Mental Health and the Attorney Discipline Process In the State of Georgia

Version Current as of:
February 20, 2021

Eric C. Lang
Atlanta, Georgia

Table of Contents

Table of Authorities

Cases

Rules

Mental Health and the Attorney Discipline Process in the State of Georgia

Eric C. Lang

I. Introduction

Attorneys face discipline when they violate the rules. Not all violations are the same; not all violators are the same. Attorneys with mental health issues who violate the rules can, if they are incredibly open about their actions and their health, be granted a chance at suspension and rehabilitation, as opposed to disbarment. Because each discipline case is unique, it is not possible to identify an explicit legal standard. The cases discussed below do present a large enough sample, however, to discuss what the *de facto* standard may be.[1]

Having a mental health issue can be grounds for disbarment. Rule 4-104(a) states "[m]ental illness, cognitive impairment . . .to the extent of impairing competency as a lawyer, shall constitute grounds for removing a lawyer from the practice of law." Two things are true with respect to Rule 4-104(a). First, it is not actually a part of the Georgia Rules of Professional Conduct, which can be found in Rule 4-102.[2] Second, very few

[1] This paper usually accompanies a presentation entitled "Mental Health and the Practice of Law." That presentation does not track this paper. In fact, the contents of this paper are discussed for less than five percent of the presentation materials. Anyone desiring the presentation materials may contact the author (elang@langlegal.com), who will be glad to provide them.

[2] The closest the Georgia Rules themselves come to the issue is Rule 1.1, regarding competence. But, it is clear from the text of the rule that competence refers to skill, and not state of mind: "Competence requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." The Bar has proposed a new comment to this rule which does refer to mental health, but that comment has not been adopted by the Supreme Court. ("A lawyer's mental, emotional, and physical well-being impacts the lawyer's ability to represent clients and to make responsible choices in the

discipline proceedings involve penalties under Rule 4-104. [3] Although lawyers with mental health issues regularly find themselves in the disciplinary process, it is not because of their mental health, it is because of something they did.

Mental health plays a role in the disciplinary process not on the prosecutorial side of the equation, but on the defense side. The Georgia Supreme Court considers many factors in determining the appropriate sanction for violation of the rules, borrowing from the American Bar Association. The ABA's rules view "mental disability" as a mitigation factor when there is evidence of a disability, that the disability caused the harm, that there has been treatment, and that the treatment worked. (ABA Rule 9.32(i).) Though it has never been expressed in this fashion, the Georgia Supreme Court imposes a penalty less harsh than disbarment when (a) the attorney admits the conduct; (b) the attorney rectifies the harm; (c) the ABA standards are met; and (d) there is medical certification of recovery. This result can be seen through an examination of recent cases where mental health played an explicit role, resulting in a lesser sanction than disbarment.

practice of law. Maintaining the mental, emotional, and physical ability necessary for the representation of a client is an important aspect of maintaining competence to practice law.")

[3] *See In re Rand*, 279 Ga. 555 (2005) where, despite five specific violations, attorney suspended under Rule 4-104(a) (although not disbarred).

II. **Mental Health's Mitigating Role in the Discipline Process**[4]

Attorneys with mental health issues engage in the same types of rule violations as do all other attorneys -- financial improprieties and failure to work/communicate. There is a third category involvement out-of-court behaviors that some might say could be more associated with mental health issues, but that is not analyzed here. In each of the following cases, an attorney with a mental health issue sought and received a mitigated sanction in the presence of remorse, openness, and rehabilitation.[5]

A. **Trust Account Issues**

In re Saunders, 304 Ga. 824 (2018) involved a conversion of client's funds for the attorney's personal use. The attorney was, in fact, willing to explain what drove her to act that way: "her boyfriend, with whom she shared an apartment, had an emotional downward spiral and failed to pay his portion of the expenses . . .unable to meet the couple's shared financial obligations, her credit was destroyed, and her car was repossessed. Her boyfriend then became abusive, causing Saunders to leave the apartment with only the clothes on her back and to give up her office space so that he would be unable to find her." She was forthcoming as to the background, she repaid the

[4] This paper is not concerned with substance/alcohol issues, but the Georgia Supreme Court handles disciplinary matters in that context in the same fashion as it does mental health cases. *See In re Barnes* 304 Ga. 324 (2018) (suspension and conditions for reinstatement for drug issues) (*see also In re Barnes*, Supreme Court of Georgia No. S18Y0982, November 18, 2019 (reinstating attorney)); *In re Duncan* 301 Ga. 898 (2017) (suspension and conditions for reinstatement for substance issues).

[5] This paper is current as of February 6, 2020. If additional relevant cases are decided between that date and the date of the presentation, those cases will be reflected in the presentation.

client, and she sought and received help: "the client has been repaid in full . .. her actions were due to extreme emotional distress stemming from domestic violence; she has undergone counseling to rebuild her self-esteem to avoid similar problems in the future." Although she could have been disbarred, she was suspended for one year. No condition was placed on her reinstatement, perhaps because her issues were situational, and not related to a medical condition.

In re Morgan 303 Ga. 678 (2018) is another trust account case. Morgan made the client whole for Morgan's actions, and explained to the Court his mental condition: "Morgan offers that he has no prior disciplinary record; that with the loss of his wife, he experienced personal and emotional problems during the time of his misconduct." His offense could have resulted in disbarment but he sought a two year suspension with conditions: "Morgan requests that this Court impose a two-year suspension that includes the following reinstatement conditions: complete a psychological evaluation and follow all recommendations; continue attending weekly Alcoholics Anonymous meetings; attend the State Bar's Law Practice Management courses; and submit a petition for reinstatement to the Review Panel showing compliance with these conditions for reinstatement." The court accepted the conditions and suspended, rather than disbarred, Morgan.

In re Storrs 300 Ga. 68 (2016) involved a lawyer who used and then repaid trust funds before they were requested by the person to whom they were due. After self-reporting these actions, the lawyer explained that "he was suffering from emotional and mental distress resulting from his separation, and eventual divorce, from his wife of many years, and from the depression suffered by one of his children, which resulted in

that child applying for a hardship withdrawal from the university that he was attending. Storrs has sought and continues to seek counseling from his psychologist, as well as his priest." Rather than disbar Storrs, the court issued a three month suspension.

In re LeDoux, 288 Ga. 777 (2011) arose out of a disciplinary matter and a subsequent petition for voluntary discipline, relating to financial irregularities, including a bounced trust check. The behavior at issue concerned two matters. In one matter, the attorney made errors with respect to a loan payoff amount in a closing. In the other matter, the attorney, among other things, wrote a check for insufficient funds to her client out of trust funds. It was noted, " In re LeDoux, 288 Ga. 777 (2011), financial irregularities, including bounced trust check, in the presence of "acute mental health episode that ultimately resulted in her hospitalization in two different mental health facilities." The court fashioned very specific discipline for the attorney. First, the attorney was suspended indefinitely, but for a minimum of one year. Second, the attorney was required to obtain certification of mental competency before returning to practice law. Third, "every six months for the first 24 months following resumption of the active practice of law, LeDoux shall forward to the State Bar a new medical certificate."

B. **Client Neglect Issues**

In re Hentz, 300 Ga. 413 (2016) involved multiple issues of client neglect by previously disciplined attorney. In mitigation, he stated that at the time of the transgressions, "Hentz states that he suffered significant personal and emotional problems, including his son's suicide, marital problems affecting his marriage of thirty-five years, his wife's diagnosis with a rare cardiac disease, his 4 youngest son's drug

addiction and incarceration, his daughter's drug addiction and the termination of her parental rights." He noted, though, that he had contacted the Lawyer's Assistance Program and had been in therapy for nine months. Instead of disbarment, he sought a two year suspension, coupled with conditions for his returned. The Georgia Supreme Court accepted this solution.

In re Bagwell, 286 Ga. 511 (2010) concerned five complaints filed against an attorney, who then filed a petition for voluntary discipline, agreeing to suspension from six months to two years. The attorney admits that in connection with his representation of these clients he failed to communicate with his clients and he failed to timely and properly pursue the legal matters entrusted to him. As a result of his misconduct, three of the clients had adverse rulings entered against them. 286 Ga. at 511. However, the attorney also offered evidence that he suffered with "Bi-Polar Disorder, attention deficit hyperactivity disorder, major depressive disorder, and generalized anxiety disorder, and has undergone in-patient psychiatric evaluation." Id. The court imposed a two year suspension, and conditioned reinstatement on certification of mental competence. It should be noted that Chief Justice Hunstein dissented, stating that "Based on Bagwell's admitted conduct, I disagree that suspension is an appropriate discipline. Because I would disbar Bagwell, I respectfully dissent." Id. at 512.

In re Moody, 281 Ga. 608 (2007) concerned an attorney who failed to properly represent two clients, and who appeared in court intoxicated and unable to represent a client. Though the opinion did not develop the details, the court noted that "In mitigation of her behavior, we find that Moody has diabetes and a bi-polar condition, and on and off consumes alcohol heavily to self-medicate. During one of the cases at

issue here Moody was hospitalized and told by her doctor not to return to work." 261 Ga. at 608. Moody sought a six month suspension in a voluntary petition. The court accepted the petition, but imposed the condition that before returning to practice law, Moody obtain "a written certification from a psychiatrist or psychologist licensed to practice in Georgia that she has no mental condition or impairment that would affect her ability to practice law." Id.

In re Jaconetti, 291 Ga. 772 (2012) arose out of eight formal complaints filed by the State Bar of Georgia, coupled with a voluntary petition and two amendments. In short, the attorney both admitted in her petition, and was found by a special master to have: "neglected civil and criminal matters involving eight clients, often with harm to the client; failed to communicate in a timely and effective way with her clients; and failed to account for fees received or to refund unearned fees." 732 S.E.2d at 448. It was also noted that "Jaconetti has exhibited indifference to making restitution." The court discussed the attorney's mental health as follows:

The special master noted that Jaconetti admitted that she was not currently mentally competent to practice law. His report discussed in detail the mitigating circumstances he found related to a series of personal and physical problems Jaconetti faced beginning in 2005, including the fact that she worked for several years with undiagnosed and untreated Bipolar Disorder. The special master found that Jaconetti has sought professional help for her mental health issues on a regular basis since 2009 and is now under the care of a board-certified psychiatrist and receiving treatment. Id. The court concluded that the three year suspension sought by the attorney was

appropriate, but, conditioned reinstatement both on repayment to clients and on certification of mental competency.

In re Ricks, 289 Ga. 136 (2011). Ricks concerned an attorney who "accepted money to represent a client in separate domestic relations matters and either performed none, or only some, of the work. In each case Ricks admits he did not complete the work for which he was retained, did not communicate with his client and did not refund the client's fee." The lawyer placed his conduct in the context of impairment: "he began to suffer from debilitating depression during this time period and, while he sought treatment, he did not take the prescribed medication or follow through with a therapist. His family obtained inpatient treatment for him at an institution where he was diagnosed as suffering from severe depression and bi-polar illness." The court accepted his petition for a one year suspension, and conditioned reinstatement on a certification of mental competency.

C. **Other Conduct and Competency Issues**

In re Corley 303 Ga. 290 (2018), Corley was convicted of domestic violence – first degree, which conviction would normally result in disbarment. Corley opened himself up publicly: "In particular, he states that in 2012, he was diagnosed with Attention Deficit Hyperactivity Disorder and depression and began receiving treatment; in January 2016, he began seeing a different doctor for issues related to his depression, which resulted in changes in his medication; and following the incident in December 2016, he sought help through the State Bar and was ultimately diagnosed as having Bipolar II disorder, resulting in a new daily prescription. He asserts that the doctor he sought treatment from through the State Bar informed him that the medication he was

previously prescribed exacerbated the symptoms of his Bipolar II disorder and that, while certainly not an excuse for his conduct, his inability to have his mental health condition properly diagnosed and medicated was a factor to his conduct in December 2016." Rather than disbarring Corley, "Before being reinstated, Corley must demonstrate that he has completed his probation, that a board-certified and licensed mental health professional has certified that he is fit to return to the practice of law, and that he is continuing to receive mental health treatment by a board-certified and licensed mental health professional."

In re Morris, 298 Ga. 864 (2016) simply states that "Morris admits that his competency as an attorney is currently impaired due to addiction and mental health issues" and that he sought a suspension with conditions on reinstatement. He stated that "he will sign releases authorizing his treating counselors and physicians to provide quarterly reports to the Bar regarding his treatment, and he will continue to cooperate with the Bar in addressing all disciplinary matters that have been or may be filed. He acknowledges that he may owe refunds to clients and commits to endeavoring to repay those fees as soon as he is able." The court accepted those conditions and agreed to suspension, not disbarment.

In re Franklin, 299 Ga. 4 (2016) concerned a lawyer accused of what amounted to unauthorized practice during a time while her license was inactive. "she has suffered from various mental and emotional conditions for an extended period of time prior to and during the time giving rise to this matter, that she has been diagnosed with clinical depression and is currently undergoing regular counseling and treatment, and that she is sincerely embarrassed and remorseful for having violated the disciplinary rules."

Accordingly, the court issued a three-month suspension, much more lenient than otherwise available in that situation.

In re Dale 304 Ga. 446 (2018) involved an attorney who "entered a guilty plea on October 6, 2017 to one count of "Peeping Tom," in violation of OCGA § 16-11-61." Though this offense would normally result in disbarment, Dale sought a suspension with reinstatement conditions. After examining evidence of his mental condition, the Court agreed: "At the conclusion of this period, Dale may seek reinstatement by demonstrating to the State Bar's Office of General Counsel that he has met the conditions for reinstatement, specifically that his probation has terminated, that a board-certified and licensed mental health professional has certified that he is fit to return to the practice of law, and that he is continuing to receive mental health treatment by a board-certified and licensed mental health professional."

III. **Scrutiny Applied to Assertions of Mental Health Issues**

A. **Burden on Reinstatement**

In re Moore, 305 Ga. 419 (2019) and its predecessor *In re Moore* 300 Ga. 407 (2016) show just how serious the court is with respect to the reentry requirement. Moore was suspended in 2016 for failing to provide the District Attorney with pleadings and then misrepresenting the facts to the Judge. After reviewing the situation, the Special Master found "Moore adamantly and unreasonably maintained throughout the hearing that he had done nothing wrong, and that he never expressed remorse or accepted any responsibility for the consequences of his actions. The special master recommended an indefinite suspension and that, as a condition of reinstatement, Moore undergo a physical and mental evaluation and be certified as fit to practice law.' The

Review Panel clarified conditioning Moore's reinstatement on, among other things, "providing a detailed, written evaluation by a licensed psychologist or psychiatrist certifying that Moore was mentally competent to practice law." Whatever it was that Moore submitted to comply with that edict, it "did not address Moore's mental fitness to practice law and that the psychologist did not describe any familiarity with the rigors and demands of the practice of law, did not have a clear understanding of the facts, and appeared to be unaware of the specific request from this Court for a written evaluation certifying that Moore was 'mentally competent to practice law.'" Moore's petition for reinstatement was denied, and as of this writing (January 3, 2020) has been no further review of Moore's case.

B. **Burden on Seeking Mitigation**

In re Kirby, 304 Ga. 628 (2018) provides another example of what precise testimony and conditions need to appear to justify a lessened punishment. Kirby admitted to four instances of client neglect. In seeking only a reprimand, he presented evidence from a doctor. "Kirby submitted under seal the March 2018 report of a psychologist who performed the evaluation and found Kirby to be fit to practice law. Generally speaking, the psychologist's report discusses Kirby's statements regarding particular stress he was under, including the 2012 death of his father, an attorney with whom he shared office space, and the 2016 death of his mother. The psychologist noted various challenges Kirby faced in managing his practice and his stress." Thus Kirby established both the existence of mental issues and their relationship in time to the client harm. However, "[t]he psychologist made specific mental health recommendations but also expressed a concern about whether Kirby would follow

through with his stated plans for personal and professional improvement. Kirby's petition for voluntary discipline provides no indication that he is following the psychologist's recommendations." Though Kirby sought only a reprimand, the court ultimately concluded that the repeat nature of his transgressions coupled with a less than enthusiastic letter from his doctor would not permit that much mitigation.[6] Kirby then filed a second petition, seeking a thirty-day suspension, which was rejected as an insufficient sanction. *In re Kirby*, Supreme Court of Georgia, S20Y0079 (November 4, 2019).

IV. **Mental Health Issues Not Asserted, Disbarment Follows**

In re Levine 303 Ga. 284 (2018) is a case where the issue of the lawyer's mental condition raised, but not by the lawyer and therefore did not impact the final decision. The special master "concluded that Levine's personal or emotional problems were a mitigating factor, describing them as "self-evident" but noting that Levine offered no medical evidence in the disciplinary proceeding to support his claim of disability."

In re Nicholson, 299 Ga. 737 (2016) is similar, with slightly more discussion of the behavior of the attorney, who was accused of financial issues and false statements. "Nicholson conveyed his contempt for the disciplinary process in general, and in others, he signaled his contempt for the special master in particular, flinging personal insults, unsupported accusations of misconduct, and conspiracy theories along the way."

6 *In re Tuggle*, Supreme Court of Georgia S19Y1553 (November 4, 2019)(rejecting proposed discipline) contains a similar conclusion when substance abuse or addiction is presented as a mitigating factor: "Of additional concern is the lack of specificity provided, under seal or otherwise, by Tuggle as to the substance abuse issues that led to his misconduct in these disciplinary matters."

Further "Nicholson abruptly walked out of the hearing before its conclusion, remarking that "I don't want to listen to [the special master] for another ten minutes," and explaining that he had a more pressing engagement — a card game — to attend." With that and other actions observed, "In the latter, however, the special master also found a mitigating circumstance, noting the evidence that Nicholson previously had received psychiatric treatment, and finding that his bizarre behavior in the course of the disciplinary process was proof of an ongoing mental health issue. The special master explained that, if Nicholson were not mentally ill, the special master would recommend disbarment. But because the special master found mental illness, she instead recommended that Nicholson be suspended from the practice of law for not less than one year," with conditions. However, both the Review Panel and the Georgia Supreme Court noted that "Nicholson never urged mental illness as a mitigating circumstance and that he had presented no admissible evidence of a mitigating mental illness." He was disbarred.

In *In re Farmer*, Supreme Court of Georgia S19Y11156 (November 4, 2019), disciplinary proceedings were brought because of counsel's in-litigation conduct. Counsel himself described this conduct as "'Conflictineering,' the purpose of which was to disrupt the judicial process to the point that either the court or the opposing party would simply capitulate for the sake of restoring order." This strategy included making more than 500 filings and *ad hominem* attacks against the judge. He threatened witnesses, was sanctioned for his conduct, expanded the litigation, and was ultimately found civilly liable for his conduct. He was disbarred. (Unlike *Levine* and *Nicholson*, mental health issues are not mentioned by the court in *Farmer*.)

V. **Conclusion: Reinstatement – The Desired Outcome of Rehabilitation**

Although the Georgia Supreme Court treats every attorney discipline case on its own merits, definable steps have evolved when asserting an attorney's mental health as a mitigating factor, all of which require the attorney to be exceedingly open. The attorney must recognize the wrongful act, eliminate the harm it caused and demonstrate remorse. The attorney must then demonstrate – not just assert – that a mental health issue exists, relates to the wrongful act, and is the subject of ongoing treatment. Many of the attorneys described above followed those steps and ultimately were reinstated. In some instances, the reinstatement was based upon a demonstration that conditions have been met. *In re Morgan*, Supreme Court of Georgia, S18Y0821, February 5, 2021; *In re Corley*, Supreme Court of Georgia, S18Y0350, January 31, 2020. *In re Ledoux*, 303 Ga. 804 (2018), In *re Bagwell* 292 Ga. 340 (2013). In others, reinstatement was conditioned only on the passage of time, and the attorneys chose to show a return to practice (Storrs; Moody (though currently inactive); Franklin). Thus, though the Georgia Supreme Court must treat each discipline case on its own merit, the opportunity for a return after rehabilitation is clearly present.[7]

[7] It would be disingenuous to exclude the matters that caused this paper and the accompanying presentation to come into existence *See In re Lang*, 292 Ga. 894, 741 S.E.2d 152 (2013) (one-year suspension of attorney with bipolar disorder for misuse of trust funds); *In re Lang*, 295 Ga. 220, 759 S.E.2d 47 (2014) (one-year suspension of same attorney for failing to communicate with client). *See also In re Lang*, 297 Ga. 156, 773 S.E.2d 253 (2015) (reinstating same attorney). The author is not competent to give a detached evaluation of those matters, other than to express gratefulness to the State Bar

of Georgia and the Georgia Supreme Court for understanding repayment, remorse, mental condition, and the necessity and efficacy of treatment.