

The Old Man and Rule 8.4(c): A Proposal for the Adoption of Maryland's Misappropriation Rule in Iowa

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ABSTRACT: Iowa's current approach to attorney misappropriation is inadequate. While the Iowa Supreme Court has identified attorney misappropriation of client funds as a grave violation of the Iowa Rules of Professional Conduct, it has a history of failing to define the precise metes and bounds of the violation's definition, the extent of its possible defenses, and what the complaint charging misappropriation must allege. This ambiguity undermines the court's self-proclaimed strict approach to misappropriation, leaving the issue unsettled and raising due process concerns. Attorneys subject to discipline for safekeeping violations, i.e. rules governing attorney preservation of client funds and property, lack adequate notice of both (1) the charges against them—whether the safekeeping charge is a trust-account violation or the more serious charge of misappropriation—and (2) the ultimate sanction they may face, ranging from reprimand to license revocation. This Note proposes that the Iowa Supreme Court simplify its distinction between misappropriation and lesser safekeeping violations to put attorneys on better notice of the charges against them and to best comply with the interests identified by the American Bar Association. It compares Iowa's approach to misappropriation with the approaches of two other jurisdictions that have adopted judge-made rules related to misappropriation: New Jersey and Maryland. New Jersey and Maryland provide paradigmatic examples of how states are adding clarity to the scope of misappropriation, New Jersey by adopting a clear, bright-line rule imposing automatic revocation on attorneys who misappropriate and Maryland by clarifying the elements of misappropriation while still treating misappropriation as a serious rule violation deserving of revocation. This Note compares the three approaches and proposes the adoption of the Maryland rule as a way for the court to

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seriously address the problem of misappropriation while providing clearer guidance to the legal profession.

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I. INTRODUCTION

In February 2012, David Kelsen, a 75-year-old Iowa attorney, was in trouble both personally and financially.¹ His wife was in poor health and had recently lost her job.² His stepson had stolen money from him.³ He owed his landlord over \$3000.⁴ And after his secretary left for a new job, he was unable to replace her due to his poor financial situation.⁵

At the same time, Kelsen began representing a client for a potential wrongful-discharge claim.⁶ Throughout the course of his representation, Kelsen accepted multiple retainer payments from the client, including one balloon payment of \$7500, all before filing a lawsuit on the client's behalf.⁷ With each of the payments, Kelsen violated a number of the Iowa Rules of Professional Conduct's safekeeping and trust account rules.⁸ The Iowa Supreme Court Attorney Disciplinary Board ("Board") filed a complaint alleging Kelsen violated the following rules: improperly routing advanced payments from the client, failing to notify the client when he made withdrawals, and ultimately, failing to return unearned payments after the client terminated his representation.⁹

Kelsen admitted all charges in the complaint.¹⁰ Sanctions for violating safekeeping and trust account rules vary in Iowa from public reprimand to revocation.¹¹ Because of this variance, Kelsen might have been aware that he was facing revocation. However, several circumstances suggest that not only was Kelsen unaware of the severity of the potential sanction he was facing, but a more lenient sanction was appropriate in his situation.

First, the Board's approach indicated that it considered the offense to be a lesser safekeeping violation rather than misappropriation. In Iowa, while lawyers who misappropriate almost invariably face revocation, many other safekeeping violations typically result in lesser sanctions, such as a public

1. Iowa Supreme Court Attorney Disciplinary Bd. v. Kelsen, 855 N.W.2d 175, 177, 179 (Iowa 2014).

2. *Id.* at 179.

3. *Id.*

4. *Id.* at 178.

5. *Id.* at 179.

6. *Id.* at 177.

7. *Id.* at 177-78.

8. *Id.* at 178-79.

9. *Id.* at 179; *see also* IOWA CT. R. 45.2, 45.7(3)-(4); IOWA R. OF PROF'L CONDUCT r. 32:1.15, 32:1.16(d).

10. *Kelsen*, 855 N.W.2d at 179.

11. *Compare id.* at 186 (revoking an attorney's license), *with* Iowa Supreme Court Attorney Disciplinary Bd. v. Piazza, 756 N.W.2d 690, 699-700 (Iowa 2008) (*per curiam*) (imposing a public reprimand and noting that "[i]n the past, the sanctions for similar violations have ranged from a public reprimand to suspension [and] revocation" (citations omitted)).

reprimand or suspension.¹² The Board's complaint did not mention misappropriation; further, the Board's decision not to call any witnesses to prove its case signaled it was not pursuing the matter as a severe violation.¹³ Second, the Grievance Commission, the adjudicative body that hears attorney disciplinary matters in Iowa, did not seem to consider the matter to be misappropriation. Though the Grievance Commission found Kelsen had committed all of the alleged safekeeping and trust account violations, it recommended a sanction of only a public reprimand, a punishment inconsistent with a finding of misappropriation.¹⁴ Finally, though sanctions for safekeeping violations vary widely and disciplinary proceedings turn on the particular facts, there is prior case law supporting a lesser sanction in circumstances similar to Kelsen's.¹⁵

Despite these circumstances, the Iowa Supreme Court revoked Kelsen's license.¹⁶ While recognizing that "[t]here are different gradations of trust account violations,"¹⁷ the court reasoned that the facts laid out in the complaint—that Kelsen failed to deposit unearned funds in the client trust account and was unable to refund the money for several months after the client requested its return—adequately implied a charge of misappropriation.¹⁸ Because Kelsen did not come forward with a valid colorable-future-claim defense, the court concluded that the appropriate sanction was license revocation.¹⁹

The court's approach to safekeeping violations is problematic in at least two ways. First, it is unclear what separates a lesser safekeeping violation, which

12. Iowa Supreme Court Attorney Disciplinary Bd. v. Carter, 847 N.W.2d 228, 234 (Iowa 2014) ("We revoke an attorney's license to practice law for stealing client funds."); *Piazza*, 756 N.W.2d at 699–700 (explaining that failure to deposit unearned fees into the client trust account or maintain adequate records may warrant only a public reprimand).

13. See *Kelsen*, 855 N.W.2d at 179, 183 n.3; see also Iowa Supreme Court Attorney Disciplinary Bd. v. Powell, 830 N.W.2d 355, 359 (Iowa 2013) ("The Board brought this case as a trust fund violation, primarily involving the taking of fees before they are earned. Normally, this conduct supports a suspension ranging from a few months to a year or beyond.").

14. *Kelsen*, 855 N.W.2d at 180. In Iowa, a finding of misappropriation generally results in revocation. See *supra* note 12 and accompanying text.

15. See *supra* note 11; see also Iowa Supreme Court Attorney Disciplinary Bd. v. Boles, 808 N.W.2d 431, 436, 442–43 (Iowa 2012) (imposing a 30-day suspension on an attorney who had a history of trust-account misconduct and in one instance failed to issue a refund to a client for more than 17 months after concluding his legal work for that client); Iowa Supreme Court Attorney Disciplinary Bd. v. Parrish, 801 N.W.2d 580, 584–85, 590 (Iowa 2011) (imposing a 60-day suspension on an attorney for failing to return unearned portions of retainer funds to two clients); Iowa Supreme Court Attorney Disciplinary Bd. v. McCann, 712 N.W.2d 89, 96–97 (Iowa 2006) (imposing an indefinite suspension with no possibility for reinstatement for two years on an attorney who, among other violations, used two client retainers prior to earning them).

16. *Kelsen*, 855 N.W.2d at 186.

17. *Id.* at 182.

18. *Id.* at 183 n.3.

19. *Id.* at 182–85. See *infra* notes 137–44 and accompanying text for a more detailed explanation of the colorable-future-claim defense.

does not require an attorney to show a colorable future claim to the unearned funds and generally results in a sanction less severe than revocation, from misappropriation, which nearly always results in revocation. The ambiguity in this area also has implications related to notice. An attorney charged with a safekeeping violation may be unable to determine whether the violation rises to the level of misappropriation or not because the rule for all safekeeping violations, including misappropriation, is the same.²⁰ The harm to the client is also the same because in both situations, the attorney is generally unable to return money belonging to the client. Even the actions are the same: taking fees before they are earned and failing to return unearned fees are both essentially theft. The only difference between the two may be intent, with a general safekeeping violation requiring only an intent of negligence and misappropriation requiring knowledge or a purposeful intent.²¹ However, it is far from clear that the court intends this to be the distinction.²²

Second, the ambiguity in this area leads to disparate sanctions for essentially the same conduct.²³ This has the potential to diminish both public confidence in the system as well as morale within the legal profession. The ambiguity in the rule makes sanction decisions at times appear arbitrary, with some attorneys receiving only a public reprimand and others facing disbarment for quite similar actions.

This Note proposes that the Iowa Supreme Court clarify the meaning of misappropriation to put attorneys on better notice of the charges against them and to best comply with the principals of the American Bar Association's ("ABA") Model Rules of Professional Conduct ("Model Rules"). Part II discusses a background of the attorney disciplinary process in the United States and the development of the Model Rules. Part III examines the client-safekeeping rule both under the ABA's Model Rules and in three jurisdictions: Iowa, New Jersey, and Maryland. While all three of these jurisdictions have generally declared that the appropriate sanction for misappropriation of client funds is license revocation, New Jersey and

20. See IOWA R. OF PROF'L CONDUCT r. 32:1.15.

21. See *infra* Part III.A.1 for a discussion of types of violations of the safekeeping rule and the different requisite mental states.

22. Compare *Kelsen*, 855 N.W.2d at 183 n.3 (noting that reference to "the relevant facts and the relevant legal rule regarding the mishandling" of client funds was sufficient to support a charge of misappropriation without mention of intent), and *Iowa Supreme Court Attorney Disciplinary Bd. v. Carter*, 847 N.W.2d 228, 234 (Iowa 2014) (stating that an attorney may avoid a finding of misappropriation with the colorable-future-claim defense, which requires an "intent to withdraw funds as fees," but not specifying any required intent for a finding of misappropriation), with *Iowa Supreme Court Attorney Disciplinary Bd. v. Baldwin*, 857 N.W.2d 195, 214–16 (Iowa 2014) (finding no misappropriation when the violation stemmed from negligence), and *Iowa Supreme Court Attorney Disciplinary Bd. v. Thomas*, 844 N.W.2d 111, 116 (Iowa 2014) (associating misappropriation with a violation of Iowa Rule of Professional Conduct 32:8.4, which requires a knowing intent).

23. See *supra* notes 11, 15.

Maryland are distinct from Iowa because they have adopted clear judge-made rules regarding misappropriation—New Jersey by adopting a bright-line rule imposing automatic revocation on attorneys who misappropriate and Maryland by clarifying misappropriation’s elements while still treating misappropriation as a serious rule violation deserving revocation.²⁴ Part IV critiques Iowa’s approach to misappropriation, which undermines the purposes of attorney disciplinary rules and has the potential to deprive attorney-defendants of sufficient notice of the charges and potential sanctions they face. Part V proposes the adoption of Maryland’s misappropriation rule, which requires both a charge and finding of fraudulent intent in order to revoke on grounds of misappropriation, as the best way for the court to: (1) seriously address the problem of misappropriation while also retaining some flexibility in its approach to sanctions; and (2) provide clear guidance to practicing attorneys.

II. THE DEVELOPMENT OF ATTORNEY DISCIPLINARY STANDARDS IN THE UNITED STATES

Each state independently regulates the legal profession.²⁵ This has led to a wide variety of approaches across the country.²⁶ This Part describes the problems that have arisen due to the state-by-state method as well as the influential roles of the ABA and the United States Supreme Court in addressing those problems and shaping more consistent procedural and substantive rules for attorney disciplinary proceedings. This Part closes by examining the attorney disciplinary procedures in Iowa, a jurisdiction that closely models the procedures envisioned by the ABA.²⁷

A. JUDICIAL STANDARDS FOR DISCIPLINARY PROCEEDINGS: INCONSISTENT STANDARDS FOR PROFESSIONAL REGULATION ACROSS THE COUNTRY LEAD STATES TO ADOPT THE MODEL RULES OF PROFESSIONAL CONDUCT

Prior to 1970, state bar associations regulated attorney discipline.²⁸ The state approaches varied, leading to a great disparity in both enforcement and sanctions across the country.²⁹ In 1970, after three years of investigation, the

24. For more information on the significance of these jurisdictions, see *infra* text accompanying notes 124–29.

25. See *infra* notes 39–40 and accompanying text.

26. See generally Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL PROF. 209 (2011).

27. See *infra* note 42 and accompanying text. While the procedures of the attorney disciplinary process vary by state, see *infra* text accompanying notes 39–41, the differing procedures are largely outside the scope of this Note.

28. See Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 919 (1994).

29. *Id.* at 920 (“In 1935, twenty-one grievance committees reported to the governing boards of their state bars, twenty reported to the courts, and seven reported to state attorneys general. In six states, the respondent was entitled to a jury trial. Twenty-one states’ prosecutors were

ABA declared the attorney disciplinary systems in place throughout the country to be failures, emphasizing the public's overwhelming dissatisfaction with the legal profession.³⁰ The investigative committee made a number of recommendations, most notably proposing the creation of independent disciplinary committees within each state to investigate and prosecute attorney misconduct charges to be governed by the highest court in each jurisdiction.³¹ The recommendations proved persuasive, and today the practice of law is regulated, directly or indirectly, by the highest court of each jurisdiction in the country.³²

With the purpose of developing a uniform set of moral guidelines for the profession, the ABA also created the Model Code of Professional Responsibility around the time of its investigation.³³ The ABA split the code into two tiers: "Disciplinary Rules" and "Ethical Considerations."³⁴ In 1983, the ABA replaced this code with a set of more practical guidelines, the Model Rules, due to criticism that the Model Code of Professional Responsibility failed to address the responsibilities of transactional attorneys and attorneys representing organizational clients.³⁵ The ABA has regularly amended the Model Rules, still in effect today, making both clarifying and substantive changes in response to developments in case law and the legal profession as a whole.³⁶ These comprehensive rules help guide states in regulating an attorney's duty to the client, the general public, the justice system, and the profession.³⁷

appointed by their bar associations, twenty-one other states' prosecutors were attorneys general or regular prosecutors, and three states' prosecutors were appointed by the courts." (footnotes omitted)).

30. *Id.* at 921–22.

31. *Id.* at 926–27.

32. *Id.* at 933 & n.201 (noting that the New York Court of Appeals delegated its regulatory power to the mid-level appellate courts).

33. Steven Krane, *Regulating Attorney Conduct: Past, Present, and Future*, 29 HOFSTRA L. REV. 247, 252 (2000).

34. *Id.* at 253.

35. *Id.* at 253–55; Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO. J. LEGAL ETHICS 441, 442–44 (2002). For a detailed history of lawyer disciplinary procedures before the development of the Model Rules, see generally Devlin, *supra* note 28.

36. Love, *supra* note 35, at 441–44, 462. For instance, in response to the fact that most attorney disciplinary claims related to client funds involve the taking of unearned fees, the ABA amended Model Rule 1.15 (Safekeeping Property) in 2002 to expressly prohibit withdrawal of unearned fees. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2013, at 358–61 (Art Garwin ed., 2013).

37. Barrie Althoff, *Lawyer Disciplinary Sanctions*, 2001 PROF. LAW. SYMP. ISSUES 105, 108–09; see also MODEL RULES OF PROF'L CONDUCT pmb. & scope (AM. BAR ASS'N 2013) (outlining the range of an attorney's professional responsibilities).

The Model Rules are not law.³⁸ Each state independently regulates attorney conduct with its own professional code.³⁹ State supreme courts control designing and implementing professional regulations.⁴⁰ Most state courts have adopted approximate versions of the Model Rules as the professional code in their respective states.⁴¹ For example, the Iowa Supreme Court adopted the Iowa Rules of Professional Conduct, which are nearly identical to the Model Rules.⁴² Because attorneys are subject to discipline in each state in which they practice, an attorney may be subject to multiple sets of regulations and procedures in the attorney disciplinary process regardless of where the infraction occurred.⁴³

Nor do the Model Rules provide guidance on sanctions.⁴⁴ As a result, states continue to implement their own individualized sanction guidelines, which vary widely.⁴⁵ Courts generally impose sanctions with the purpose of “shap[ing] the individual lawyer’s future conduct,”⁴⁶ and these sanctions typically consist of a private reprimand, public reprimand, license suspension, or disbarment.⁴⁷ Generally, the primary objective of disciplining attorneys is

38. See H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 75 (1997) (noting that “individual states have made significant modifications to the Model Rules of Professional Conduct or have rejected them altogether”).

39. Althoff, *supra* note 37, at 105.

40. See Curtis, *supra* note 26, at 210.

41. *Id.*

42. There are only three differences between the rules. First, unlike the Model Rule, Iowa does not require the client account to be maintained in the same state. Compare IOWA R. OF PROF'L CONDUCT r. 32:1.15(a), with MODEL RULES OF PROF'L CONDUCT r. 1.15(a) (AM. BAR ASS'N 2013). Second, Iowa requires complete accounting records to be preserved for six years after termination of representation rather than the five years suggested by the Model Rule. Compare IOWA R. OF PROF'L CONDUCT r. 32:1.15(a), with MODEL RULES OF PROF'L CONDUCT r. 1.15(a) (AM. BAR ASS'N 2013). Third, Iowa notes that “client trust accounts shall be governed by chapter 45 of the Iowa Court Rules,” a chapter specifying additional technical rules for trust accounts. IOWA R. OF PROF'L CONDUCT r. 32:1.15(f); IOWA CT. R. 45.1–11. For example, under chapter 45, attorneys must keep specified financial records such as copies of bills for fees and expenses, documentation of disbursement to clients, and monthly client-trust-account reconciliations. See IOWA CT. R. 45.2(3)(a).

43. Curtis, *supra* note 26, at 211. For instance, in Iowa, “[a] lawyer admitted to practice . . . is subject to the disciplinary authority of Iowa, regardless of where the lawyer’s conduct occurs. . . . A lawyer may be subject to the disciplinary authority of both Iowa and another jurisdiction for the same conduct.” IOWA R. OF PROF'L CONDUCT r. 32:8.5(a).

44. Althoff, *supra* note 37, at 105 (“[The Model Rules] do not provide guidance, however, as to the disciplinary process or as to what sanction, if any, should be imposed for ethical misconduct.”). *But see infra* text accompanying note 57 (noting that the ABA provides guidance on the subject of sanctions with the Model Rules for Disciplinary Enforcement and Standards for Imposing Lawyer Sanctions).

45. Althoff, *supra* note 37, at 106.

46. Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 677, 685 (2003).

47. Althoff, *supra* note 37, at 106. The type of sanction a judge may impose is not unlimited. For instance, judges are typically precluded from instituting fines or mandating public service. Zacharias, *supra* note 46, at 685–86.

not to punish attorneys for their bad acts,⁴⁸ but rather, to protect the general public and the justice system as a whole.⁴⁹ Secondary objectives include upholding public confidence in the profession and legal system, as well as preserving values such as fundamental fairness.⁵⁰

Courts generally reserve suspension and revocation for lawyers who pose a threat of continuing to act improperly.⁵¹ This policy is consistent with the goals of attorney discipline.⁵² Rule violations related to serious moral deviation, such as misappropriation or misrepresentation,⁵³ are the most likely to result in disbarment or suspension across the country.⁵⁴ On the other end of the spectrum, public reprimands and private admonitions are “expressive sanctions” meant to send a message to the offending attorney.⁵⁵ This message serves the function of specific deterrence, placing the offending attorney on notice that certain behavior will be punished so that the attorney will be likely to correct the behavior rather than face more severe sanctions in the future.⁵⁶

The states are not without guidance from the ABA on the subject of sanctions. In the mid-1980s, the ABA published the Model Rules for Disciplinary Enforcement and Standards for Imposing Lawyer Sanctions, which are sets of broad principles applicable to a large range of attorney misconduct and that are designed to aid in “[c]onsistency and uniformity” of sanctions.⁵⁷ In these standards, the ABA advocates that courts consider all

48. Mary Hackett, *Misappropriation of Clients' Funds: Is Disbarment Always Justified?*, 12 J. LEGAL PROF. 75, 81–82 (1987).

49. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.1 (AM. BAR ASS'N 1991) (“The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.”); Zacharias, *supra* note 46, at 677, 681, 688 (“The main goal of disciplinary prosecutions, therefore, is not simply to implement legislative moral judgments, but rather to assure that lawyers exercise their discretion in an acceptable way and that lawyers unwilling to exercise discretion appropriately, or incapable of doing so, are controlled.”).

50. Hackett, *supra* note 48, at 81.

51. See Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 20 (1998).

52. Zacharias, *supra* note 46, at 694.

53. See *infra* text accompanying note 102.

54. Benjamin H. Barton, *The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons*, 83 N.C. L. REV. 411, 451 (2005).

55. Levin, *supra* note 51, at 22.

56. *Id.*

57. Althoff, *supra* note 37, at 105–07, 120; see also David L. Hudson Jr., *California's In-Depth Review of its Lawyer Discipline Standards May Inspire Other States to Follow*, A.B.A. J. (Aug. 1, 2014, 8:30 AM), http://www.abajournal.com/magazine/article/californias_in-depth_review_of_its_lawyer_discipline_standards_may_inspire_ (“The absence of [disciplinary] standards contributes to the disparities in New York. The existence of standards helps ensure consistency.” (quoting Stephen Gillers, a professor who served on the ABA’s Commission on Ethics 20/20)).

circumstances, including mitigating and aggravating facts, when imposing sanctions⁵⁸ and emphasizes the importance of an individualized approach to disciplining attorneys.⁵⁹ However, scholars have criticized these guidelines as overly flexible and ultimately incapable of providing meaningful guidance to courts assigning sanctions.⁶⁰ Perhaps due to this lack of clarity, these standards have been less influential than the Model Rules. Only four states have adopted forms of the ABA's sanction standards explicitly, and many others simply rely on their own precedent, determining sanctions on a "case-by-case basis."⁶¹ The lack of clear standards for attorney disciplinary sanctions have led to inconsistencies in sanctions both from jurisdiction to jurisdiction as well as between different cases within a single jurisdiction.⁶² Among other ramifications, these inconsistencies have the potential to implicate constitutional issues of due process.

B. CONSTITUTIONAL STANDARDS FOR DISCIPLINARY PROCEEDINGS: IN RE RUFFALO AND DUE PROCESS REQUIREMENTS IN ATTORNEY DISCIPLINARY PROCEEDINGS

While judicial rules and sanctions within and among states vary widely, all attorney disciplinary proceedings are alike in that they are "quasi-criminal [in] nature" and thus subject to heightened due process concerns.⁶³ While many jurisdictions have concluded that they need not give an attorney in such a proceeding as much due process protection as a defendant in a criminal trial, the exact scope of an attorney's due process rights is unclear.⁶⁴ In fact, interpretation of due process requirements in attorney disciplinary proceedings varies significantly between jurisdictions.⁶⁵ This variance creates ambiguity, which means attorneys may suffer from a lack of notice—that is, they may be unaware of the charges against them or the severity of the

58. Hackett, *supra* note 48, at 83.

59. STANDARDS FOR IMPOSING LAWYER SANCTIONS pt. II (AM. BAR ASS'N 1991).

60. Althoff, *supra* note 37, at 115 (advocating revision of sanction guidelines for more clarity and increased practical value); Levin, *supra* note 51, at 39 ("[T]hese voluntary standards provide virtually limitless flexibility, but they do not promote the considered decision-making or provide the consistency sought by the ABA Sanctions Committee."); Zacharias, *supra* note 46, at 681–82.

61. Levin, *supra* note 51, at 34 n.154, 35–36.

62. *Id.* at 5 ("Yet even casual observation of the vague, often unarticulated standards used by state decision-makers when imposing discipline raises serious questions about whether sanctions could be imposed fairly.")

63. *In re Ruffalo*, 390 U.S. 544, 551 (1968). Other terms used to describe attorney disciplinary hearings include "special civil" and "*sui generis*," yet despite these different choices in terminology, all of these terms place similar emphasis on the special nature of attorney disciplinary proceedings, distinguishing them from both civil and criminal actions. Joseph Frank Strength, Comment, *Attorney Disciplinary Proceedings: Civil or Criminal in Nature?*, 19 J. LEGAL PROF. 257, 266 (1995).

64. Strength, *supra* note 63, at 262.

65. See Samuel T. Reaves, Comment, *Procedural Due Process Violations in Bar Disciplinary Proceedings*, 22 J. LEGAL PROF. 351, 351 (1998).

sanctions they may face.⁶⁶ Under the Due Process Clause of the Fourteenth Amendment, individuals have a constitutional right to notice. Thus, lack of notice due to ambiguity in professional standards, in particular, has the potential to implicate due process concerns.⁶⁷

While due process rights under state constitutions vary from state to state, the Fourteenth Amendment of the United States Constitution gives state defendants federal due process rights when subject to state action.⁶⁸ In the context of attorney disciplinary proceedings, the United States Supreme Court addressed the scope of procedural rights that due process affords to defendant–attorneys in *In re Ruffalo*.⁶⁹ In *Ruffalo*, the state grievance commission charged the defendant–attorney Ruffalo with multiple counts of misconduct, including solicitation of clients.⁷⁰ During the proceedings and over Ruffalo’s objection, the grievance commission added an additional charge, punishable by disbarment and based on earlier testimony at the proceeding.⁷¹ The State Board, adjudicator for the proceeding, granted Ruffalo a continuance to give him time to respond to this additional charge.⁷² The Supreme Court of Ohio ultimately disbarred Ruffalo due to adverse findings on two of the charges, including the charge that the grievance commission added at the hearing.⁷³

In its reversal, the Supreme Court confirmed that a lawyer subject to an attorney disciplinary proceeding must be afforded “procedural due process, which includes fair notice of the charge.”⁷⁴ The Court reasoned:

In the present case petitioner had no notice that [the actions he testified about at the proceeding] would be considered a disbarment offense until *after* . . . testif[ying] at length on all the material facts pertaining to this phase of the case. . . . *The charge must be known before the proceedings commence.* They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused.⁷⁵

66. See *supra* text accompanying note 20. For example, because the word “misappropriation” appeared nowhere in the complaint, David Kelsen was likely unaware that he was being charged with misappropriation. See *supra* text accompanying notes 12–15.

67. Wilburn Brewer, Jr., *Due Process in Lawyer Disciplinary Cases: From the Cradle to the Grave*, 42 S.C. L. REV. 925, 935–36 (1991).

68. Reaves, *supra* note 65, at 351.

69. *In re Ruffalo*, 390 U.S. 544, 550 (1968).

70. *Id.* at 546. Solicitation of clients is “[the] attempt or effort to gain business The Model Rules of Professional Conduct place certain prohibitions on lawyers’ direct solicitation of potential clients.” *Solicitation*, BLACK’S LAW DICTIONARY (10th ed. 2014).

71. *In re Ruffalo*, 390 U.S. at 546–47.

72. *Id.* at 547.

73. *Id.*

74. *Id.* at 550.

75. *Id.* at 550–51 (second emphasis added).

Despite the several months granted to Ruffalo to respond to the additional charge,⁷⁶ the Court insisted that he did not have proper notice, holding that fair notice consists of notice before the disciplinary proceeding “as to the reach of the grievance procedure and the precise nature of the charges.”⁷⁷

Because the Supreme Court directly addressed the issue in *Ruffalo*, the guarantee of notice is one of the few due process requirements “universally recognized . . . in attorney disciplinary matters.”⁷⁸ However, the extent of *Ruffalo*’s notice requirement is unclear. While a broad reading of *Ruffalo* supports the conclusion that an attorney–defendant’s due process rights have been violated where either the complaint is vague or notice of the charge is inadequate, a narrower reading would only prevent amendment of the complaint after the attorney–defendant has testified.⁷⁹ In fact, some limitation of due process rights in this context is suggested in Justice White’s concurrence in *Ruffalo*. White argued that attorneys should be held to a higher standard of care than other defendants, noting that “members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment.”⁸⁰

Due to the ambiguity in the Supreme Court’s holding in *Ruffalo*, states vary in their interpretations of the requirements of due process for attorney disciplinary proceedings. For instance, the Arizona Supreme Court has advanced a narrow reading of *Ruffalo*, positing that the state bar⁸¹ could amend an attorney disciplinary complaint during a disciplinary hearing as long as the amendment is not based upon the attorney’s testimony at the hearing and the attorney has “ample opportunity to respond.”⁸² Latching onto Justice White’s concurrence in *Ruffalo*, the Supreme Court of Kansas has held that attorney disciplinary complaints need not refer to specific ethical-rule violations as long as the facts set out in the complaint are sufficiently clear to put the attorney–defendant on notice of the ethical violations that could arise, reasoning that:

[I]t is incumbent on an attorney to know the disciplinary rules regulating his profession . . . [and] that the failure of the State Board

76. *Id.* at 551 n.4.

77. *Id.* at 552.

78. Reaves, *supra* note 65, at 352.

79. *Id.* at 353.

80. *In re Ruffalo*, 390 U.S. at 555 (White, J., concurring).

81. In Arizona, the state bar files and prosecutes attorney disciplinary complaints. *See generally* ARIZ. R. SUP. CT. 55.

82. *In re Levine*, 847 P.2d 1093, 1116–17 (Ariz. 1993) (en banc). However, in *Levine*, the court ultimately found a due process violation, noting that the charge was “so broad and vague that extensive and inconclusive explanation was required throughout the proceedings to unsuccessfully define its scope.” *Id.* at 1117.

of Law Examiners to set forth the specific disciplinary rules violated by respondent cannot be a basis for avoiding *discipline*.⁸³

This is essentially the same reasoning the Iowa Supreme Court adopted in *Kelsen*.⁸⁴

C. A STUDY IN ONE STATE'S PROCEDURAL STANDARDS: THE ATTORNEY
DISCIPLINARY PROCESS IN IOWA

As described above, each state supreme court establishes and implements its own procedures to enforce professional regulations.⁸⁵ The Iowa Supreme Court, for example, has established the Attorney Disciplinary Board, comprised of three laypersons and nine attorneys, to investigate and bring complaints against attorneys practicing law in Iowa who it suspects have violated the Iowa Rules of Professional Conduct.⁸⁶ Though the Board officially initiates the complaint, individuals may prompt the Board to investigate by filing a grievance about an attorney with the Board.⁸⁷ After the Board completes its investigation, it may either “dismiss the complaint, admonish or reprimand the attorney, or file and prosecute the complaint before the grievance commission or any division thereof.”⁸⁸ If the Board moves forward with a complaint against an attorney, all or a subset of the Grievance Commission, which the Iowa Supreme Court has also established, will preside at a hearing in which both the Board and attorney have the opportunity to present evidence.⁸⁹

After the hearing, the Grievance Commission either “dismiss[es] the complaint, issue[s] a private admonition, or recommend[s] to the supreme court that the attorney be reprimanded or the attorney’s license to practice law be suspended or revoked.”⁹⁰ If the Grievance Commission recommends a sanction to the Iowa Supreme Court, the court reviews the entire record de novo, including any statements the parties file supporting or opposing the recommended sanction, and then imposes a final sanction.⁹¹ As in other states, sanctions for attorney disciplinary infractions in Iowa include private admonition, public reprimand, license suspension, and license revocation.⁹²

83. *State v. Turner*, 538 P.2d 966, 972 (Kan. 1975) (quoting *State v. Alvey*, 524 P.2d 747, 751 (Kan. 1974)).

84. *See supra* notes 16–19 and accompanying text.

85. *See supra* notes 38–42 and accompanying text.

86. IOWA CT. R. 35.2(1).

87. *See id.* (noting that the Board has the duty to “initiate or receive, and process complaints against any attorney”).

88. *Id.*

89. *Id.* R. 35.1(2).

90. *Id.* R. 35.10.

91. *Id.* R. 35.11. If either party appeals the Grievance Commission’s recommended action, the supreme court will also consider the parties’ briefs and hear oral arguments. *Id.* R. 35.12(2)–(4).

92. *Id.* R. 35.10, 35.11(2); *see also* text accompanying note 47.

However, the court may also impose “additional or alternative sanctions such as restitution, costs, practice limitations, appointment of a trustee or receiver, passage of a bar examination or the Multistate Professional Responsibility Examination, attendance at continuing legal education courses, or other measures consistent with the purposes of attorney discipline.”⁹³

III. CLIENT-SAFEKEEPING RULES

As a part of most attorney–client relationships, an attorney will handle client funds or property. Perhaps due to the wide range of situations in which an attorney may be required to manage client funds, attorney mishandling of client funds is not uncommon.⁹⁴ Client-safekeeping rules govern attorney preservation of client funds and property. In recognition of the importance of safekeeping client property, most jurisdictions punish safekeeping violations severely.⁹⁵ This Part examines the Model Rules’s approach to client safekeeping as well as the approaches of three jurisdictions: Iowa, New Jersey, and Maryland. Though the language of these jurisdictions’ safekeeping rules is essentially identical, each jurisdiction’s interpretation of that language is distinct, leading to different sanctions for essentially the same conduct.

A. CLIENT SAFEKEEPING UNDER THE ABA’S MODEL RULES

The ABA has proved influential in the formulation of state rules of professional conduct.⁹⁶ The ABA addresses the important area of client-fund management and safekeeping with Model Rule 1.15 (Safekeeping Property).⁹⁷ In addition to promulgating Model Rules, the ABA has published rationales for its rules, emphasizing the need for consistent enforcement and identifying interests in the good of the legal system as well as the public as a whole.

1. Model Rule 1.15: Safekeeping Property

Model Rule 1.15 (Safekeeping Property) applies to all aspects of client funds within the attorney–client relationship—“receipt, protection, and

93. IOWA CT. R. 35.10.

94. COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, AM. BAR. ASS’N, LAWYER REGULATION FOR A NEW CENTURY 75 (1992) (“In 1989, client protection funds in twenty-eight jurisdictions received claims for reimbursement of stolen money totaling almost \$72 million. ‘Robbing Peter to pay Paul’ is a common pattern of lawyer theft.” (footnote omitted)); Philip F. Downey, Comment, *Attorneys’ Trust Accounts: The Bar’s Role in the Preservation of Client Property*, 49 OHIO ST. L.J. 275, 275–76 (1988).

95. See A.L. DeWitt, Comment, *Protecting the Client’s Trust: A Way to Solve the Troubling Problem of Attorney Misappropriation*, 12 ST. LOUIS U. PUB. L. REV. 169, 171 (1993) (“Attorneys who steal from their clients usually face disbarment. While some jurisdictions apply a different rule, such as suspension from law practice, in the majority of jurisdictions theft from clients is considered grounds for disbarment.” (footnote omitted)).

96. See *supra* Part II.A.

97. See generally MODEL RULES OF PROF’L CONDUCT r. 1.15 (AM. BAR ASS’N 2013).

distribution.”⁹⁸ There are three types of safekeeping violations specified in the rule: (1) commingling attorney and client funds;⁹⁹ (2) failure to maintain adequate trust-fund and accounting records;¹⁰⁰ and (3) misappropriation of client funds.¹⁰¹ A misappropriation violation occurs when an attorney uses client funds for personal or business purposes without the prior authorization of the client.¹⁰² No specific intent is required for a violation of Model Rule 1.15.¹⁰³ However, jurisdictions commonly require a showing of at least a negligent state of mind for commingling and recordkeeping violations and a knowing state of mind to prove misappropriation.¹⁰⁴

The rationale behind the safekeeping rule is simple: to protect client property. The rule’s detail and broad scope emphasize the importance of the lawyer’s fiduciary duty to the client.¹⁰⁵ The prohibition on conversion and the recordkeeping requirement support this interest.¹⁰⁶ The commingling ban is less obvious. The commingling ban functions both to protect client money from their lawyer’s creditors and to prevent an unscrupulous lawyer from attempting to conceal her own personal assets by transferring them to a client account.¹⁰⁷ The ban also protects clients from an attorney who may be well-intentioned but nevertheless does not use an adequate degree of care. Commingling eliminates the distinction between attorney and client funds; once funds are commingled, mere negligence on part of the attorney could lead to unintentional misappropriation.¹⁰⁸

98. Heather Boyd & Brian Turetsky, Note, *Conversion and the Dilemma of Disciplinary Sanctions*, 14 GEO. J. LEGAL ETHICS 1019, 1021 (2001).

99. MODEL RULES OF PROF’L CONDUCT r. 1.15(a) (AM. BAR ASS’N 2013) (“A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property. Funds shall be kept in a separate account maintained in the state where the lawyer’s office is situated or elsewhere with the consent of the client or third person.”).

100. *Id.* (“Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.” (alteration in original)).

101. *Id.* r. 1.15(c) (“A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.”); Jeanne M. Whalen, Comment, *Safekeeping Client Property: Why the ABA is Hands-Off and the States are Hand-Holding*, 38 U. TOL. L. REV. 1279, 1282–86 (2007) (dividing the safekeeping rule into three parts).

102. Boyd & Turetsky, *supra* note 98, at 1022.

103. AM. BAR ASS’N, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 244 (Ellen J. Bennett et al. eds., 7th ed. 2011).

104. *Id.* at 242–44; Whalen, *supra* note 101, at 1282–86.

105. Whalen, *supra* note 101, at 1280 (“Nowhere is [client] trust more important and more abused than when lawyers handle their clients’ money.” (quoting Professor John M.A. DiPippa)); *see also id.* at 1309.

106. AM. BAR ASS’N, *supra* note 103, at 241–42; *id.* at 245–46.

107. *Id.* at 241–42.

108. Downey, *supra* note 94, at 277–78.

The safekeeping rule covers a wide variety of misconduct related to client funds and property, and perhaps because of this, the sanctions for violating this rule vary significantly. An attorney who violates the rule may receive a punishment anywhere from a public reprimand to disbarment.¹⁰⁹ The ABA also approves this range in its Standards for Imposing Lawyer Sanctions, with the severity of the sanction depending on the attorney's mental state and the potential or actual injury caused.¹¹⁰

Further complicating the issue, a violation of the safekeeping rule may include violations of more than one category of the rule. For example, an attorney may deposit an unearned client deposit and the lawyer's general business funds in the same account and because the attorney has neglected to keep adequate financial records, she might also negligently misappropriate client money when paying rent or utilities. This complexity makes it difficult to specifically charge attorneys in the complaint, which may lead to vague charges that fail to put attorneys on notice of possible sanctions and give rise to due process concerns.

2. Interests Underlying the Rules

The ABA stresses the importance of uniform and consistent enforcement of attorney disciplinary rules because they protect the public, foster public confidence in the legal profession and justice system, and simply promote adherence to the rules within the legal profession.¹¹¹ The ABA also notes the importance of clear and well-developed standards for sanctions as the way to best effectuate these interests:

[S]anctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.¹¹²

109. Whalen, *supra* note 101, at 1279, 1280 ("While disbarment generally results from only the most egregious violations of the fiduciary duties, courts also impose various sanctions in less serious misappropriations cases."); see also Bruce A. Campbell & Ruth A. Kollman, *The Lady or the Tiger? Opening the Door to Lawyer Discipline Standards*, 1 FLA. COASTAL L.J. 231, 241 (1999) (noting the wide range of sanctions for safekeeping violations and that "[p]redicting a likely sanction based on the facts reported in the Texas Bar Journal [would be] impossible").

110. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 4.1 (AM. BAR ASS'N 1991).

111. See *id.* preface; see also *supra* Part II.A.

112. STANDARDS FOR IMPOSING LAWYER SANCTIONS pt. I.A. (AM. BAR ASS'N 1991).

The interests identified by the ABA are applicable to every jurisdiction's attorney disciplinary rules.¹¹³ Absolute rules, however, are not necessarily the best way to promote the principles identified by the ABA.

The ABA stresses the importance of flexibility in its Standards for Imposing Lawyer Sanctions: "[A]ny proposed standards should serve as a *model* which sets forth a comprehensive system of sanctions, but which leaves room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct."¹¹⁴ Similar to criminal sentencing, which relies on both mitigating circumstances and rehabilitation,¹¹⁵ the Standards for Imposing Lawyer Sanctions suggest the following considerations: (1) whether the lawyer's duty to a particular client, the public, the profession, or the judicial system has been violated; (2) whether the lawyer's mental state was intentional, knowing, or negligent; (3) the extent of the actual or potential damages the misconduct caused; and (4) whether there are any aggravating or mitigating factors.¹¹⁶ The drafters specifically rejected a mechanistic sentencing standard for each type of misconduct, reasoning that individual circumstances must be taken into account to determine the proper sanction.¹¹⁷

There is tension between the competing interests of consistency, uniformity, and flexibility touted by the ABA. While each of these values are important in the entirety of attorney disciplinary sanctions, it is questionable whether limitless flexibility is appropriate in the case of misappropriation, the most serious violation of the client-safekeeping rule.¹¹⁸ In fact, the ABA Standards for Imposing Lawyer Sanctions recommend disbarment as the appropriate sanction for knowing misappropriation.¹¹⁹

113. For example, Maryland attorney disciplinary opinions frequently refer to the ABA Standards for Imposing Lawyer Sanctions specifically. See *Attorney Grievance Comm'n v. Santos*, 803 A.2d 505, 511 (Md. 2002) (referring to the ABA Standards for Imposing Lawyer Sanctions to determine whether disbarment was the appropriate sanction).

114. STANDARDS FOR IMPOSING LAWYER SANCTIONS pt. I.A (AM. BAR ASS'N 1991).

115. Melissa E. Nirenberg, Note, *Reconsidering the Wilson Doctrine: Should New Jersey Continue to Automatically and Permanently Disbar Attorneys Who Have Misappropriated Funds?*, 51 RUTGERS L. REV. 713, 714-15 (1999).

116. STANDARDS FOR IMPOSING LAWYER SANCTIONS pt. II (AM. BAR ASS'N 1991).

117. *Id.* pt. I.A.

118. Levin, *supra* note 51, at 41 ("Since conversion is considered one of the most serious breaches of a lawyer's duties—and carries one of the most unforgiving sanctions—clarity about the conduct that constitutes 'conversion' is essential, and it is missing from the ABA Standards." (footnote omitted)).

119. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 4.11 (AM. BAR ASS'N 1991) ("Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.").

B. CLIENT-SAFEKEEPING RULES IN THE STATES: IOWA, NEW JERSEY, AND MARYLAND

States treat violations of the client-safekeeping rule seriously because a failure to safeguard client funds is a considerable violation of client trust.¹²⁰ As mentioned above, one subset of this violation is misappropriation—using “another’s property or money dishonestly to one’s own use.”¹²¹ This Subpart examines three states’ approaches to misappropriation: Iowa, New Jersey, and Maryland. While the Iowa Supreme Court has identified misappropriation as a serious violation of the Iowa Rules of Professional Conduct,¹²² it has failed to define the exact scope of this violation. The court purports to be tough on misappropriation of client funds; however, the court’s ambiguity undermines this approach, leaving the issue unsettled. Recent opinions, such as *Iowa Supreme Court Attorney Disciplinary Board v. Kelsen*, have increased that ambiguity rather than resolved it.¹²³ In contrast, New Jersey and Maryland both have distinct yet differing approaches to misappropriation. New Jersey is a particularly important jurisdiction in the realm of attorney discipline. It is known for having “one of the most demanding disciplinary systems in the nation”¹²⁴ and being on “the vanguard of both procedural reforms and substantive discipline.”¹²⁵ New Jersey’s misappropriation rule, which imposes automatic disbarment on attorneys who misappropriate client funds, reflects the unforgiving nature of the system.¹²⁶ In contrast, Maryland has distinctively approached this issue by making it more difficult to disbar an attorney who misappropriates client funds by differentiating between negligent misappropriation and misappropriation by “fraud, deceit, or misrepresentation.”¹²⁷ Ultimately, Maryland’s rule best complies with the interests identified by the ABA as well as the overriding concerns of due process by striking a balance between the competing values of consistency and flexibility and clearly defining the scope of misappropriation.

120. DeWitt, *supra* note 95, at 170.

121. *Misappropriation*, BLACK’S LAW DICTIONARY (10th ed. 2014); Boyd & Turetsky, *supra* note 98, at 1022 (“Using client funds for personal or business purposes is known as ‘misappropriation’ or ‘conversion.’”); *see also supra* Part III.A.1.

122. *See, e.g.*, Comm. on Prof’l Ethics & Conduct of the Iowa State Bar Ass’n v. Ottesen, 525 N.W.2d 865, 866 (Iowa 1994) (“There is no place in our profession for lawyers who convert funds entrusted to them.”).

123. *See supra* Part I.

124. James R. Zazzali, *Disciplining Attorneys: The New Jersey Experience*, 1 GEO. J. LEGAL ETHICS 659, 661 (1988).

125. *Id.* at 659.

126. *In re Wilson*, 409 A.2d 1153, 1154 (N.J. 1979). The District of Columbia has adopted a nearly identical approach. *See infra* note 205.

127. Attorney Grievance Comm’n v. Santos, 803 A.2d 505, 511 (Md. 2002).

C. DISTINGUISHING THE STATES FROM THE ABA

Iowa, New Jersey, and Maryland have all adopted safekeeping rules almost identical to the corresponding Model Rule.¹²⁸ Despite small differences between the Model Safekeeping Rule and the safekeeping rules of Iowa, New Jersey, and Maryland, the overarching meaning remains virtually identical.¹²⁹ However, each jurisdiction's interpretation of that language is distinct, and this has the potential to result in differing sanctions between the jurisdictions for essentially the same conduct.

1. Iowa

The Iowa Supreme Court has neither defined the scope of a misappropriation violation with precision nor specified what the Board's complaint must allege to constitute a valid charge of misappropriation. The court has alternatively considered misappropriation to arise under Iowa Rule of Professional Conduct 32:8.4(b)–(c) and Rule 32:1.15(a), in cases decided just two months apart.¹³⁰ In *Kelsen*, the court finally addressed the contours of the charge of misappropriation, both suggesting a broad definition of the violation and granting itself wide latitude in the determination of whether misappropriation had occurred.¹³¹ The court stated that neither an allegation of a Rule 32:8.4 violation nor even the inclusion of the word “misappropriation” was necessary to constitute a valid charge of misappropriation.¹³²

128. See *supra* notes 41–42 and accompanying text. New Jersey and Maryland also closely track the Model Rule language. Like Iowa, New Jersey requires attorneys to preserve accounting records longer than recommended in the Model Rules and has a chapter of additional rules governing client trust accounts. N.J. R. OF PROF'L CONDUCT r. 1.15(a), (d). Additional trust account rules are common across the country, and in recent years, the tendency has moved towards more detailed and demanding ethical regulations on the subject of client funds and property. Whalen, *supra* note 101, at 1279, 1297–309. Maryland is more permissive, requiring attorneys to keep records for only five years after their creation. MD. R. OF PROF'L CONDUCT r. 1.15(a).

129. Compare MODEL RULES OF PROF'L CONDUCT r. 1.15 (AM. BAR ASS'N 2013), with IOWA R. OF PROF'L CONDUCT r. 32:1.15, MD. R. OF PROF'L CONDUCT r. 1.15, and N.J. R. OF PROF'L CONDUCT r. 1.15.

130. In the first case, the court considered misappropriation to violate Rule 32:8.4(b)–(c), i.e., that it is a rule violation for an attorney to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.” Iowa Supreme Court Attorney Disciplinary Bd. v. Thomas, 844 N.W.2d 111, 116 (Iowa 2014) (quoting IOWA R. OF PROF'L CONDUCT r. 32:8.4(c)). In the second case, decided just two months later, the court analyzed misappropriation under Rule 32:1.15(a). Iowa Supreme Court Attorney Disciplinary Bd. v. Carter, 847 N.W.2d 228, 231–34 (Iowa 2014). Notably, Carter was also charged with Rule 32:8.4(b) and (c) violations; however, nowhere in the opinion did the court associate this violation with the charge of misappropriation. See *generally id.*

131. See Iowa Supreme Court Attorney Disciplinary Bd. v. Kelsen, 855 N.W.2d 175, 183 n.3 (Iowa 2014).

132. *Id.*

Though the charge of misappropriation remains ill-defined, the court has been clear on the proper sanction for this violation: license revocation.¹³³ The Iowa Supreme Court has proclaimed that “[i]t is almost axiomatic that” it will revoke the license of an attorney who misappropriates client funds.¹³⁴ The court recognizes limited exceptions to this rule. It “will on occasion impose a lesser penalty when commingling of funds appears negligent, instead of intentional; the funds were not converted to the attorney’s own use; no client suffered financial loss; or the attorney had a colorable future claim to the funds.”¹³⁵ An attorney who meets one of these exceptions typically avoids license revocation.¹³⁶

In 2014, the court provided an in-depth explanation of the colorable-future-claim exception, noting its purpose and delineating its scope.¹³⁷ “[T]he colorable-future-claim defense exists to distinguish ‘for purposes of sanctions between conduct involving trust fund violations and conduct in the nature of stealing.’”¹³⁸ The court enumerated principles which delineate the exception’s scope.¹³⁹ First, as long as an attorney seeking this exception can show an “intent to withdraw funds as [attorney’s] fees,” this exception applies, even if the amount withdrawn by the attorney is more than the amount the attorney ultimately earned.¹⁴⁰ Second, the defense requires the attorney to do more than simply offer “a bare claim that *some* of the converted funds *would*

133. Iowa Supreme Court Attorney Disciplinary Bd. v. Wengert, 790 N.W.2d 94, 102 (Iowa 2010) (“Misappropriation of a client’s funds by an attorney will typically result in license revocation. ‘Restitution or restoration of client funds prior to the discovery of their misappropriation does not preclude the imposition of revocation as a sanction.’” (citations omitted) (quoting Iowa Supreme Court Attorney Disciplinary Bd. v. Plumb, 766 N.W.2d 626, 634 (Iowa 2009)). Although the court has not specified which states of mind will lead to revocation, it appears the court will revoke for misappropriation with an intentional or knowing state of mind while being more lenient with less culpable states of mind. For example, in *Iowa Supreme Court Attorney Disciplinary Board v. Kadenge*, the court imposed an 18-month license suspension on an attorney whose client-trust-account violations stemmed from neglect and alcohol problems. Iowa Supreme Court Attorney Disciplinary Bd. v. Kadenge, 706 N.W.2d 403, 405, 410–11 (Iowa 2005); see also Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Plumb, 589 N.W.2d 746, 749 (Iowa 1999) (imposing a two-month suspension on an attorney whose failure to return client property was due to his “slopp[iness] and reckless[ness]”).

134. *Thomas*, 844 N.W.2d at 117 (quoting Comm’n on Prof’l Ethics & Conduct v. Ottesen, 525 N.W.2d 865, 866 (Iowa 1994)).

135. *Wengert*, 790 N.W.2d at 102.

136. *Id.*

137. Iowa Supreme Court Attorney Disciplinary Bd. v. Carter, 847 N.W.2d 228, 233–34 (Iowa 2014).

138. *Id.* at 233 (quoting Iowa Supreme Court Attorney Disciplinary Bd. v. Powell, 830 N.W.2d 355, 359 (Iowa 2013)).

139. *See id.*

140. *Id.* at 234; see also Iowa Supreme Court Attorney Disciplinary Bd. v. Kelsen, 855 N.W.2d 175, 185 (Iowa 2014) (“We generally do not revoke the licenses of hourly rate attorneys who take client funds for personal use before they have done the work but in anticipation of doing so.”).

have been earned.”¹⁴¹ For example, in *Iowa Supreme Court Attorney Disciplinary Board v. Carter*, the court determined the defendant, Carter, had no colorable future claim to funds taken from an “estate that could only be used as attorney fees if approved by the court,” reasoning that the times of the attorney’s withdrawals “were inconsistent with an intent to take the funds as estate fees” and no evidence indicated Carter would have ever earned the amounts withdrawn.¹⁴²

Though the court has now formulated a standard to prove the colorable-future-claim exception, in the past, the court has not imposed such clear requirements. For instance, in 2013, just one year before *Carter*, an attorney named Powell successfully made a colorable-future-claim argument after depositing advanced client payments into his general operating account numerous times between 2007 and 2011.¹⁴³ The court simply presumed a colorable future claim to the funds, determining that suspension was the appropriate sanction because Power converted client funds he was holding as an advanced fee.¹⁴⁴

2. New Jersey

The Supreme Court of New Jersey has addressed misappropriation with a bright-line rule: the sanction for an attorney who misappropriates is permanent license revocation.¹⁴⁵ The Supreme Court of New Jersey defines misappropriation clearly, as “any unauthorized use by the lawyer of clients’ funds entrusted to him, including not only stealing, but also unauthorized temporary use for the lawyer’s own purpose, whether or not he derives any personal gain or benefit therefrom.”¹⁴⁶ With this rule, the court has divided safekeeping violations into two groups, distinguishing knowing (a more culpable state of mind than negligent) misappropriation from all other safekeeping violations. Like Iowa, New Jersey has adopted an expansive

141. *Carter*, 847 N.W.2d at 234.

142. *Id.*

143. *Iowa Supreme Court Attorney Disciplinary Bd. v. Powell*, 830 N.W.2d 355, 357 (Iowa 2013).

144. *Id.* at 358–59 (distinguishing between the acts of conversion and taking fees before earned). In fact, even after *Carter*, the colorable-future-claim exception has proved difficult to apply. In *Kelsen*, the court cited language from *Carter* in its determination that Kelsen did not meet the colorable-future-claim exception. *Kelsen*, 855 N.W.2d at 182–83. The court reasoned that Kelsen did not meet the exception because he had used the client funds to pay office rent and expenses. *Id.* at 183–84. The court went on to distinguish Kelsen from hourly attorneys as rationale for its determination; however, Kelsen and his client had in fact signed an hourly-rate agreement. *Id.* at 177, 185. It is unclear what separates Kelsen from other hourly attorneys such as McCann, an attorney who had directly deposited client retainers into his business account and used the money “for his personal or business use.” *Iowa Supreme Court Attorney Disciplinary Bd. v. McCann*, 712 N.W.2d 89, 94 (Iowa 2006).

145. *In re Wilson*, 409 A.2d 1153, 1154 (N.J. 1979).

146. *Id.* at 1155 n.1.

definition of misappropriation, requiring only a charge of a violation of the state safekeeping rule to constitute a valid charge of misappropriation.¹⁴⁷

In 1979, the Supreme Court of New Jersey formulated its current rule regarding the appropriate sanction for an attorney who knowingly misappropriates client funds in *In re Wilson*.¹⁴⁸ An attorney, Wilson, had “failed for almost two years to turn over \$23,000—the proceeds from the sale of a house—to the client,” and in another matter, forged a client’s signature and directly deposited over \$4000 into his own account.¹⁴⁹ The court not only determined that permanent disbarment was “the only appropriate discipline” in the case at hand but also announced a rule for sanctioning knowing misappropriation: “[G]enerally all such cases shall result in disbarment. We foresee no significant exceptions to this rule and expect the result to be almost invariable.”¹⁵⁰

The court highlighted the seriousness of the offense—that misappropriation is not only a violation of professional rules but also a crime¹⁵¹—and the overall importance of maintaining the legal profession’s integrity.¹⁵² The court then concluded that misappropriation requires the strictest sanction, noting:

No clearer wrong suffered by a client at the hands of one he had every reason to trust can be imagined. The public is entitled, not as a matter of satisfying unjustifiable expectations, but as a simple matter of maintaining confidence, to know that never again will that person be a lawyer. That the moral quality of other forms of misbehavior by lawyers may be no less reprehensible than misappropriation is beside the point.¹⁵³

The court’s reasoning focused on the public—protecting the public from unscrupulous lawyers and preserving overall public trust. Because a client frequently must entrust money to an attorney, it is essential for the client to be able to trust that attorney.¹⁵⁴ This reasoning also explains why the court

147. *Id.* at 1154. Because of this, Kelsen’s license would likely have been revoked if the disciplinary proceedings took place in New Jersey rather than Iowa.

148. *Id.* Attorney Wilson’s misconduct was extensive and reached beyond misappropriation. The Disciplinary Review Board also found that Wilson had misled clients and “advised them to commit fraud.” *Id.* However, the court based its disbarment decision solely on the misappropriation charges. *Id.*

149. *Id.*

150. *Id.*; see also Zazzali, *supra* note 124, at 664 (noting that disbarment is permanent in New Jersey). Further indicating New Jersey’s serious approach to misappropriation, the court adopted a broad definition of misappropriation. See *supra* notes 146–47 and accompanying text.

151. *In re Wilson*, 409 A.2d at 1154–55.

152. *Id.*; see also Zazzali, *supra* note 124, at 664 (“Public confidence in the bar appears to have been, and remains, the linchpin of the *Wilson* doctrine.”).

153. *In re Wilson*, 409 A.2d at 1155.

154. *Id.* at 1154.

determined that leniency and consideration of mitigating circumstances would be an inadequate approach.¹⁵⁵ Public perception that the courts are soft on attorney discipline diminishes public confidence in the judicial system as a whole.¹⁵⁶ While recognizing that a bright-line rule may lead to “harsh” results in some situations, the court viewed the overall benefit of the rule, “continued confidence of the public in the integrity of the bar and the judiciary,” as significant enough to outweigh these harsh results.¹⁵⁷

New Jersey has remained faithful to the rule announced in *Wilson*, giving credence to New Jersey’s reputation of having some of the strictest ethical standards in the country.¹⁵⁸ The doctrine has also been persuasive. Several jurisdictions, including New York, Colorado, Minnesota, Georgia, and the District of Columbia, have cited *Wilson* with approval.¹⁵⁹ Since 1979, the court has frequently been given the opportunity to decrease the scope of the *Wilson* doctrine but largely has refused to do so.¹⁶⁰ For instance, the court has

155. The court left open the possibility that mitigating factors could prevent disbarment but did not elaborate further on what mitigating factors might lead to a more lenient sanction. *Id.* at 1157–58 (noting that “mitigating factors will rarely override the requirement of disbarment”).

156. *Id.* at 1155. The court specifically rejected restitution as a mitigating factor in misappropriation cases. *Id.* at 1156 (“Restitution 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.”). The court noted that using restitution to mitigate “simply cloaks the mistaken premise that the unauthorized use of clients’ funds is excusable when accompanied by an intent to return them.” *Id.*

157. *Id.* at 1157; see also Robert C. Holmes, *Is There a Place for Indeterminate Suspension in the New Jersey Attorney Discipline System?*, N.J. LAW., Dec. 2011, at 51, 51 (“[T]he [New Jersey Supreme] Court has consistently placed the possible loss of public confidence in the bar and the [c]ourt ahead of punishment as the basis for disciplinary rules the [c]ourt insists be strictly enforced.”).

158. Anne Ben-Ami, *Disbarment and Reinstatement in the District of Columbia and New Jersey: Misappropriation and the Merits of Permanent Disbarment*, 27 GEO. J. LEGAL ETHICS 359, 363 (2014); James R. Zazzali, *The Whys and Hows of Permanent Disbarment: New Jersey’s Wilson Rule*, 21 GEO. J. LEGAL ETHICS 311, 312 (2008). In 2002, the Supreme Court of New Jersey adopted a new category of sanction, indeterminate suspension, for use in attorney disciplinary cases that “lie on the cusp of disbarment.” Holmes, *supra* note 157, at 51 (quoting the Supreme Court of New Jersey Administrative Determination of July 30, 2002). This sanction allows attorneys to apply for reinstatement as soon as five years after its imposition. *Id.* at 51–52. However, much like mitigating factors, though the court has reserved the possibility to use indeterminate suspensions to provide flexibility to the *Wilson* rule, it has thus far declined to use it. *Id.* at 52; see *In re Harris*, 868 A.2d 1011, 1020 (N.J. 2005) (“[K]nowing misappropriation . . . is itself sufficient to trigger automatic disbarment.”); *In re Hall*, 858 A.2d 552, 552 (N.J. 2004) (rejecting a disciplinary-board recommendation of indeterminate suspension in favor of disbarment).

159. *People v. Torpy*, 966 P.2d 1040, 1046 (Colo. 1998) (en banc); *In re Addams*, 579 A.2d 190, 193–94 (D.C. 1990) (en banc); *In re Dowdy*, 277 S.E.2d 36, 40 (Ga. 1981); *In re Discipline of Okerman*, 310 N.W.2d 568, 571 (Minn. 1981) (per curiam); *In re Marks*, 424 N.Y.S.2d 229, 230 (N.Y. App. Div. 1980) (per curiam); Zazzali, *supra* note 124, at 667.

160. Zazzali, *supra* note 124, at 665, 668 (“Carving and crafting exemptions will transmute per se to ad hoc in no time. Public confidence will diminish, perhaps disappear. Some attorneys, seeing the advent of new exceptions to *Wilson*, will be tempted to take a chance with a trust

rejected narrowing the requirement that misappropriation be “knowing,” to a requirement of “an intent to defraud or permanently deprive clients of their funds.”¹⁶¹ Since *Wilson*, the court has exempted from the rule only attorneys who demonstrated a reasonable belief of entitlement to funds when they were withdrawn.¹⁶² The court has also refused to consider a variety of mitigating factors, such as negligent and inadequate accounting procedures, lack of harm to clients, and medical disabilities.¹⁶³ However, the *Wilson* doctrine is tempered by a stringent evidentiary standard of proof; the court requires the disciplinary board to prove misappropriation by “clear and convincing evidence.”¹⁶⁴ When the disciplinary board fails to prove misappropriation with clear and convincing evidence or the attorney commits a lesser safekeeping violation, sanctions are generally less than revocation.

3. Maryland

Maryland has also distinguished misappropriation from other safekeeping violations as deserving the most severe sanction.¹⁶⁵ However, the Court of Appeals of Maryland defines misappropriation violations differently than either New Jersey or Iowa. The court has held that an attorney’s license may not be revoked for misappropriation without a finding of fraud, deceit or misrepresentation.¹⁶⁶ This essentially requires the attorney disciplinary board to charge an attorney facing revocation for a safekeeping violation with

account. The deterrent effect of *Wilson* will evanesce. With Scarlet, they will assume that tomorrow is another day.”).

161. *Id.* at 665 (citing *In re Noonan*, 506 A.2d 722, 723 (N.J. 1986)). This means that inadequate account management falls into the category of misappropriation under the New Jersey rule. Nirenberg, *supra* note 115, at 714.

162. Zazzali, *supra* note 158, at 320 (citing *In re Nelson*, 857 A.2d 180, 180 (N.J. 2004); *In re Glick*, 798 A.2d 1247, 1247 (N.J. 2002); *In re Paragano*, 725 A.2d 1117, 1117 (N.J. 1999); *In re Bromberg*, 705 A.2d 741, 741 (N.J. 1998)). Unfortunately, none of the cases cited by Zazzali contain reasoning accompanying the sanction order but rather simply note the existence of “good cause.” *In re Nelson*, 857 A.2d at 180; *In re Glick*, 798 A.2d at 1247; *In re Paragano*, 725 A.2d at 1117; *In re Bromberg*, 705 A.2d at 741.

163. Zazzali, *supra* note 124, at 665–66 (citing *In re Romano*, 516 A.2d 1109, 1111 (N.J. 1986) (per curiam); *In re Hein*, 516 A.2d 1105, 1108 (N.J. 1986) (per curiam); *In re Fleischer*, 508 A.2d 1115, 1120, 1122 (N.J. 1986) (per curiam)). However, the court did note that an attorney who “demonstrate[s] that a disease of the mind rendered him unable to tell right from wrong or to understand the nature and quality of his acts” would be able to avoid revocation. *In re Romano*, 516 A.2d at 1112. To date, no attorney has met the standard for this exception in New Jersey. Ben-Ami, *supra* note 158, at 369.

164. Zazzali, *supra* note 158, at 331 (emphasis omitted). In *In re Rogers*, the court imposed a suspension rather than disbarment after determining that the record did not “clearly and convincingly demonstrate[] that respondent knowingly misappropriated” when the record supported “that respondent may have had a good faith belief” that his actions were not conversion. *In re Rogers*, 599 A.2d 141, 148 (N.J. 1991) (per curiam).

165. *Attorney Grievance Comm’n v. Santos*, 803 A.2d 505, 511 (Md. 2002).

166. *Id.*

a Rule 8.4 (Misconduct) violation, indicating the existence of fraud, deceit, or misrepresentation.¹⁶⁷

While the default rule that an attorney who intentionally misappropriates will suffer the sanction of revocation applies in Maryland, the rule retains flexibility. Similar to New Jersey and Iowa, it provides notice to both attorneys and the general public of the gravity of a safekeeping violation and the sanctions that may result. However, unlike New Jersey and Iowa, the Maryland rule emphasizes the role of “bad” intent within the “knowing” requirement.¹⁶⁸ While Maryland requires that an attorney intentionally attempt to deceive clients, New Jersey and Iowa have expressly rejected that requirement.¹⁶⁹

The Court of Appeals of Maryland formulated this rule in *Attorney Grievance Commission v. Santos* in 2002.¹⁷⁰ The Maryland Attorney Grievance Commission charged the attorney, Santos, with violating several professional rules including Maryland’s Rule 1.15 (Safekeeping Property) and Rule 8.4 (Misconduct).¹⁷¹ Santos admitted to depositing initial, unearned deposits from several clients into his operating account, and at his hearing, his former clients testified that he had not returned their retainers after he failed to perform work on their cases.¹⁷²

Like the New Jersey court, the Maryland court considered a key purpose of disciplinary proceedings—“to protect the public.”¹⁷³ However, like Iowa, the court determined that when determining how to best protect the public, the facts of each particular case are pertinent.¹⁷⁴ Specifically, the court

167. *Id.*; John A. Carpenter, *Attorney Grievance Commission v. Santos: An Attorney May Not Be Disbarred for Failing to Return Unearned Fees, Absent Fraud, Deceit or Misrepresentation*, 33 U. BALT. L.F. 17, 17 (2002). The Iowa Supreme Court expressly rejected this requirement in *Kelsen*. See *supra* text accompanying note 132. Maryland’s misappropriation rule would have prevented the court from revoking Kelsen’s license as Kelsen was not charged with a Rule 3:2.8.4 violation. See *supra* text accompanying notes 13–14.

168. See *Santos*, 803 A.2d at 511.

169. Iowa Supreme Court Attorney Disciplinary Bd. v. *Kelsen*, 855 N.W.2d 175, 183 n.3 (Iowa 2014); *In re Noonan*, 506 A.2d 722, 723 (N.J. 1986) (per curiam) (“It makes no difference whether the money is used for a good purpose or a bad purpose, for the benefit of the lawyer or for the benefit of others, or whether the lawyer intended to return the money when he took it, or whether in fact he ultimately did reimburse the client; nor does it matter that the pressures on the lawyer to take the money were great or minimal. The essence of *Wilson* is that the relative moral quality of the act, measured by these many circumstances that may surround both it and the attorney’s state of mind, is irrelevant: it is the mere act of taking your client’s money knowing that you have no authority to do so that requires disbarment.”). The Maryland rule also encompasses willful blindness. *Attorney Grievance Comm’n v. Cafferty*, 831 A.2d 1042, 1054 (Md. 2003) (revoking the license of an attorney in a reciprocal discipline case who had “engaged in a pattern of misappropriation” and “willfully blinded herself to [her partner’s] improper transfer of funds”).

170. *Santos*, 803 A.2d at 511.

171. *Id.* at 506–07.

172. *Id.* at 507–08.

173. *Id.* at 510.

174. *Id.* at 511.

considered Santos's lack of prior disciplinary infractions as well as his cooperation and remorse throughout the proceedings.¹⁷⁵ The court also noted the importance of the findings of fact by the lower court, reasoning that it was up to the hearing judge to determine whether there had been misappropriation and that, because the judge had not found a violation of Rule 8.4(c) or characterized the failure to return unearned fees as fraudulent, no misappropriation had occurred.¹⁷⁶ While noting that disbarment is the usual sanction for "unmitigated misappropriation," the court found these reasons sufficient to warrant a lesser sanction and imposed only an indeterminate suspension with opportunity to apply for reinstatement after 90 days.¹⁷⁷ Citing the ABA Standards for Imposing Lawyer Sanctions, the court reasoned that disbarment was only appropriate when an attorney "engages in serious criminal conduct" or "other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation."¹⁷⁸

The court recognized that its prior case law had not been clear, noting that while in several previous cases, the court suspended attorneys who had both "neglected client matters and then failed to refund unearned fees," while in others, the court disbarred attorneys for "failing to refund unearned fees."¹⁷⁹ The court explained and distinguished these cases, however, noting that aggravating or mitigating factors present in those cases contributed to the ultimate sanction.¹⁸⁰

The court's decision in *Santos* effectively made it much more difficult to disbar an attorney than it had been previously. After *Santos*, the court required the Grievance Commission to prove by clear and convincing evidence the heightened standard of misappropriation "by fraud, deceit, or misrepresentation."¹⁸¹ However, though the standard is more stringent, it is questionable whether this significantly hinders the Grievance Commission's power to disbar an attorney. For instance, in *Attorney Grievance Commission of Maryland v. Colton-Bell*, the court simply presumed a violation of 8.4(c) when

175. *Id.* The hearing judge also noted that Santos's problems were "exacerbated by undiagnosed physical and mental health problems, his mother's health problems, and the dissolution of his sister's marriage. . . . His sister's divorce also led to the loss of the Respondent's housing." *Id.* at 509 (alteration in the original). The court did not specifically address whether it considered these to be mitigating circumstances.

176. *Id.* at 511.

177. *Id.* at 511-12.

178. *Id.* (quoting STANDARDS FOR IMPOSING LAWYER SANCTIONS § 5.11 (AM. BAR ASS'N 1986)); see also *Attorney Grievance Comm'n v. Tun*, 51 A.3d 565, 572 (Md. 2012) ("Under Maryland's two-tiered system, intentional misappropriation warrants disbarment ordinarily, but where the conduct was unintentional or due to negligence, indefinite suspension is the appropriate sanction usually.").

179. *Santos*, 803 A.2d at 509.

180. *Id.* at 510 (listing aggravating factors such as prior discipline for similar misconduct, severity of the offense, and misleading clients to their severe detriment).

181. *Carpenter*, *supra* note 167, at 18; see also *Attorney Grievance Comm'n v. Tauber*, 26 A.3d 967, 971 (referring to the "clear and convincing evidence" standard of proof).

an attorney “expend[ed] Complainant’s entire fee, without preserving funds in trust, or performing the agree[d-]upon work,”¹⁸² a description which essentially would have encompassed the conduct of Santos.¹⁸³ However, the *Colton-Bell* court’s deviation from *Santos* is unlikely to carry significant precedential value—the decision is arguably attributable to the court’s deference to the findings of the lower court, which had found an 8.4(c) violation.¹⁸⁴ Regardless, *Santos* remains in effect. The day after the *Colton-Bell* decision, the court reverted to *Santos* sanctions, imposing an indeterminate suspension with opportunity for reinstatement after six months on an attorney who had violated client-safekeeping rules when the hearing judge “found that the respondent did not act dishonestly, fraudulently or with a ‘nefarious motive.’”¹⁸⁵

IV. THE SHORTCOMINGS OF IOWA’S APPROACH TO MISAPPROPRIATION

Iowa’s current approach to misappropriation is inadequate. By overvaluing the importance of a particularized, flexible approach, Iowa fails to provide adequate notice of charges and potential sanctions to attorney-defendants and undermines the legitimacy of the attorney disciplinary system as a whole. This Part critiques Iowa’s approach to misappropriation in light of: (1) the purposes of attorney disciplinary rules as identified by the ABA; and (2) the due process requirement of sufficient notice.

A. IOWA’S AMBIGUOUS STANDARDS AND PARTICULARIZED APPROACH UNDERMINE THE PURPOSES OF ATTORNEY DISCIPLINARY RULES ACCORDING TO THE ABA

Iowa’s approach fails to effectuate the intent of the ABA. Because the Iowa Supreme Court overvalues flexibility and a particularized approach, the ABA values of uniformity and consistency are lost. While exceptions to Iowa’s misappropriation rule, like the colorable-future-claim defense and the ambiguous definition of misappropriation,¹⁸⁶ allow the court to tailor sanctions to each case’s specific facts, these factors also lead to inconsistency

182. *Attorney Grievance Comm’n v. Colton-Bell*, 76 A.3d 1096, 1105 (Md. 2013) (second alteration in original).

183. Santos abandoned several clients without providing them proper notice, deposited all client retainers into his operating account, and failed to return unearned fees. *Santos*, 803 A.2d at 507–08.

184. *Colton-Bell*, 76 A.3d at 1105.

185. *Attorney Grievance Comm’n v. Sperling*, 76 A.3d 1172, 1185 (Md. 2013); *see also* *Attorney Grievance Comm’n v. Tun*, 51 A.3d 565, 569 (Md. 2012) (imposing an indefinite suspension in a reciprocal disciplinary case when an attorney made reckless misrepresentations on vouchers to obtain payment for work he had done for indigent defendants and failed to maintain adequate time records.); *Attorney Grievance Comm’n v. Moeller*, 46 A.3d 407, 411–12 (Md. 2012) (per curiam) (imposing an indefinite suspension when an attorney withdrew funds from his client trust account for personal use but the court found no “fraudulent or deceptive intent”).

186. *See supra* Part III.C.1.

in sanctions.¹⁸⁷ As noted by the ABA, wide variance and inconsistency in sanctions, such as the sanctions imposed by the Iowa Supreme Court, may cause the public as well as those within the profession to “doubt . . . the efficiency and the basic fairness” of the disciplinary system.¹⁸⁸

The Iowa Supreme Court must delve deep into the factual intricacies of every case that comes before it. With this approach, Iowa strives for “consistency in discipline cases by considering its treatment of lawyers in ‘similar’ cases.”¹⁸⁹ However, while it is true that the ABA values flexibility and a particularized approach may promote fairness, the extent of flexibility in Iowa’s approach may have the opposite effect. Case-by-case approaches like Iowa’s

are often unsuccessful because the court[] disregard[s] seemingly similar cases, or cannot agree upon the factors that should be considered when assessing similarity, or do[es] not consider the same factors important from case to case. As a result, the quest for “similarity” is chimerical because it is often possible to find both similarities to and distinctions from earlier decisions, giving [the] court[] significant latitude to show that any case is “similar to” or “different from” previous cases.¹⁹⁰

The result is a sense of arbitrariness, not evenhandedness. The widely varied case law in Iowa regarding sanctions for “seemingly similar” safekeeping violations demonstrates the failure of this approach.¹⁹¹ While the Iowa Supreme Court revoked Kelsen’s license for a finding of misappropriation,¹⁹² the court imposed only an 18-month license suspension on Kadenge, an attorney who, among other violations, misappropriated client funds that he had yet to repay at the time of the court’s decision.¹⁹³ And, in *Piazza*, the court imposed only a public reprimand after finding misappropriation when an attorney failed to deposit a \$5000 flat fee into his client trust account and provide proper accounting to his client.¹⁹⁴

187. See *supra* notes 15, 22.

188. STANDARDS FOR IMPOSING LAWYER SANCTIONS pt. IA (AM. BAR ASS’N 1991).

189. Levin, *supra* note 51, at 36.

190. *Id.* at 36–37.

191. See *supra* note 11.

192. For a detailed discussion of Kelsen’s attorney disciplinary proceedings, see *supra* Part I.

193. Iowa Supreme Court Attorney Disciplinary Bd. v. Kadenge, 706 N.W.2d 403, 408, 411 (Iowa 2005).

194. Iowa Supreme Court Attorney Disciplinary Bd. v. Piazza, 756 N.W.2d 690, 697–700 (Iowa 2008).

B. IOWA'S AMBIGUITY MAY DEPRIVE ATTORNEY-DEFENDANTS OF SUFFICIENT NOTICE

The ambiguity of Iowa's approach to misappropriation may also lead to confusion within the profession by failing to provide clear notice to attorneys. Though Iowa's approach does not directly contradict United States Supreme Court interpretation of due process rights in the realm of attorney disciplinary proceedings, it fails to comport with the general rules of fundamental fairness inherent in the Due Process Clause.¹⁹⁵ Specifically, Iowa has declared that the Board, which files disciplinary complaints, need not explicitly allege misappropriation but rather requires only a charge of a safekeeping violation to constitute misappropriation no matter the severity of the offense.¹⁹⁶ This is problematic because there is a broad scope of possible violations within the safekeeping rule, including less serious violations, such as recordkeeping violations, and more serious violations, such as misappropriation.¹⁹⁷ Understandably, the possible sanctions for different violations of the safekeeping rules also vary widely.¹⁹⁸ Due to the lack of requirements for a charge of misappropriation, a complaint issued by the Board might put attorneys on notice of neither the specific charges against them nor the possible sanctions they face, making it difficult for a charged attorney to adequately prepare a defense.¹⁹⁹

195. See RHONDA WASSERMAN, PROCEDURAL DUE PROCESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 79 (2004) (“[A]s a general rule, due process guarantees notice and an opportunity to be heard . . .”). Iowa has adopted a narrow interpretation of *In re Ruffalo*. The court will not act upon charges filed after the attorney-defendant has testified at the disciplinary proceedings but will allow reinstatement of those disciplinary charges in a subsequent action. *Comm. on Prof'l Ethics & Conduct of the Iowa State Bar Ass'n v. Wenger*, 454 N.W.2d 367, 369–70 (Iowa 1990).

196. *Iowa Supreme Court Attorney Disciplinary Bd. v. Kelsen*, 855 N.W.2d 175, 183 n.3 (Iowa 2014) (“While we believe it would be better practice for the Board to specifically allege in its complaint that a respondent misappropriated or converted client funds for personal use if its investigation supports such an allegation, we do not believe the absence of a specific reference to misappropriation in the complaint is critical here.”). However, the court has recently tempered this rule, finding lack of notice when both: (1) the complaint did not specifically allege misappropriation; and (2) the defendant-attorney did not have the opportunity to present evidence supporting a colorable future claim to client funds due to sanctions. *Iowa Supreme Court Attorney Disciplinary Bd. v. Cepican*, 861 N.W.2d 841, 845 (Iowa 2015). The court distinguished *Kelsen*, noting that *Kelsen* “actually had an opportunity to submit evidence of a colorable future claim at the disciplinary hearing and understood the issue was being litigated.” *Id.*; see also *Iowa Supreme Court Disciplinary Bd. v. Ryan*, 863 N.W.2d 20, 28–29 (Iowa 2015) (distinguishing from *Kelsen* when the Board did not allege misappropriation either in the complaint or at the hearing).

197. See *supra* Part III.A.1.

198. See *supra* Part II.C.

199. The case of David Kelsen demonstrates the potential Iowa's current approach has to deprive attorney-defendants of proper notice. See *supra* Part I.

V. A PROPOSAL FOR THE ADOPTION OF MARYLAND'S APPROACH

Iowa should adopt Maryland's approach to resolve the ambiguities that have arisen in the area of attorney misappropriation. Among Iowa, New Jersey, and Maryland, Maryland's approach to misappropriation best addresses the shortcomings of Iowa's approach. It both effectuates the principles identified by the ABA and protects attorney-defendants by providing them with clear notice regarding the nature of the charges brought against them and the possible sanctions they face. In contrast, though at first glance New Jersey's automatic revocation rule may seem clear and in line with the principles identified by the ABA, its rule, much like Iowa's, suffers from its failure to define the precise metes and bounds of the definition of misappropriation.

A. ABA INTERESTS IN MARYLAND AND NEW JERSEY

Maryland's approach best reflects the intent of the ABA by providing limited flexibility while maintaining general consistency.²⁰⁰ Maryland's default rule is clear and well-defined: it will revoke the license of an attorney who has misappropriated by fraud, deceit, or misrepresentation; the clarity of the rule supports the value of consistency.²⁰¹ Maryland also provides limited flexibility: allowing attorneys to rebut a charge of fraudulent intent by using mitigating circumstances to explain the particular events leading up to the misappropriation.²⁰² This tempers Maryland's rule by giving the adjudicator limited flexibility. Despite the flexibility, by targeting attorneys with a fraudulent intent, the Maryland rule still sends a clear message to misappropriating attorneys that they are not fit to be in the legal profession. Further, Maryland does not allow attorneys who recklessly or negligently misappropriate to go unpunished. Instead, the court imposes indeterminate suspensions in those situations, allowing for strict sanctions tailored as the court sees fit.²⁰³ By allowing for serious but impermanent solutions like

200. See *supra* Parts III.A.2, III.C.3.

201. See *supra* Part III.C.3.

202. See *supra* Part III.C.3.

203. The situations in which Maryland has imposed indeterminate suspensions typically arise when the court has found negligent or reckless misappropriation, an offense that would not qualify for New Jersey's *Wilson* rule. See *Attorney Grievance Comm'n v. Sperling*, 76 A.3d 1172, 1180, 1185 (Md. 2013) (imposing an indefinite suspension when an attorney failed to retain enough money to cover client liens in his trust account due to a mathematical error); *Attorney Grievance Comm'n v. Tun*, 51 A.3d 565, 567, 569 (Md. 2012) (imposing an indefinite suspension in a reciprocal disciplinary case when an attorney made reckless misrepresentations on vouchers to obtain payment for work he had done for indigent defendants and failed to maintain adequate time records); *Attorney Grievance Comm'n v. Moeller*, 46 A.3d 407, 411-12 (Md. 2012) (imposing an indefinite suspension when an attorney commingled personal and client funds and overdrew the account).

indeterminate suspensions for violations involving negligence, the court emphasizes the possibility of rehabilitation.²⁰⁴

New Jersey's approach supports the principles identified by the ABA to a lesser extent than Maryland. Like Maryland, New Jersey's rule provides for predictability and consistency in attorney disciplinary sanctions.²⁰⁵ Also like Maryland, the rule is a clear and well-defined standard.²⁰⁶ However, New Jersey's rule of automatic revocation can lead to harsh results, especially in consideration of its broad definition of misappropriation.²⁰⁷ New Jersey's definition encompasses Maryland as well as Iowa's rule, which though framed nearly the same way as New Jersey's rule, contains exceptions that are not applicable in New Jersey.

This broad scope means that in addition to providing clarity, New Jersey's revocation rule arguably provides the most actual protection to the public by permanently removing the most offending attorneys from the profession;²⁰⁸ however, New Jersey's rule fails in its utter lack of flexibility. Though the State takes an individualized approach to most safekeeping violations, the *Wilson* doctrine is effectively absolute and encompasses violations that other states would not consider misappropriation.²⁰⁹ While most states consider disbarment appropriate in some cases of misappropriation,²¹⁰ critics of the *Wilson* doctrine stress the importance of fairness; an inflexible rule inevitably leads to circumstances in which its effects are unjustifiably harsh, and with the lack of exceptions to the broad *Wilson* rule, as well as the finality of revocation in New Jersey, there are doubtless instances in which the rule will seem unfair.²¹¹ Critique of the rule has even come from inside the walls of the

204. There is a possibility that future clients could be harmed under Maryland's approach. While New Jersey's rule assures that a misappropriating attorney will never again serve clients in the state, a Maryland attorney who has received an indeterminate suspension after a finding of no fraudulent intent has the potential to regain admission to the bar and continue to harm clients. Ben-Ami, *supra* note 158, at 370. However, overly severe sanctions also have detrimental effects on the legal profession. See *supra* Part III.A.2. For an argument that there is little difference between permanent revocation and indeterminate suspension, see generally Holmes, *supra* note 157.

205. See Boyd & Turetsky, *supra* note 98, at 1022 (describing the District of Columbia's approach to attorney discipline which, like New Jersey, "imposes a strict presumption of disbarment" in misappropriation cases and generally does not take mitigating factors into account).

206. See *supra* Part III.B.

207. See *supra* Part III.C.2.

208. Ben-Ami, *supra* note 158, at 372 ("[T]here is 'no clearer wrong suffered by a client at the hands of one he had every reason to trust . . . [t]he public is entitled . . . as a simple matter of maintaining confidence, to know that never again will that person be a lawyer.'" (second, third, and fourth alterations in original) (quoting Zazzali, *supra* note 124, at 664)).

209. Though the court has been careful to preserve the possibility of an exception, in practice, the *Wilson* rule has been essentially absolute. See *supra* text accompany notes 160–63.

210. DeWitt, *supra* note 95, at 171.

211. Nirenberg, *supra* note 115, at 713–15 ("[A]ny attempt by an attorney to show that his actions were the result of alcoholism, drug addiction, or some other condition will invariably fail. Because the 'knowing' misappropriation does not require a demonstration of intent, cases of mismanagement of records or accounts have sometimes fallen into this category." (footnote omitted)).

Supreme Court of New Jersey, with justices noting the importance of individualized justice and recognizing that the *Wilson* rule has the potential to lead to unfair results.²¹²

B. NOTICE IN MARYLAND AND NEW JERSEY

The scope of due process requirements in attorney disciplinary proceedings is not entirely clear.²¹³ All jurisdictions have a requirement that attorneys be placed on notice of the charges against them.²¹⁴ It is unlikely that any of the jurisdictions discussed in this Note violate due process with their rules on misappropriation;²¹⁵ however, some approaches comport with the essence of due process—fundamental fairness—better than others. Further, clear notice also fosters confidence and compliance within the profession, as more procedural protections promote a perception of fairness.

By requiring the complaint to include any charges of misrepresentation or fraud, Maryland best serves due process because the complaint itself puts attorney–defendants on notice that the state is charging them with a revocable offense. As a result, in Maryland, the face of a complaint will always indicate whether a safekeeping violation could result in license revocation. Arguably, New Jersey’s rule also puts attorneys on notice with a simple automatic disbarment rule.²¹⁶ However, what constitutes a charge of misappropriation in New Jersey is much less clear. New Jersey’s definition of misappropriation,

212. See *In re Greenberg*, 714 A.2d 243, 256 (N.J. 1998) (Stein, J., dissenting) (“The Court should exercise caution and restraint in considering the extent to which it should apply rigid, bright-line rules in attorney disciplinary proceedings. Disbarment is the most unforgiving discipline, and it condemns every lawyer on whom it is imposed to a life sentence of professional disgrace.”); Nirenberg, *supra* note 115, at 725–29. Critics of the *Wilson* rule also highlight the rule’s “disproportionate impact on sole practitioners,” noting that almost all disbarments under the *Wilson* rule are imposed on this group of attorneys. *Id.* at 729–30. Because sole practitioners often manage their own accounts, the rule may be functioning to disbar simply inexperienced or negligent attorneys. *Id.* at 730.

213. See *supra* note 64 and accompanying text.

214. See *supra* note 78 and accompanying text.

215. The Iowa Supreme Court addressed due process concerns in the *Kelsen* decision, distinguishing between notice of charges and notice of sanctions. *Iowa Supreme Court Attorney Disciplinary Bd. v. Kelsen*, 855 N.W.2d 175, 183 n.3 (Iowa 2014) (“In short, the issue here is one of the appropriate sanction for an alleged ethical violation as to which the respondent was clearly on notice, both as to the factual circumstances and as to the relevant rule allegedly violated.”).

216. It appears as though New Jersey is also in the practice of specifically charging knowing misappropriation rather than simply a violation of safekeeping rules. See, e.g., *In re Gifis*, 717 A.2d 406, 407 (N.J. 1998) (“The five-count complaint charged respondent with knowing misappropriation of escrow funds in three instances . . .”); *In re Shelly*, 659 A.2d 460, 461 (N.J. 1995) (per curiam), *reinstatement granted*, 669 A.2d 815 (N.J. 1996) (“Counts One, Two, and Three of the formal ethics complaint charged respondent with knowing misappropriation of client trust funds . . .”); *In re Barlow*, 657 A.2d 1197, 1198 (N.J. 1995) (per curiam) (“[T]he District XIV Ethics Committee (DEC) filed a three-count complaint . . . charging respondent, Dennis M. Barlow, with record-keeping violations, gross neglect in failing to safeguard client funds, and knowing misappropriation of client funds.”). However, like Iowa, New Jersey does not require a specific misappropriation charge. See *supra* note 147 and accompanying text.

which, much like Iowa's, does not require the complaint to allege anything more than a safekeeping violation to constitute misappropriation, may fail to put attorney-defendants on notice of what they are charged with and whether they are facing automatic revocation.²¹⁷

VI. CONCLUSION

Iowa's current method of addressing the problem of attorney misappropriation is inadequate. The case of David Kelsen, whose license was revoked after a recommendation of a public reprimand by the Grievance Commission, is illustrative.²¹⁸ While Kelsen's conduct may have been misappropriation, in consideration of the recommended sanction, it seems that the Board and Grievance Commission treated his actions as a lesser safekeeping violation.²¹⁹ When even the initial adjudicative body is unaware that an attorney's violations require revocation, it is unlikely that the attorney-defendant is on notice of this consequence. The ambiguity in both charges and sanctions undermines Iowa's approach to misappropriation because it fails to adequately notify attorneys of the sanctions they may face. Ultimately, Iowa's approach to misappropriation has the potential to harm public confidence in the legal profession as well as cause dissatisfaction within the profession.

Implementation of a rule like Maryland's would largely solve the problems of Iowa's approach. By requiring a charge and finding of a Rule 8.4(c) violation in order to revoke for misappropriation, Maryland puts attorneys on clear notice of the charges against them while also sending a message to the public that fraudulent misuse of client funds will not be tolerated. And by allowing for the consideration of mitigating factors or other special circumstances, Maryland also retains flexibility in its approach, which reduces the perception of unfairness. By adopting Maryland's rule, Iowa can best effectuate the values identified by the ABA while also providing clarity in the area of misappropriation.

217. See *supra* Part III.C.2.

218. See *supra* Part I.

219. See *supra* note 14 and accompanying text. The Board did not specifically allege either misappropriation or conversion in its complaint. *Kelsen*, 855 N.W.2d at 183 n.3.