and poor mental health were intrinsically linked in as many as 28 (7 percent) disciplinary cases. Although it was not always possible to discern temporal ordering between these two variables—i.e., whether financial problems caused deterioration in mental health, or vice versa—the tribunals in most of these cases ruled that financial stress, no matter how severe, was not a mitigating factor on penalty. In *Law Society of Manitoba v. Nadeau* (2013), the hearing committee observed that "many practitioners have challenging financial circumstances and difficult areas of practice but never become the subject of disciplinary proceedings" (p. 11). Similarly, the panel in *Law Society of Upper Canada v. Bruce* (1997) stated, "[t]he fact that your practice is in economic difficulty…will not be a basis on which a solicitor is likely to be successful in obtaining [a reduced sanction]" (para. 111). And in *Nova Scotia Barristers' Society v. Van Feggelen* (2010), the majority held that "[u]ndoubtedly many lawyers experience personal financial difficulties. That does not justify misappropriation of funds" (para. 92). As evidenced in the following case examples, however, it appears the discipline panels had taken into consideration the personal financial circumstances of the lawyer when imposing sanctions for misconduct.

In the case of *Law Society of Alberta v. Leveque* (1997), the lawyer was found guilty of professional misconduct by the Law Society of Alberta for misappropriating client funds. Leveque admitted wrongdoing and said he used the money to keep his practice going. He told the committee that he was facing severe financial pressures and was also suffering from a depressive illness at the time of the misconduct. In a unanimous decision, the panel accepted the lawyer's explanation for his actions, stating, "it appears the Member's misconduct was attributable in substantial part to his depressive illness, exacerbated by financial concerns. He felt he had 'no choice' but to take the funds to pay expenses of his practice" (para. 12). The hearing committee was of the view that a two-year suspension with conditions was sufficient to protect the public. In justifying a lesser penalty, the panel noted that Leveque's actions were not motivated by greed or avarice, there appeared to be a lack of planning and deliberation, the member reimbursed the client, and he cooperated with the law society investigation.

Likewise, in the *Laxer* (2002) case, a Law Society of Manitoba hearing panel applied the same legal reasoning in disciplining a lawyer who misappropriated $2,867.90 in client funds under similar circumstances. The member had been struggling financially in his law practice and was diagnosed as suffering from depression. Laxer pleaded guilty to the charges and cooperated with the investigation. The majority of the panel adopted the joint submission from the parties that the lawyer be suspended from practice for three months and pay costs. The dissenting member was of the view that disbarment was the appropriate penalty, writing:

> I found no exceptional circumstances for this misappropriation. Rather, the reasons offered were those that we at the Society see far too often; financial difficulties, a struggling legal practice, personal difficulties and depression. While I appreciate that Mr. Laxer's conduct was neither sophisticated nor planned, the reality is that he gave into a temptation that presented itself and stole his clients' money. The money was paid back only after the auditor identified the problem files. In the interim, the money was used to finance Mr. Laxer's lifestyle rather than to pay the disbursements due and owing on the files. In my opinion, such action calls for disbarment. It is for these reasons that I must reluctantly decline to accept the joint recommendation that my two colleagues have endorsed. (para. 13)

The decision noted that the lawyer voluntarily withdrew from practice in 2001 to pursue a career outside the practice of law. With respect to penalty, the majority of the panel commented that, if Laxer were to apply for readmission in the future, that such an application only be granted on the condition that he practice under the supervision of another lawyer.

And in *Law Society of Alberta v. Anderson* (1996), a case involving similar misconduct, the member was found guilty of misappropriating client and law firm funds. Over several years, the member had developed a very successful commercial real estate practice. He was consistently one of the top financial contributors to his law firm. However, following a downturn in the commercial real estate market, the lawyer saw his income fall by more than one quarter, and he found himself looking for a way to solve his financial problems. Anderson acknowledged that he had no right to use client trust funds or the firm's general funds, but he perceived his actions as necessary to meet ongoing personal and business expenses. During the hearing, counsel for the member submitted that Anderson "had shown an incredible lack of judgment but was suffering from severe financial pressures and a mental depression at the time" (para. 17). The hearing

committee found that “the Member’s depression undoubtedly stemmed from the financial problems which appear to have given the impetus to his actions”, but ultimately found that Anderson’s inability to face such problems did not justify his conduct (para. 14). While the benchers were sympathetic to the pressures facing the lawyer, they noted, “we must be mindful of the very heavy burden under which all lawyers occasionally must practice. We [must] also be mindful of the trust which we as a profession have had placed upon us” (para. 18). And despite the presence of several mitigating factors, the hearing committee concluded that it could not condone the lawyer’s conduct and that disbarment was the appropriate remedy in the circumstances.

However, a Law Society of Alberta appeal panel found that disbarment was too harsh a penalty in the circumstances and reduced the sanction of disbarment to a suspension of two years. There were several mitigating factors justifying the imposition of a reduced sanction. The appeal panel noted that the case involved the misappropriation of relatively small amount of money and that the lawyer’s actions were not motivated by avarice. Also, upon discovery of the misconduct, Anderson resigned from the firm, reported himself to the law society, and voluntarily registered himself as an inactive member with the Law Society of Alberta. And the lawyer expressed remorse for his misconduct and sought psychological help. The appeal panel stated, “if there ever is a situation which permits leniency, this is it” (*Anderson v. Law Society of Alberta*, 1996b, para. 29).

Claim of Entitlement

Twenty-five lawyers (6 percent) justified their conduct on the grounds they had legitimate entitlement to the funds. This neutralization was used exclusively in cases involving the misappropriation of funds. As shown in Table 5-1, the law societies overwhelmingly (23/25) rejected the claim of entitlement as a mitigating factor when imposing discipline.

Some of the lawyers who invoked this mitigation strategy argued they deserved, or were entitled to, the money because of perceived economic inequities in the workplace. They viewed the theft of funds as a mechanism to correct the perceived injustice. This finding is consistent with previous studies which have reported that employee theft is often motivated by feelings of resentment and job dissatisfaction

(Hollinger & Clark, 1983) and underpayment inequity (Greenberg & Scott, 1996). The case involving Juergen Sagel is illustrative. Sagel wrongfully deprived his partners of $36,000 to which they were entitled by arranging for certain clients to pay fees to him directly for legal services he rendered while he was a partner in the law firm. Sagel believed he was entitled to the funds because "his partners had not recognized his financial contribution to the firm in the distribution of the partnership profits" (online). The discipline committee rejected the lawyer's rationalization for the misappropriations out of hand, noting:

> What we are dealing with in this case is nothing less than theft from one's partners. It is of little consequence that the solicitor felt entitled to the money. The solicitor very intentionally over a period of months deceived his partners and his clients for one single purpose, namely, to advantage himself materially. This conduct cannot be characterized as a momentary lapse of judgment. Rather, it was a continuing course of conduct requiring the employment of deceit and falsehood so as to achieve the goal intended. (online)

The parties made a joint submission that the appropriate penalty should be a suspension of six months. The committee, however, was of the view that the proposed sanction was inadequate in the circumstances and increased the suspension penalty to that of one year. The unanimous decision noted that "[p]artners do and will continue to have differences of opinion, sometimes serious. Such differences should never entitle a partner to engage in a continued process of self-help which is rooted in deceit" (online). At Convocation, the joint submission was upheld, and the lawyer was suspended for a period of six months and ordered to pay costs of $5,000 (*Law Society of Upper Canada v. Sagel*, 1995).

In the *Hudson* (2014) case, the lawyer justified her conduct by arguing that she was merely taking money that was owed to her. The Law Society of Upper Canada found that Hudson defrauded the Legal Services Society (LSS) by misreporting time and submitting numerous false accounts on her behalf and on behalf of other lawyers in her firm. She also billed the LSS for legal assistant time, which was not allowed under LSS billing policy. Hudson "submitted false accounts because, in her mind, she thought that she was 'justified in doing so,' and because she believed that the exclusion of legal assistant's time from the LSS Tariff was 'improper'" (para. 17). The hearing panel ruled that Hudson's conduct "resulted in LSS paying funds to which neither she nor her firm

was entitled" and that such conduct "amounted to misappropriation" (para. 19). Counsel for the lawyer asked the panel to consider a sanction that would allow her to return to practice, noting that she dedicated much of her time to poor and marginalized clients, and that she continued to take on pro bono cases even after legal aid coverage was discontinued. Notwithstanding Hudson's contributions to her community, the panel found she failed to tender a satisfactory explanation for her misconduct or provide evidence of compelling mitigating circumstances that might justify a departure from the presumptive penalty for misappropriation. Taking into account the general principles regarding penalty, the panel noted that "[a] clear message must be sent to the Respondent and to all lawyers that the Law Society will not tolerate dishonesty or deceit, even if the lawyer believes it is 'justified' by the unfair terms of their engagement" (para. 40). The hearing panel ordered that the lawyer be disbarred.

Some of the lawyers in this group also invoked the "honest belief defence" to misappropriation. Those using this strategy claimed they had an honest but mistaken belief that they were entitled to the money by way of fees, and that their misconduct was the result of negligence, carelessness, or haphazard accounting practices, as opposed to dishonest conduct on the part of the lawyer. The law societies rejected this argument in all but two cases. Exemplified in *Law Society of Alberta v. McGechie* (2007), the lawyer's explanation was that he removed funds from trust on account of fees owing for work completed, but that his records were in total disarray, which resulted in McGechie withdrawing funds to which he was not entitled. The discipline committee held that the lawyer was not entitled to assert a defence to misappropriation where the alleged honest belief is founded on reckless and careless behaviour" (para. 15). The Law Society of Manitoba made a similar ruling in *Young* (2017). Young testified that "he felt that he was entitled to the monies but had taken the funds by the wrong route through oversight, incompetence or carelessness" (para. 14). The panel, however, rejected the lawyer's explanations, finding that "the taking of the money in each case was deliberate and for the benefit of Mr. Young" (ibid).

In both *Mikitchook* (1998) and *Simonelis* (2001), cases in which the Law Society of Upper Canada accepted the defence of entitlement, the disciplinary panels ruled that the misappropriations essentially consisted of technical breaches because, although both lawyers were entitled to certain funds, the manner in which they made the withdrawals was improper. The benchers found "an absence of any evidence showing

mala fides on behalf of the Member" (*Law Society of Upper Canada v. Mikitchook*, 2998, para. 33) and "the solicitor, rather than being motivated by mala fides was driven by sloppiness and inadequate records" (*Law Society of Upper Canada v. Simonelis*, 2001, para. 91). In both cases, the lawyer's accounting records were in such disarray that the lawyer could not reasonably know whether or not he had earned the fees. Mikitchook was suspended for three months, while Simonelis received a one-month suspension with conditions.

Condemning the Condemners

Condemning the condemners neutralization technique was identified in 17 (4 percent) of the reported discipline cases. Those who engaged this strategy attempted to shift attention away from their wrongdoing to the motives and actions of the adjudicators presiding over the hearing. These lawyers claimed they were unfairly or arbitrarily singled out for sanctioning by the regulator and leveled accusations of bias and other impropriety against law society investigators, opposing counsel, benchers, and others. In all 17 cases, the hearing panels categorically rejected these assertions and arguments when imposing discipline. This line of cases recognized that the primary purpose of disciplinary proceedings is to protect the public and maintain public confidence in the legal profession. The technique of condemning the condemners is exemplified in the following cases.

In *Law Society of Upper Canada v. Coady* (2010), the lawyer was found to have engaged in serious professional misconduct spanning a 16-year period. Throughout a particularly lengthy hearing (lasting more than 30 days), the Coady vehemently denied any misconduct on her part. She maintained the complaints leveled against her were motivated by personal hostility and were the result of an elaborate conspiracy orchestrated by a group of lawyers and judges associated with her former husband. As noted in the following passage, the panel was troubled by the lawyer's lack of insight into her misconduct:

> Ms. Coady has offered no explanation or apology, nor has she expressed remorse for her misconduct. Right up to the final moment of her participation in the hearing, she has blamed others for the events that were the subject of these applications. She has continued to make serious allegations and cast baseless aspersions on her former clients, opposing counsel, members of the judiciary, counsel for the Society and

> members of this Hearing Panel. Indeed, she has been defiant, disrespectful and at times belligerent in her dealings with counsel for the Society and this Hearing Panel. (para. 21)

The panel concluded that "the evidence of misconduct in this case is staggering and almost without precedent" (para. 24). They further determined that the threshold for a finding of ungovernability had been met. In the absence of any mitigating factors, the panel found that revocation was the only appropriate penalty. On appeal to the Law Society Appeal Panel, Coady argued that "every hearing panel member was biased against her, that the prosecutors were unethical and hopelessly mired in a conflict of interest, and that the entire proceedings were a nullity on jurisdictional grounds" (*Law Society of Upper Canada v. Coady*, 2012, para. 9). She also accused the hearing panel of preventing her from leading evidence as to the purported conspiracy against her, claiming "that at least some members of the hearing panel closed down this defence for their own personal or financial reasons" (para. 10). The appeal against findings of misconduct and penalty of revocation was dismissed.

In the *Tulk* (2017) case, a Law Society of Upper Canada tribunal found the lawyer committed professional misconduct by misappropriating more than $2.6 million. The lawyer indicated that his practice had been operating at a loss for several years and that he had been using client funds to cover the losses, as well as some personal expenses. During the course of the hearing, the lawyer expressed several concerns and anger with the Law Society. Specifically, he "expressed bitterness about what he considered to be prior unfair treatment at the hands of the Law Society" (para. 43). This included two previous findings of professional misconduct against the lawyer. Tulk "described these decisions in some detail as 'dead wrong' and 'miscarriages of justice'. He asserted that these findings and other actions by the Law Society had affected his ability to make a living and 'screwed up his head'" (para. 46). As the following passage indicates, the lawyer appeared to be projecting blame for his conduct onto the Law Society, as if the lawyer's previous discipline history had precipitated his current disciplinary problems:

> Mr. Tulk indicated that it reached the point where he was considering shutting down his office. However, he decided 'the hell with it.' He would carry on as he saw fit but 'any way you slice it I was not paying.' At different points in his evidence he described this as his way of

> ‘protesting,’ ‘fighting back’ or waging ‘warfare with the Law Society’. (para. 48)

The hearing panel was not persuaded by the lawyer’s arguments, noting that “[n]othing said on these points justified his outrageous and egregious actions” (para. 48). The lawyer had expressed regret for what he had done. However, considering the seriousness of the lawyer’s misconduct and the pattern of dishonesty, the panel was over the view that revocation was the only appropriate remedy in the circumstances.

And, in *Crozier* (2002), the lawyer was found guilty by the Law Society of Upper Canada of several trust account violations, including the misappropriation of client funds, and other misconduct. During the hearing, the lawyer displayed a hostile attitude toward the law society and members of the hearing panel. In her submissions on penalty, Crozier argued that the hearing panel should have vacated its decision on the basis of “what she termed the extraordinary misconduct of the Law Society and its counsel…” (para. 5). Her position throughout the proceedings was that “others ha[d] caused her problems, including her clients, the Law Society, its counsel and this Panel” (para. 26). She also “made it clear that she [did] not accept the findings of the Panel as to her misconduct” (ibid). The findings of professional misconduct, together with the lawyer’s conduct throughout the proceedings, and her contempt for the law society, led the benchers to conclude that Crozier was ungovernable and that the penalty of revocation should follow.

Crozier appealed against the decision of the hearing panel regarding both the findings of professional misconduct and the sanction imposed. The crux of the lawyer’s argument was that the hearing panel’s decision was unreasonable and resulted in a denial of procedural fairness and natural justice. She raised a number of arguments in relation to both the law society and the hearing panel, including conflict of interest, failure of timely and full disclosure, abuse of process, and apprehension of bias. The appeal panel upheld the findings of professional misconduct against the lawyer but set aside the hearing panel’s order of disbarment on the basis of fresh evidence submitted by the member. A psychiatric report showed that Crozier was suffering from severe depression, which was “brought on by problems in her practice and by her issues with the Law Society” (*Law Society of Upper Canada v. Crozier*, 2004, para. 33). In respect of penalty, the panel stated, “[t]he combination of the undertaking not to practise and the decision of

the Hearing Panel has effectively suspended Ms. Crozier from practice for a time period which in our view has been more than sufficient to penalize her for her professional misconduct as found" (para. 98). In addition, the appeal panel indicated that, should the member return to the practice of law, she would be restricted to practicing as an employee and required to continue treatment/counselling.

Appeal to Higher Loyalties

The appeal to higher loyalties neutralization technique was raised by lawyers as a defence or mitigating factor in 17 (4 percent) of the reported discipline cases. Those using this technique said they engaged in unethical or illegal behaviour for the benefit of others, rather than for reasons of self-interest. When accounting for the misconduct, these lawyers said they found themselves caught between conflicting imperatives but legitimized their actions by citing a moral obligation to some higher-order ideal or value. Twelve lawyers justified their actions by emphasizing their professional responsibilities and obligations towards their clients, while four lawyers said their offending was motivated by a need to provide for their families. And one lawyer indicated that his actions were based on a desire to help the community in which he practiced, specifically, to improve access to legal services for the poor and disadvantaged.

As the data in Table 5-1 indicate, a majority of hearing panels (71 percent) rejected this strategy as a mitigating factor, although some of the panels appeared to recognize the lawyer's need or desire to help others as a laudable, albeit misguided, justification for wrongdoing. The case involving lawyer Kenneth Sockett is illustrative.

In *Law Society of Alberta v. Sockett* (2002), the hearing committee found that the lawyer defrauded the federal government by submitting statements of accounts with respect to the payment of legal fees and disbursements while representing a number of Indigenous minors in legal matters. The minors had trust funds that were administered by the federal government. The funds were typically frozen until the youths reached the age of eighteen, however, the money could be accessed for limited purposes. The hearing committee found that on more than 90 occasions the lawyer had accessed funds for the minors for improper purposes, such as cash advances (for clothes or other items) or funds to pay the legal fees of their family members. Sockett admitted he deceived the federal government as to the actual purpose for the funds because he knew that if the

requisitions and statements of account were accurate the funds would not have been provided. Sockett's counsel emphasized that the member acted with a higher purpose and that he "was genuinely motivated to help those minors on whose behalf he assisted in accessing their trust funds" (para. 93), notwithstanding the fact that Sockett had earned considerable fees for the work he completed. He described the lawyer as a "surrogate parent" and a "one person crusader" who was determined to help a vulnerable and socially and economically deprived group of persons "sometimes forgotten by other members of the profession" (ibid). The panel agreed that the lawyer was driven primarily by a desire to help those in need, saying:

> It is worth stating that the Committee accepts the Member's evidence that his motivation for his actions was to help the minors involved. While it is true that the Member also benefited personally from his actions, the overwhelming evidence before the Committee was that the Member has a genuine empathy for his First Nations clients which he has demonstrated through his actions in the community over many years. (para. 83)

Other mitigating factors weighing in Sockett's favour included the lack of resources and guidance on the appropriate use of a minor's trust funds, the lawyer's record of service to his community and profession, his cooperation with the Law Society, and the fact that he provided competent services and charged reasonable fees. The hearing committee concluded that the lawyer's conduct was deserving of sanction and that the public interest would be served if the lawyer was suspended for a period of 18 months and ordered pay a fine in the amount of $15,000. In deciding against disbarment, the benchers felt it was "appropriate to distinguish between the Member's conduct and others who have acted fraudulently or misappropriated funds primarily for their personal gain" (para. 97).

The hearing panel's justification for imposing a less serious sanction is arguably inconsistent with the facts of this case. Sockett's evidence was that he wanted to help young people in in his community. He testified that he was "offended when he sees others taking advantage of those in need" (para. 43). The lawyer insisted he was motivated to help save young people from loan sharks whom, he claimed, were charging minors interest rates of up to 40 percent to access their funds. It is important to note, however, that Sockett's legal fees for accessing the funds were as high as 35 percent of the amount accessed. And, he acknowledged that in some instances he charged fees where no legal services were provided other than accessing the trust accounts of

minors, and that these legal fees should not have been charged. Another important consideration is that, of the $440,000 Sockett accessed for his minor clients, he retained $217,000 (49 percent) in fees (DeCoste, 2002, p. 762). There is no disputing that the member wanted to, and did help, young aboriginals in his community, there is, however, a disconnect in distinguishing the lawyer's conduct from other cases involving fraud and misappropriation of funds.[97]

In *Law Society of Upper Canada v. Bishop* (2013), the lawyer was found to have knowingly assisted in dishonest and fraudulent conduct to obtain mortgage funds under false pretenses. Bishop, a lawyer with no previous discipline history, was a well-respected member of the Ontario bar who had a reputation for helping the poor and underprivileged in the greater Kingston area. The scheme at issue involved helping lower income clients purchase a home while avoiding the required down payment and transaction costs. At the penalty hearing, the member testified on his own behalf. Bishop acknowledged that the scheme at issue was deceptive, however, he explained that he facilitated the fraudulent transactions because "he wanted to help people of modest means purchase homes" (para. 9). In addition, an impressive array of character witnesses either wrote letters or appeared on behalf of the lawyer. They stated unequivocally that Bishop was "of the utmost integrity and honesty and that a revocation of his licence would have a devastating impact on the community that he serves" (para. 11).

The panel majority noted that the Bishop's desire to help financially disadvantaged members of the community purchase homes was "a good cause," but it did not explain or excuse the lawyer's misconduct (para. 25). While sympathetic to the lawyer's position, the majority concluded that the evidence led in mitigation of penalty was insufficient to justify a departure from the presumptive penalty of revocation of Bishop's licence to practice law. The dissenting member would have imposed an eighteen-month suspension followed by a period of supervision, noting that Bishop's belief that the scheme would assist financially disadvantaged members of the community to become home owners was a "credible explanation entitling him to consideration by this panel of a penalty less than revocation" (para. 55). The bencher

[97] See DeCoste (2002) for a critique of the discipline committee's treatment of Sockett's defence and its reasons for decision on penalty in this case, as well as its impact on *self-governance* of the legal profession.

further noted that the character evidence tendered by the lawyer also weighed in his favour. Bishop unsuccessfully appealed the findings of misconduct and the penalty of revocation imposed by the hearing panel to both the Appeal Division of the Law Society Tribunal (*Law Society of Upper Canada v. Bishop*, 2014) and the Ontario Superior Court of Justice Divisional Court (*Bishop v. Law Society of Upper Canada*, 2014).

Seven of the disciplined lawyers used the appeal to higher loyalties technique alongside the defense of necessity to justify their disciplinary offences. These individuals recounted how they acted out of desperation stemming from severe financial problems and family crisis. They generally emphasized their role as either the sole income-earner or provider and the desire to provide for family members or loved ones. The appeal to higher loyalties technique, in particular, appeared to play a vital role in the lawyer's efforts to resolve the competing demands of family and professional responsibilities. This finding is consistent with previous studies showing that both male and female white-collar offenders are motivated by the desire to provide for their families, although they differ in terms of how they account for or justify their involvement in economic crime. Men tend to reference their breadwinner role and the need to provide financially for their families, whereas women emphasize their responsibilities as caregivers when accounting for their crimes (Daly, 1989; Klenowski et al., 2011; Willott et al., 2001; Vieraitis, 2012; Zietz, 1981). The following cases highlight the motivational differences between male and female lawyers when accounting for their disciplinary violations.

In *Law Society of Upper Canada v. Wolfe* (2006), the lawyer admitted to misappropriating over $47,000 from his law firm and another $4,800 from two clients of the firm. Wolfe testified at his disciplinary hearing. He told the hearing panel that his disciplinary problems were the result of severe emotional and mental stress arising from a troubled marriage, which ultimately resulted in separation and domestic hostility. Wolfe explained that, as a result of a dysfunctional home environment, "his children were in severe struggles at school and he believed a change to a private school would save them" (para. 18). The expenses, however, were large and Wolfe could not keep up with the tuition payments. He, therefore, resorted to taking money from his firm to pay the bills. The misconduct involved a sophisticated scheme of transferring funds owed to the firm to his own numbered company and misleading the firm's accounting department as to the whereabout of those funds. All of the money went to the children's education

expenses. The member appeared to set aside his better judgment because he viewed his loyalties to his children as most pressing and important at the time.

Both the hearing panel and counsel for the Law Society (in her submissions on penalty) appeared to sympathize with the member's situation. The panel found that the overwhelming emotional and mental stress suffered by Wolfe constituted exceptional mitigating circumstances. In addition, the lawyer admitted his misconduct to the law society from the beginning of the investigation, saving the time and expense of a lengthy hearing. He also expressed sincere remorse for his actions and repaid all of the misappropriated funds to the firm. And, Wolfe filed a series of character letters written by the partners at his firm attesting to the Wolfe' remorse and stating that the acts of professional misconduct were aberrational and out of character. Regarding the funds taken from his clients, the panel accepted Wolfe's explanation that he was under the mistaken impression that the money was owed by these clients for services provided by the member, and that he thought he was taking from his firm. In all the circumstances, the panel imposed a 12-month suspension and ordered the lawyer to pay costs of $1,000. Wolfe's saving grace appears to be that his misconduct involved the misappropriation of law firm funds, and the fact that he used the funds solely for the purpose of supporting his children.[98]

In *Lubon-Butcher* (2007), a factually similar case, a Law Society of Upper Canada hearing panel refused to consider the lawyer's family and personal financial difficulties as a mitigating circumstance. Lubon-Butcher was found guilty of professional misconduct for misappropriating nearly $30,000 in client funds and for practicing while she was administratively suspended. At her discipline hearing, Lubon-Butcher admitted the alleged particulars and cited her family's rapidly deteriorating financial situation as the primary cause of her misconduct. The lawyer told the panel she had two children attending university and one child in elementary school. The family's financial situation was further complicated by the fact that her husband, with whom she practiced, was forced to stop work due to serious health problems. He "required constant medical assistance and expensive drugs during the material time" (para. 47). Lubon-Butcher admitted in hindsight that she exercised poor judgment but explained that she acted out

[98] In 2014, Wolfe's licence was revoked after he was found to have knowingly participated in a bogus residential real estate investment scheme that cheated investors out of $1.2 million.

of desperation to ensure the financial wellbeing of her family. As is illustrated in the following passage, the hearing panel rejected outright the member's submissions:

> …survival, economic or otherwise, can never provide a justification, an excuse, in any way for misappropriation and the other kinds of misconduct that we are dealing with here. The clients have the right to be fully protected. The clients have their own needs. The clients, of course, have their own right to survival, and we reject absolutely any notion of justification arising out of the personal economic situation of the licensee or Mr. Butcher. That point has to be made explicit. (para. 56)

Notwithstanding the committee's position regarding the lawyer's explanation for her conduct, the benchers were sympathetic to Lubon-Butcher's personal circumstances. The panel reluctantly accepted the joint submission of counsel that the licensee be granted permission to surrender her licence. She was also ordered to reimburse the Lawyer's Fund for Client Compensation.

And in the *Law Society of Upper Canada v. Flak* (1995) case, a Toronto lawyer was found guilty of misappropriating more than $250,000 in client and law firm funds for his personal use. The lawyer cited personal and emotional problems as the catalyst for the thefts. Flak explained that he misappropriated the funds as a result of the extreme pressures of providing for his very ill father who was incapacitated and required care 24 hours a day. The lawyer's sister and aging mother were both caring for the father by themselves. Flak said he also used the money to pay back a portion of a debt owed to his personal creditor, who was threatening physical violence, and to reimburse money he had "borrowed" from other client accounts to cover up the misappropriated funds. The committee chair, one of only two benchers hearing the case, sympathized with the lawyer's family situation, but recommended disbarment. In making this recommendation, he cited the case of *Milrod* (1986), in which the panel stated the following:

> The Society cannot countenance theft and fraud by its members, and must express its disapproval in no uncertain terms. The penalty of disbarment is not meant to be reserved only for members who are thoroughly lacking in good qualities; experience shows that the penalty attends the tragic downfall of good lawyers who succumb to pressure as frequently as it is the fitting conclusion of an evil career. (para. 63)

The other panel member, however, was persuaded that the stress facing the lawyer, together with the extreme personal and financial pressures of providing for his family, was a significant factor mitigating against his disbarment. In her report to

Convocation, the committee member noted that the lawyer “deserves our compassion, if for no other reason than his incredible sacrifice to his family - he has given his life to them” (para. 42), and that “[i]n consideration of the difficult personal circumstances alone in this case, it is recommended that [the lawyer] be given permission to resign” (para. 48). At Convocation, the lawyer received permission to resign from the Law Society.

As illustrated throughout this chapter, the various neutralization and stigma management techniques used by lawyers can have a considerable impact on the sanctioning decision. In appropriate cases, personal mitigation, such as stress, mental health, and substance use problems, can be the decisive factor in justifying the imposition of less serious sanctions. Examining the specific neutralizations lawyers use to justify and excuse their misconduct sheds important light on the individual and situational factors that enable unethical behaviour by lawyers. The findings suggest that hearing panels do indeed give effect to a range of neutralization and stigma management techniques when imposing discipline and, in some instances, rely on them to justify or defend the imposition of a more lenient penalty once misconduct has been established. Chapter 6 discusses the implications of these findings.

Chapter 6.

Discussion and Conclusion

The primary goal of this study was to investigate how disciplined lawyers use techniques of neutralization when accounting for their deviance in professional conduct hearings. The current research shows that neutralization theory is a useful framework for understanding rationalizations and justifications lawyers put forward to account for their ethical failings. Like other research on neutralization and white-collar offending, the study revealed that lawyers facing disciplinary proceedings employed a range of neutralizing strategies as a means of rationalization and impression management.

The study also examined how law society hearing panel members evaluate and respond to lawyers' rationalizations when imposing discipline. Overall, the findings indicate that the use of neutralization techniques during the proceedings can have a considerable impact on the sanctioning decision. Disciplinary cases are adjudicated on a case-by-case basis, and the hearing panel has broad discretion to consider the factual circumstances of each case, the context of the alleged misconduct, and any aggravating or mitigating factors in tailoring an appropriate disposition. Personal mitigation is frequently presented in the form of techniques of neutralization and can be the decisive factor in justifying the imposition of a lesser punishment. This chapter discusses three implications from this research: 1) the prevalence of substance use and other mental health concerns in lawyer discipline cases, 2) the role of post-offence mitigation in the sanction determination, and 3) the need to re-examine mitigating factors as techniques of neutralization and whether they should be neutralized when imposing sanctions in disciplinary cases. The chapter also discuss some of the limitations of this research and directions for future study. Finally, I return to the issue of professional self-regulation.

The Prevalence of Substance Use and Other Mental Health Concerns in Lawyer Discipline

This study revealed that lawyers found guilty of serious financial misconduct are vulnerable to mental health and substance use problems and use these factors to neutralize the seriousness of their misconduct. Almost half of all lawyers (n=193) subject to disciplinary action alleged they were impaired by psychological, emotional, or other medical problems, or some combination thereof at the time of misconduct (see Table 5-2). These findings are in keeping with previous studies showing that a large percentage of disciplinary cases involve lawyers who are impaired by mental illness, substance use, or other impairment problems. In the United States, for example, it is estimated that between 40 and 75 percent of disciplinary and malpractice cases involve lawyers who are chemically dependent or mentally ill (Allan, 1997; American Bar Association, 2017; Benjamin, Darling, & Sales, 1990; Cohen, 2002; Elwork, 2007; Ramos, 1994; Reddy & Woodruff, 1992; Rhode, 2002, Seto, 2012).

Similar trends are observed in other jurisdictions. Research from Australia (Bergin & Jimmieson, 2014; Sharpe, 2011) and New Zealand (Moore et al., 2015) has also found that disciplinary cases there involve substance use and other mental health issues. One British study indicates that lawyer distress is a significant factor in many disciplinary proceedings in England (Davies, 1999; Goodliffe, 1994). And while Canadian research on addiction and mental illness among lawyers is limited, a study of all Ontario discipline cases heard between 1992 and 1995 found that nearly half of licencees facing serious disciplinary charges were identified as suffering from one or both of these problems at the time of misconduct (Legal Profession Assistance Conference, 2015).

It is perhaps not surprising that mental health and substance use problems figure in lawyer misconduct. Studies suggest that lawyers struggle with depression, anxiety, stress, substance abuse and other mental health problems at rates two to three times higher than the general population and other professionals (Beck, Sales, & Benjamin, 1995; Benjamin, Darling, & Sales, 1990; Conley, 2004; Eaton, Anthony, Mandel, & Garrison, 1990; Drogin, 1991; Elwork, Andrew, & Benjamin, 1995; Krill et al., 2016; Leignel, Schuster, Hoertel, Poulain, & Limosin, 2014; Ontario Lawyers' Assistance

Program, 2010; Rhode, 2015; Schiltz, 1999).[99] While there has been less research on law students, studies show they too experience higher rates of psychological distress, including chronic stress, depression, anxiety, and substance abuse (Association of American Law Schools, 1994; Benjamin, Kaszniak, Sales, & Shanfield, 1986; Beck et al., 1995; Dammeyer & Nunez, 1999; Hess, 2002; Kozich 1989; Jolly-Ryan, 2010; Organ, Jaffe, & Bender, 2016; Peterson & Peterson, 2009; Sheldon & Krieger, 2004). Mental health and substance use issues, if left untreated, can impair the lawyer's ability to practice law competently which, in turn, may expose the lawyer to professional misconduct and discipline.

The issue of whether substance use and other mental health concerns among lawyers should be considered as mitigating factors in disciplinary proceedings has been the subject of much discussion in recent years (see Goren & Smith, 2001; Kelly, 1988; Klingen, 2002; Levin, 1998; Rush, 2011; Seto, 2012; Workie, 1996; Zacharias, 2003). Although historically understood as signs of personal or moral weakness, substance abuse and other psychiatric illnesses, such as depression and anxiety, are now recognized as diagnosable and treatable illnesses. And in more recent years, there has been an increased understanding and willingness to consider such problems as a determinant of professional misconduct (*Law Society of Upper Canada v. Snidr*, 2014, para. 40; *Law Society of Upper Canada v. Rosenthal*, 1999, paras. 57-61). The data from this study generally lend support to this view and provide a glimpse into the approach of the law societies to lawyers who are chemically dependent or mentally ill.

Psychological distress and substance use problems were generally accepted as a mitigating factor on penalty (neutralizing the seriousness of the conduct), provided there was evidence of a causal relationship between the problem or disorder and the lawyer's misconduct, and the member was seeking appropriate treatment to prevent or reduce the likelihood of future discipline problems. Both impairment and rehabilitation of the errant lawyer had a significant mitigating effect on the type of penalties imposed. In more than half of cases, the law society tribunals found that such circumstances caused

[99] A recent study conducted by the Hazelden Betty Ford Foundation and the American Bar Association (ABA) Commission on Lawyer Assistance Programs revealed widespread substance abuse and other mental health issues among American lawyers. A survey of nearly 13,000 practicing lawyers found that one in five lawyers qualified as problem drinkers, while 28 percent reported experiencing depression, and 19 percent showing symptoms of anxiety (Krill et al., 2016).

or contributed to the misconduct and justified a reduced sanction. In one case, the panel accepted the lawyer's psychiatric illness as a neutralizing factor and the illness provided a complete defence to misconduct charges and justified relief from discipline (see *Law Society of Upper Canada v. Simpson*, 2008). The decision to impose a lesser disciplinary action was usually based on the evidence of psychologists and other mental health experts, whose opinions were key to gauging the likelihood of the lawyer reoffending in the future.[100]

One of the more interesting findings to emerge from this study is how not all mental health disorders received the same treatment by the disciplinary panels. In most cases, the law societies were reluctant to recognize problem and pathological gambling as an explanation for wrongdoing. Studies from other jurisdictions have reported that lawyer disciplinary boards, supreme courts, and other institutions, have similarly rejected the existence of gambling addiction as a mitigating circumstance justifying a lawyer's professional misconduct (Nirenberg, 1999; Zazzali, 2008). A recent study examining the treatment of lawyers with gambling disorder in professional disciplinary proceedings in four U.S. states found that the bar's recognition of substance-related disorders, but not behavioural addictions, was attributed to judicial misconceptions about the nature of addiction and its causes, as well as stigma and prejudice against those with gambling disorder (Tovino, 2016). The author puts forward a number of recommendations to ensure fair and equal treatment of lawyers with gambling disorder, including giving statutory recognition to behavioural and process addictions, providing lawyers a range of evidence-based treatment options and recovery support programs, and offering educational programs (targeting disciplinary board members, judges, lawyers, and law students) to increase awareness and understanding of gambling disorder as a diagnosable and treatable mental disorder.

Some authors caution against the legal profession accepting alcoholism and chemical dependency as mitigating factors in disciplinary proceedings. Workie (1996), for example, has suggested that substance abuse as mitigation should be limited to minor offences, such as neglect of client matters. Some offences, such as stealing or misusing client funds, are so serious as to preclude any mitigation of sanctions,

[100] While beyond the scope of the current inquiry, future research may want to examine the role that mental health professionals may play in the sanctioning process.

regardless of drug or alcohol impairment. In view of the main purposes of lawyer discipline, such an approach is necessary to protect the public from lawyers who are unfit to practice and maintain public confidence in the legal profession. Similarly, Zacharias (2003) suggests that "[l]eniency on addiction grounds sends a signal to other lawyers that professional misconduct will be countenanced if an excuse for it can be found" (pp. 702-703). As matter of both specific and general deterrence, the threat of harsh sanctions may serve to encourage other impaired lawyers to seek treatment from substance abuse problems before they engage the disciplinary process.[101]

Research also shows that health and wellness issues among lawyers stem in large part from the professional culture and stress factors that are specific to law practice (American Bar Association, 2017; Beck et al., 1995; Canadian Bar Association, 2012; Elwork et al., 1995; Koltai, Schieman, & Dinovitzer, 2018; Krill et al., 2016; Law Society of British Columbia, 2018b; Nerison, 2010; Rothstein, 2008). High levels of stress were cited as a neutralization technique in 21 percent (n=84) of the cases under study. Sole practitioners appeared to be at greater risk of discipline due to stress arising in their personal and professional lives. Marital and family problems, serious illness or death of a family member, and severe financial stress were among the factors put forward in terms of neutralizing the offence across cases.

Other factors contributing to increased stress levels identified through techniques of neutralization include those specific to law practice, such as long hours, heavy workloads, time constraints and deadlines, and burnout. As noted in Chapter 4, certain areas of practice, such as family, personal injury, and criminal law, tend to be particularly stressful. For lawyers, especially those in private practice, these stressful experiences are a leading cause of substance abuse and mental health difficulties (Beck et al., 1995; Benjamin et al., 1990; Hall, 2013; Koltai et al., 2018; Levin, 2004, Moore et al., 2015; Nerison, 2010; Rhode, 2002).[102] These occupational risk factors, in turn, can impair a lawyer's professional judgment and contribute to performance and discipline problems. Financial pressure and the fear of falling (from their status) are also important types of

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[101] I recognize that the effectiveness of specific and general deterrence measures has been the subject of considerable debate, however, this debate is beyond the scope of the current work.

[102] Stress is also widely recognized as a risk factor for developing hypertension, cardiovascular disease, diabetes, stroke, migraines, and cancer among other health problems (Cohen & Williamson, 1991; Dager, Roy-Byrne, & Dunner, 1988; Matthews & Haynes, 1986; Palmer, Scharff, & Masek, 2010; Zakowski, Hall, & Baum, 1992).

strain that might explain why some lawyers engage in deviant behaviour. In several cases, the lawyer's motivation for engaging in financial misconduct stemmed from the perceived loss of one's economic security, status, and professional career. When faced with personal or professional crisis, many lawyers perceived the theft of funds as the only way out of their predicament. This reasoning was demonstrated under the defence of necessity technique of neutralization.

In general, lawyers overwhelmed by stress-related problems also received lenient treatment from the law societies. A possible explanation may lie in the composition of the hearing panels adjudicating disciplinary matters. Given their proximity to the profession, lawyers sitting in judgment of other lawyers are familiar with the nature of legal work and, therefore, may be more sympathetic to the challenges of law practice and the stressful situations their colleagues routinely face. According to MacKenzie (2001), however, evidence that a lawyer's misconduct occurred during a period of stress caused by financial or other pressures should be afforded little weight in mitigation of the penalty. He notes, "[t]he fact that lawyers yield to temptation while under stress may, indeed, be regarded as a sign that they lack the moral strength necessary to be lawyers" (p. 26-45). The author further suggests that lawyers often are responsible for their own downfall because they create the conditions that lead to stress, anxiety and burnout, by, for example, taking on more cases than they can handle. Consequently, he argues that law office management problems and/or an inability to cope with a heavy workload should not be compelling mitigating factors because both are within the control of the lawyer.

Reducing Mental Health Stigma and Promoting Wellness Within the Legal Profession

Given the frequency that mental health is used as a technique of neutralization, it is an issue that should be addressed by the legal profession. While attitudes around mental illness are changing, social, professional, and institutional stigma have been identified as key factors preventing lawyers and other legal professionals from seeking the help they need (Law Society of British Columbia, 2018b). Lawyers often suffer in silence for fear of professional consequences, such as losing one's job, reputation, or licence to practice (Gold, 2013). Other incentives that create barriers to diagnosis and treatment include an inability to appreciate the decline in one's own health, not having

the time or finances, the belief that individual can manage their own health, or hoping the disorder or problem will somehow resolve itself (Heil, 1993; Moore et al., 2015; Rothstein, 2008). As the hearing panel in *Law Society of Upper Canada v. Vader* (2013) remarked, the key to addressing mental health and substance use issues is early intervention:

> The Law Society must continue to be an active participant in efforts to ensure the availability of critical support resources to assist members of the profession struggling with mental illness and other issues, through the promotion of early self-awareness, diagnosis and treatment before client interests might be adversely affected and the licensee becomes the subject of regulatory scrutiny. (para. 67)

With increased recognition of the prevalence of substance use and other mental health concerns among legal professionals, many regulators have established Lawyer Assistance Programs (LAPs), which offer confidential counselling, referral, information, and peer support services to lawyers, law students, and their family members who need help dealing with addiction, mental health, or other personal problems (Canadian Bar Association, 2018). Wellness programs "are designed to encourage the earliest possible detection of impaired attorneys and, thereby, facilitate intervention before clients' interests are jeopardized" (Heil, 1993, p. 1285; see also Benjamin et al., 1992). Data from the current study indicating the frequency with which impairment appears as a technique of neutralization underscore the need for, and importance of, LAPs to promoting and enhancing mental health and wellness among lawyers. A large percentage of serious disciplinary cases studied here involve chemical dependencies, stress, depression, anxiety, and other personal problems that affect the well-being of legal professionals. Consequently, LAP resources should be directed toward developing programs and services that address the prevention, early intervention, treatment, and/or rehabilitation from these specific issues. These measures are meant to serve three purposes, namely rehabilitating impaired lawyers, reducing disciplinary complaints, and protecting the public from lawyer misconduct. Importantly, however, efforts to promote physical, mental, and emotional well-being must extend beyond detection and treatment to include substantive changes at the institutional and organizational levels (American Bar Association, 2017). The more readily that law societies provide programs for these types of issues, the more likely and the more justified they may be in rejecting or neutralizing neutralizations which rely on these issues.

Educating lawyers about addiction and other behavioural health problems in the legal profession is also an important step toward reducing stigma and improving the mental health and well-being of lawyers. Over the past decade, a growing number of law societies across Canada have identified lawyer health and wellness as a top priority. While most law societies recognize professional well-being as a subject matter that is eligible for CLE credit, currently, no province or territory requires lawyers to complete a specified number of CLE hours of mental health and wellness programming (Law Society of British Columbia, 2017b, n8). Accordingly, it may be advisable that all practicing members be required to complete mental health and substance abuse awareness courses as part of their CLE requirements. In addition to teaching lawyers to recognize the signs of addiction and mental illness, professional responsibility courses should also focus on stress management and ways to deal with work-life balance issues.

The Role of Post-Offence Mitigating Factors in the Sanctioning Determination

One of the most surprising findings of the study is the role that mitigating factors not directly related to the lawyer's conduct (discussed in Chapter 5 under metaphor of the ledger and denial of victim) played in determining the appropriate punishment. The most salient factors to emerge from the cases include evidence of prior good character (including the absence of a prior discipline record), cooperating with the law society, providing restitution to those harmed, self-reporting misconduct, and any rehabilitative efforts taken by the offending lawyer. The case law has consistently held that in cases of serious misconduct, such as fraud and misappropriation, only exceptional circumstances can justify a deviation from the presumptive penalty of revocation.[103] To meet the threshold of exceptional circumstances, "the mitigating factors must temper the culpability of the member's commission of the offence" (Ehrlich, 2008b, para. 30). Although mitigating circumstances that arise after the fact or are simply incidental to the lawyer's conduct do not relate to why the offence was committed, these factors were among the mitigating factors taken into consideration by the hearing panels to justify the imposition of a lesser penalty.

[103] There is no presumptive penalty in cases where the lawyer neglects or abdicates his/her professional responsibilities or is found to have been duped into facilitating mortgage fraud.

This finding is consistent with an earlier empirical study of lawyer discipline cases from across the United States showing that varying combinations of factors such as the lawyer's remorse, restitution, cooperation, and presentation of character witnesses were among the variables predicting that a lawyer who converted client funds would not be disbarred (Kelly, 1988). Similar results have also been observed in other systems of professional discipline. A study of disciplinary actions taken by the Investment Industry Regulatory Organization of Canada (IIROC) against investment dealers for securities-related misconduct found that post-offence mitigating factors such as acceptance of responsibility and remorse, credit for cooperation, voluntary rehabilitative efforts, and the relative culpability of the respondent were among the factors militating in favour of a lesser sanction (Lokanan, 2014, 2015).

While evidence suggests that disciplinary penalties may be influenced by mitigating factors not related to the conduct at issue, there is some question about whether such factors, or combinations thereof, should be considered in determining the appropriate level of discipline in cases involving serious misconduct. Some of the most salient factors in the metaphor of the ledger and denial of victim /injury are discussed in the following sections. I then turn to reframing mitigating factors as techniques of neutralization as a means whereby disciplinary panels can stay focused on the primary goal of lawyer discipline, which is protection of the public interest.

Evidence of Good Character

Whether evidence of a lawyer's good character (discussed in Chapter 5 under metaphor of the ledger) should carry any relevance in the sanctioning decision has garnered attention in both the scholarly literature and disciplinary jurisprudence. The previous good character of the lawyer can be very persuasive and is routinely a mitigating factor in sanctioning determinations, even where the evidence provided does not address *why* the misconduct occurred or predict future offending behaviour by the lawyer. Levin (1998) has rightly points out that "[w]ho you are, where you practice, and who you know can directly affect the severity of the sanction imposed…" (p. 11). Disciplinary bodies often rely on such evidence to justify lenient treatment of a fellow lawyer when imposing discipline for professional misconduct.

While most hearing panels are willing to consider proof of a lawyer's good character as mitigating, often this evidence has little probative value. Some authors have suggested character and reputation evidence is "the most misused of all the mitigating factors" (Levin, 1998, p. 54). All too often character evidence in support of the lawyer is provided by witnesses who are unfamiliar with the lawyer's practice or not aware of the alleged misconduct. Consequently, these witnesses are not in a position to judge whether the lawyer's conduct was truly out of character. Moreover, disciplined lawyers frequently parade a series of high-profile character witnesses—including highly regarded members of the bench and bar, elected officials, and other politically influential people—to attest to the lawyer's general good character and reputation for honesty and integrity. As such, there is a risk that disciplinary bodies may be susceptible to being unduly influenced by favourable testimony from influential or highly regarded individuals. As one author suggests, the metaphor of the ledger neutralization "seems particularly susceptible to becoming a tool for judges seeking to lessen punishment for defendants with similar backgrounds as their own" (Haugh, 2014, p. 3184). Gavin MacKenzie (2001), a former Bencher of the Law Society of Upper Canada, writes that such evidence may be of doubtful value for purposes of penalty mitigation:

> Character evidence is common and can be persuasive, but is much less valuable if the witnesses are not fully informed of the facts. Even then, it is difficult to gauge the extent to which evidence is affected by factors such as friendship. Virtually all lawyers are responsible for some good deeds, and virtually all are held in high esteem by some other lawyers and clients. The discipline hearing panel must ensure that the process is not transformed from a deliberative process into a referendum among members of the profession. (p. 26-45)

Several cases have also cautioned against attributing undue weight to evidence that may distract the hearing panel's attention away both from the misconduct at issue and the law society's primary objective of protecting the public and maintaining public confidence in the legal profession (not protecting the lawyer's reputation or livelihood). For example, in *Law Society of British Columbia v. Hordal* (2004), the lawyer was found guilty of breaching an undertaking and making false representations to another member of the Law Society, behaviour the hearing panel characterized as "grave misconduct" (para. 24). Hordal's actions were aggravated by the fact that he had previously undergone a conduct review for similar behaviour and did not appear to have "learned his lesson" (ibid). Nevertheless, Hordal's pattern of conduct was tempered by the

numerous letters of support written by other lawyers practicing in the same legal community as Hordal. The lawyer was given a two-month suspension, a reprimand, and he was ordered to pay a fine.

The Law Society referred the hearing panel's decision to the benchers for a review on the record. On review, the benchers found that Hordal's character was a relevant factor on penalty but cautioned that it was "improper to confuse popularity with probity" when considering the mitigating value of this evidence in the sanctioning decision (para. 69). The character letters tendered in support of Hordal noted that his conduct was out of character. The benchers sitting in review, however, noted, "[t]he apparent inconsistency of that observation appeared to be lost on many of the members providing letters of support" (para. 69). The authors of those letters "were faced with two essentially identical and concurrent events of misconduct within twelve months of each other, and in those circumstances it must be difficult to suggest that this conduct is out of character" (par. 69). The review panel determined that the two-month suspension imposed by the hearing panel was insufficient in the circumstances and substituted a suspension of six months. The fine was deleted on appeal.

Another consideration regarding the admissibility of character and reputation evidence in lawyer discipline proceedings is that it is "often a one-way street that only benefits lawyers" (Levin, 1998, p. 56). There is no real downside for a lawyer facing disciplinary action to adduce evidence of good character during the penalty phase. The purpose of this type of evidence is to show the hearing panel that the misconduct proven is "isolated" and uncharacteristic behaviour. The law societies generally will not call evidence of bad character in rebuttal, outside of the misconduct for which the lawyer is currently being sanctioned or any prior disciplinary history. Even if a prior conduct record exists, it may not disadvantage the lawyer if that misconduct is unrelated to the instant case or is at the minor end of the spectrum (see, for example, *Law Society of Alberta v. Hanson*, 2014). Moreover, it is difficult to identify cases in which disciplined lawyers have received harsher sanctions due to extrinsic evidence of prior bad acts.

In view of these concerns, character evidence should be given relatively little weight in the sanctioning decision. If character evidence is to be treated as mitigation in discipline cases, it should be admissible only under limited circumstances as, for example, where the witness is fully aware of the particulars of the misconduct ultimately

proven, has substantial knowledge of the lawyer's day-to-day law practice, and is able to provide testimony that speaks directly to the relevant character traits placed in issue by the lawyer's misconduct (Levin, 1998, p. 57). Additionally, as a general rule, certain individuals, such as judges, members of the bar, and other politically prominent persons, should not be permitted to testify as character witnesses in disciplinary proceedings, unless the witnesses are current employers of the wrongdoing lawyer and/or "their testimony relates to unique facts that cannot be obtained from other witnesses" (p. 58). The primary rationale for excluding this evidence stems from the risk that the status of the witness can exert a powerful influence on panel members and may unduly influence the sanctioning decision. Again, it may be worthwhile to rethink this mitigating factor as a metaphor of the ledger (discussed later).

Absence of Prior Discipline

A related post-offence mitigating factor that falls under metaphor of the ledger is the absence of a disciplinary record. It is understandable why some adjudicators view the absence of a prior disciplinary history, especially if over a long career, as prima facie evidence of a lawyer's otherwise good moral character and reputation. It may also be an indication that the misconduct in question is both out of character and unlikely to be repeated. Although this line of reasoning may be intuitive, the absence of prior discipline is not a sufficient mitigating factor to justify the imposition of a lesser penalty in cases involving serious professional misconduct for several reasons. First, as Levin (1998) notes, "[m]itigation due to lack of prior discipline sends the message to lawyers…that they have behaved in an exemplary fashion simply because they have not previously been subject to discipline" (p. 53). As noted in Chapter 2, disciplinary agencies do not have the necessary resources to adequately seek out and investigate unethical conduct and rely primarily on reporting by clients and third parties; therefore, the lack of prior discipline is not by itself proof of good character. Wrongdoing lawyers may go undetected and unpunished. Furthermore, evidence from this and other studies reveals that this mitigating factor is present in many disciplinary cases (see Kelly, 1988).[104] A

[104] Most of the disciplined lawyers in this study who had a prior discipline history were sanctioned for relatively minor violations (e.g., failure to file forms, failure to maintain proper books and records, failure to reply to the law society, etc.).

considerable number of lawyers facing disciplinary action for serious professional misconduct have not previously been disciplined.

Second, as the study results show, the absence of discipline over a long career can weigh considerably in the wrongdoing lawyer's favour. From the standpoint of protecting the public, the fact that an older and more experienced lawyer does not have a prior disciplinary record reinforces the view that the misconduct in question is out of character and unlikely be repeated. Yet, as many of the disciplinary cases cited in this study illustrate, stress and financial pressures are identified as inducing otherwise morally good lawyers to behave unethically. On the one hand, the misconduct at issue may be a single, albeit significant, lapse in ethics and judgment that is unlikely to recur; on the other hand, it may also foreshadow similar misconduct in the future, particularly if the situational factors that precipitated the lawyer's conduct reappear in the future.[105] As noted earlier, the fact that a lawyer succumbs to pressure while under stress may be an indication that the lawyer lacks the necessary moral strength and fortitude to carry on the practice of law (MacKenzie, 2001, p. 26-45).

And third, the fact that a practitioner with an otherwise spotless discipline history intentionally commits a dishonest act, such as stealing from clients, may demonstrate the member's general disregard for compliance with the ethical rules, and that he or she is unlikely to be dissuaded by the threat of sanctions (Luty, 2004, p. 1030).

Given the underreporting of lawyer misconduct, the problem of determining whether the conduct in question truly is an isolated occurrence, and the difficulty in predicting the likelihood of future misconduct by a lawyer, the absence of a prior disciplinary record should not be treated as a mitigating factor in most disciplinary cases. Because the underlying ethical violation(s) often is a first instance of uncovered misconduct for the wrongdoing lawyer, this factor should generally be treated as a neutral factor in the initial sanction determination. Moreover, there is a risk that the

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[105] Law society hearing panels in numerous cases have pointed out the inherent difficulty in predicting the likelihood of future misconduct (*Law Society of Upper Canada v. Davies*, 1994; *Law Society of Upper Canada v. Lundrigan*, 2014, para. 26; *Law Society of Upper Canada v. Luzius*, 2013, para. 18; *Law Society of Upper Canada v. Manilla*, 2010, para. 95). Predicting future misconduct on the basis of prior acts necessarily requires consideration of various individual and situational risk factors including, but not limited to, the nature and circumstances of the violation(s), the length of time that has elapsed since the misconduct, acceptance of responsibility and changes in attitudes and behaviours, and evidence of rehabilitation of the lawyer.

hearing panel may treat the lawyer's clean discipline history as a significant mitigating factor, especially if the respondent is a senior and experienced lawyer. In this vein, the absence of discipline over a lengthy career should not be viewed as mitigating in cases of serious professional misconduct, but rather, should weigh against the lawyer on the reasoning that an experienced practitioner should have known better about the importance of adhering to the professional, ethical and legal standards required of lawyers (*Law Society of Upper Canada v. Bishop*, 2013, paras. 22-23; *Law Society of Upper Canada v. Lang*, 2008, para. 113). A long unblemished career may be material to the assessment of penalty if, for example, other mitigating factors are present, and the lawyer is seeking permission to resign with an undertaking never to apply for readmission.

Self-Reporting Lawyer Misconduct

The issue of whether to voluntarily self-report disciplinary violations to the law society is one of the more significant ethical dilemmas confronting lawyers, especially if the misconduct is unlikely to be discovered. Self-reporting exposes lawyers to disciplinary liability and may result in very serious consequences for practitioners, including a loss of licence and livelihood. Indeed, the act of self-reporting may be a measure of the wrongdoing lawyer's moral character, personal and professional integrity, as well as demonstrating accountability for one's conduct and actions. On the other hand, self-reporting to the law society may be out of concern for the lawyer's own self-preservation, another technique of neutralization that falls under the metaphor of the ledger (discussed in Chapter 5).

Given that the law societies have taken a largely reactive, complaint-driven approach to regulating the professional conduct of lawyers, the fact that a member self-reports professional misconduct to the law society should be relevant to the sanctioning decision. It may be that the hearing panel should only consider self-reporting as a mitigating factor if the lawyer voluntarily discloses the matter to the law society in a timely manner and if the misconduct is unlikely to have been discovered otherwise. The act of self-reporting may carry greater mitigating weight where the reporting lawyer is remorseful and has accepted responsibility for wrongdoing, cooperates fully with the law society in its investigation, and has taken remedial action to prevent reoccurrence of the misconduct. In some cases, the convergence of such factors could make lesser

discipline appropriate. While self-reporting (and other post-offence mitigating factors) must be weighed against the seriousness of the misconduct and the likelihood of recurrence, such a rule may encourage other lawyers to self-report to the law society.

Restitution

Providing restitution to persons who have suffered loss or damage due to a lawyer's misconduct is also material to the assessment of penalty (discussed in Chapter 5 under denial of victim/injury). It is typically regarded as an important mitigating factor by the law societies, provided the lawyer makes restitution both voluntarily and in a timely manner. In addition to rectifying the consequences of the misconduct, a willingness to make restitution demonstrates acceptance of responsibility for the offence and understanding of the effects of the misconduct on others. While a hearing panel will sometimes give great weight to this factor (*Law Society of Upper Canada v. Kolman*, 2002, para. 29), whether a lawyer's restitution should be considered as a mitigating circumstance at all in lawyer discipline cases is also controversial.

In some American jurisdictions, courts have held that treating restitution as a mitigating factor in conversion cases is incompatible with the stated goals of lawyer discipline, and a lawyer's ability to make restitution should not determine the level of punishment for serious professional misconduct. In the seminal case of *In re Wilson* (1979), for example, the Supreme Court of New Jersey dismissed this factor as having no relevance to a charge of intentional conversion of client funds, and articulated the rationale for this approach as follows:

> Judicial consideration of restitution as a mitigating factor in disciplinary proceedings creates the impression that sanctions are proportioned in accordance with ability to pay, rather than gauged against the seriousness of the misconduct. Furthermore, according significance to restitution leads to an obvious and substantial possibility of unjust discrimination.
>
> At worst, refusal to consider restitution in this class of cases removes an incentive for compensation of injured parties. Encouraging restitution in individual cases is a worthy purpose, but the lenient discipline needed to achieve it conflicts with the paramount goal of preserving public confidence in the entire bar. From this point of view, compensation of injured parties should not be deemed an appropriate function of our disciplinary process. (p. 459)

The court also rejected the contention that a lawyer's subjective intent at the time of taking the money could qualify as mitigating circumstance. Chief Justice Wilentz for the Court stated, "[w]hen restitution is used to support the contention that the lawyer intended to 'borrow' rather than steal, it simply cloaks the mistaken premise that the unauthorized use of clients' funds is excusable when accompanied by an intent to return them" (p. 458). The court reasoned that accepting such an argument would send the message to other lawyers that taking money from clients is somehow appropriate if they pay it back. With respect to penalty, one author writes, "giving lawyers sanctioning breaks for paying back money they had no right to take in the first place gives lawyers, in certain situations, extra incentive to 'borrow' a client's money" (p. 1032).

In addition, according significance to this mitigating factor has the potential to inject unfairness and discrimination into the proceedings, because not all disciplined lawyers may have the financial means to repay misappropriated funds, thereby resulting in disparity in the imposition of sanctions for comparable conduct. The ability to pay restitution becomes a means for the bar's elite members to "buy" their way out of harsher sanctions.[106] The mere fact that restitution has been made is not in itself a reliable measure of the moral qualities of the wrongdoing lawyer, but rather, may be characterized as "an honesty of compulsion" (*In Re Wilson*, 1979, p. p. 457). Providing restitution to aggrieved parties may be a calculated effort to minimize negative consequences through impression management, rather than an indication of repentance or a genuinely altered attitude. Moreover, the ability to pay restitution may simply be a reflection of the lawyer's accumulated wealth, such as personal or business assets, ability to borrow money, or other favourable circumstances (see, for example, *Law Society of Upper Canada v. Bredin*, 1998; *Law Society of Upper Canada v. Lachapelle*, 1999; *Law Society of Upper Canada v. Mott-Trille*, 1997; *Law Society of Alberta v. Sondermann*, 2005). Again, rethinking the denial of victim/injury neutralization technique may assist in better assessing if and when it is appropriate at the penalty stage.

Notwithstanding these valid considerations, the chances of a complete dismissal of restitution as a mitigating factor in Canadian lawyer disciplinary cases is unlikely. Law

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[106] As the Delaware Superior Court rightly pointed out in the case of *In re Hawkins* (1913), "[a] thoroughly bad man may make restitution, if he is able, in order to rehabilitate himself and regain his position in the community; and a thoroughly good man may be unable to make any restitution at all" (cited in *In re Wilson*, 1979, p. 457).

society adjudicators have refrained from adopting a bright-line rule for determining whether this factor should be considered as mitigation, instead favouring a flexible case-by-case approach to lawyer sanctions. Given the growing recognition and acceptance of rehabilitation theory in the lawyer discipline context, a lawyer's restitution can be an important factor in the final sanctioning decision. A good faith effort by the wrongdoing lawyer to make restitution should be taken into account by the hearing panel when determining the appropriate penalty, but only in limited circumstances. The most salient factors informing this inquiry should include the lawyer's motivation, timing, and quantum of restitution. Restitution should only be relevant to the sanction determination where it is made upon the lawyer's own initiative and prior to the initiation of disciplinary proceedings by the law society.

In some circumstances, this factor may be given greater weight if the money is paid back before the law society discovers the lawyer's misconduct. Restitution, however, should be discounted as mitigation where the lawyer is coerced into paying back the money under, for example, the threat of disciplinary proceedings or court action. Lastly, as a general rule, it may be that a lawyer's offer to make restitution should not, by itself, mitigate the severity of the penalty imposed, but rather, should be considered where other mitigating factors are present, including, at a minimum, evidence of exceptional mitigating circumstances explaining why the misconduct occurred.

In a similar vein, it may be that the lawyer's subjective intent or motive should, as a general rule, be irrelevant in determining the appropriate discipline in cases of knowing misappropriation. Drawing a distinction between a lawyer who "borrows" money with the intent to pay it back and one who takes it without such an intention for purposes of mitigation is problematic for at least three reasons. First, it creates unwarranted inconsistency in the imposition of disciplinary sanctions for similar misconduct, which raises concerns about the fairness and efficacy of the disciplinary process. A second, related concern, is that the inconsistent application of discipline undermines the purposes of lawyer discipline, including protection of the public and maintaining public confidence in the legal profession. And third, such a distinction tends to minimize the seriousness of the lawyer's misconduct and the potential or actual harm surrounding the offence. Whereas a lawyer who "borrows" with an intent to return the money may, in theory, be less culpable than one who has no intention of returning the money, this distinction is not very great (see *In re Wilson*, 1979, p. 458). As a general rule, the fact

that a lawyer did not intend to permanently deprive the client of their funds should not mitigate the seriousness of the punishment, even when the money is paid back. There is support for the proposition that the fact that no client suffered any actual loss should not be relevant to the determination of the appropriate penalty in cases of knowing misappropriation.[107] If the expectation is that wrongdoing lawyers will receive sanctioning breaks in the absence of a deliberate intention to steal the funds, and where the funds are replaced and there is no actual harm to clients, lighter penalties are unlikely to deter other lawyers from engaging in similar misconduct.

To remedy these concerns over misappropriation, the provincial and territorial law societies, perhaps under the guidance of the Federation of Law Societies of Canada, should consider adopting a standard definition of what constitutes misappropriation. Currently, there is no consensus definition in the case law of this term, with much of the deliberation surrounding the necessary intention or mental element for a finding of misappropriation. Over the past two decades, and, more recently, a number of law society disciplinary panels, the majority in Ontario, have endorsed the broad definition as set out in *Nebraska State Bar Association v. Veith* (1991) (see, inter alia, *Law Society of Ontario v. Stevens*, 2019; *Law Society of Ontario v. Wilkins*, 2019; *Law Society of Upper Canada v. Mikitchook*, 1998; *Law Society of Upper Canada v. Chojnacki*, 2010; *Law Society of New Brunswick v. Howes*, 2012; *Law Society of Manitoba v. Young*, 2017 MBLS 9; *Doolan v. Law Society of Manitoba*, 2016; *Law Society of Alberta v. Thomas*, 2016; *Law Society of British Columbia v. Harder*, 2005).[108] According to this definition, misappropriation may be found if there is an unauthorized temporary use of the client's money. Law societies should consider whether a finding of knowing misappropriation should attract the presumptive penalty of revocation, no matter the lawyer's intent for taking the money. A broader, more comprehensive definition of misappropriation would

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[107] As noted by the Supreme Court of New Jersey in the case of *In re Wilson* (1979), "[r]estitution may compensate an individual complainant for the financial loss suffered; conceivably, it may partially restore the shattered faith of a particular client. It does not, however, significantly retard the subtle but progressive erosion of public confidence in the integrity of the bench and bar" (p. 458).

[108] To restate, the Court defined the term as follows: "[m]isappropriation is 'any unauthorized use… of clients' funds entrusted to [a lawyer], 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'…(an attorney's failure to use entrusted funds for the purpose for which they were entrusted constitutes misappropriation.) Misappropriation caused by serious, inexcusable violation of a duty to oversee entrusted funds is deemed willful, even in the absence of a deliberate wrongdoing" (p, 554).

help achieve a greater degree of consistency and fairness when sanctioning lawyers for comparable conduct.

Rethinking Mitigating Factors as Techniques of Neutralization

Law society tribunals have long extolled the virtues of individualized sanctioning practices, emphasizing that no two cases are alike and that the appropriate penalty must be tailored to the specific facts of a case.[109] Neutralizations form an important part of the aggravation/mitigation analysis informing the sanctioning decision. I believe that reframing some of the mitigating factors as techniques of neutralization (as suggested above) and in effect neutralizing them may act as a form of proactive prevention and assist disciplinary panels in taking an approach that addresses part of their public interest mandate.

For example, almost half of the lawyers denied or tried to reduce their responsibility by alleging they were impaired by psychological, emotional, or other medical problems, or some combination thereof at the time of misconduct. Such impairment could be reduced and the techniques of neutralization neutralized by providing free and confidential counselling, education and other tools to deal with these issues. Lawyers who do not take advantage of these tools are less likely to be able to deny responsibility with any degree of credibility. Since many law societies already provide these services, this technique of neutralization should hold less or no weight when imposing sanctions unless the lawyer availed themselves of these free and confidential services.

It may be that law societies should address techniques of neutralization and render some ineffective where appropriate. As noted in Chapter 2, the vocabularies offenders use to rationalize their behaviour are learned and adapted through social interaction with others and one's environment. The various defence and mitigation strategies lawyers use to account for their misconduct are learned not only from their

[109] In *Law Society of Upper Canada v. Yat* (2007), the hearing panel cautioned that "there can be no matrix or chart matching specific misconduct with a specific penalty. The appropriate penalty must be determined for each case taking into account its own specific circumstances" (para. 124).

peers in an organizational setting, but they are also learned from and sanctioned by the law itself (Matza, 1964). Consequently, law society hearing panels, through their sanctioning decisions, have the ability to prevent and discourage undesirable neutralization techniques. In rejecting certain vocabularies, "this lessens the ability of future potential offenders to use those neutralizations to free themselves from the moral bind of the law" (Haugh, 2014, p. 3148). This sends a clear message to lawyers which techniques should and should not be led in mitigation of penalty. When a neutralization ceases to effectively rationalize unwanted behaviour, the behaviour can no longer proceed (p. 3187). A balanced and flexible approach to evaluating neutralizations in disciplinary hearings is beneficial to the sanctioning process. How neutralization techniques are treated by hearing panels can encourage and discourage their use in the future.

Alternative Models of Lawyer Regulation: A Cautionary Tale for Canada's Legal Profession

Concluding comments on professional self-regulation raise the issue of whether a profession should remain self-regulating. While this research was designed to cast some light on the issue of self-regulation in the legal profession in Canada, it does not provide any definitive evidence or commentary on the question of whether lawyers should be self-regulating. However, a cautionary tale for Canadian lawyers is unfolding in numerous jurisdictions around the world. Other countries with legal systems comparable to Canada "have assessed self-regulation and found it wanting as a defensible regime" (Devlin & Heffernan, 2008, p. 170). In countries like Australia and England and Wales, legislative reforms have resulted in far greater government involvement in the regulation of the legal profession. Self-regulation has been replaced with co-regulatory structures that subject professional regulation to independent external oversight (see Buckingham, 2012; Devlin & Heffernan, 2008; Maute, 2008; Paton, 2010; Semple, 2015; Shinnick, Bruinsma, & Parker, 2003; Webb, 2008).[110]

[110] Among the catalysts for change were lax procedures for handling consumer complaints against lawyers, inadequate discipline, anti-competitive practices, and a fundamental lack of consumer orientation on the part of the legal profession (Maute, 2011, p. 37; Parker, 1999, pp. 12-17).

To illustrate, in England and Wales, concerns over the rights of consumers and problems with the handling of complaints against solicitors led to enactment of the Legal Services Act 2007. Among the many reforms, this sweeping legislation established the Legal Services Board (LSB)—an independent body comprised primarily of non-lawyers, which is responsible for overseeing the regulation of legal services in England and Wales. Similar reforms have been enacted in Australia. Several Australian states and territories have instituted co-regulatory systems "where the courts and the professional bodies share regulatory responsibilities with a variety of statutory regulators appointed by the executive branch of government" (Briton, 2010, p. 5). In New South Wales (NSW), for example, legislation has established the Office of the Legal Services Commissioner (OLSC), which is responsible for resolving consumer disputes, overseeing the investigation of complaints, and taking disciplinary action against a barrister or solicitor (Office of the Legal Services Commissioner, 2019; see also Parker & Evans, 2018, pp. 92-94).

The regulatory reforms taking hold internationally have important implications for the self-regulation debate in Canada. The "regulatory recalibration" (Devlin & Cheng, 2010) that has occurred in Australia, the United Kingdom, and elsewhere exemplifies "the renegotiation which is taking place between the profession, the state and consumer movements, a generalised realignment which is changing the old order of professionalism" (Seneviratne, 2000, p. 39). The shift toward a more consumer oriented, co-regulatory system is a signal "that government will and can step in to end self-regulation of the legal profession when the legal profession no longer exercises that self-regulatory authority to serve the public interest" (Paton, 2008, p. 97).

Limitations and Directions for Future Study

The results of this study should be considered in the light of some limitations. First, as with most research on neutralization techniques, this study was unable to determine the timing of neutralization processes (see, for example, Hirschi, 1969; Sheley, 1980, and discussion in Chapter 2). One of the enduring questions underlying neutralization theory is whether neutralization follows deviant behaviour or precedes it. Because of the nature of the archival data used in this study, the current research is limited to analyzing the outward manifestations of the neutralization techniques identified in the lawyer discipline reports. Since the study relies on lawyer accounts reported in

disciplinary cases, it is not possible to determine whether neutralizations preceded unethical behaviour or were invoked as after-the-fact rationalizations in an attempt to justify their misconduct to others. That is, I was unable to address how and whether neutralizations operate *ex ante* to facilitate certain types of lawyer misconduct in the first place. Despite this limitation, the study's findings suggest that neutralization theory is a useful framework for understanding how disciplined lawyers account for their professional misconduct during disciplinary proceedings and how law society adjudicators respond to these rationalizations when imposing sanctions. The results also bear important policy implications for addressing the use of these techniques in disciplinary hearings, rendering some of them ineffective, thereby discouraging their use in the future.

A second limitation also concerns the nature of the archival data collected. In addition to being used as a means of rationalization, techniques of neutralization are also used by offenders to cope with potential stigma and avoid damage to their self-concept (Benson, 1985; Bryant et al., 2018; Maruna & Copes, 2005; Vasquez & Vieraitis, 2016). The study findings provide some evidence to support this notion. As noted in Chapter 5, three quarters of the disciplined lawyers in this study used varying combinations of the metaphor of the ledger neutralization to recast both themselves and their acts in a more favourable light. However, one cannot fully know whether the motive was to reframe a stigmatized identity, create a favourable impression with the hearing panel, or a calculated effort by the lawyer to seek a reduced punishment, or a combination thereof. Interviews with disciplined lawyers might clarify some of these issues.

Third, the results also lend support to the contention that some of the individual techniques of neutralization may not be conceptually distinct from one another to be considered different categories (see Maruna & Copes, 2005; Landsheer, Hart, & Kox, 1994; Minor, 1981; Forsyth & Evans, 1998; Copes, 2003; Friedman, 1974; Coleman, 1994). Although techniques of neutralization were developed as theoretically distinct concepts, this study, like other research on neutralization, confirms that these techniques are not mutually exclusive categories (Stadler & Benson, 2012; Forsyth & Evans, 1998). Some of the neutralization statements identified in the cases could be assigned to more than one category (see Chapter 3). This is a limitation of content analysis in general and raises the possibility of classification inaccuracies. Several steps

were taken to help reduce the reporting of unreliable results. The coding scheme was pretested and revised several times. Each neutralization was coded “under the technique it best fits, realizing that aspects of other techniques may be present” (Forsyth & Evans, 1998, p. 217). Also, two of the original techniques (i.e., denial of injury and denial of victim) were collapsed due to the similarity of their contents and to simplify data analysis. These findings suggest that further refinement of the theoretical concepts of neutralization theory is needed.

A final shortcoming of the study relates to the relative weight or importance attached to lawyer neutralizations by the hearing panel in respect of penalty. As noted in the Chapter 1, one of the aims of this research was to examine how law society adjudicators respond to lawyer neutralizations when determining the appropriate punishment for professional misconduct. In most cases, I was able to determine if the hearing panel accepted or rejected the lawyer’s proffered neutralizations as mitigating factors, although it was sometimes challenging to discern how they were ranked and weighted against one another (i.e., their specific mitigating effect). This problem was particularly pronounced in cases where disciplined lawyers invoked multiple neutralization techniques in respect of the same disciplinary offence. Findings should therefore be interpreted in light of this caveat.

Future research that expands on the current study could examine how techniques of neutralization are ranked and weighted by law society hearing panels using a vignette design and interviews with adjudicators. Vignettes could be used to present a hypothetical case in which a lawyer is found to have committed profession misconduct and invokes a range of neutralizing statements in the form of mitigating circumstances to justify or excuse wrongdoing. Following each scenario, researchers could ask participants to rate the importance they attach to different neutralization techniques in determining the appropriate punishment. Key features of these vignettes, such as the type of misconduct and techniques of neutralization, can be systematically varied to determine how they influence adjudicator decision-making during the sanctioning decision. The results of such a study may provide more definitive evidence of the effects of neutralization techniques on the sanctioning decision.

Despite these limitations, I believe this study does contribute to our knowledge of how lawyers raise techniques of neutralization during disciplinary hearings and how

discipline panels respond to such accounts. It also raises some policy issues that should be considered by law societies and other self-regulating professions.

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