

2011

Jonathan W. Grimes v. : Brief of Respondent/ Appellee

Utah Supreme Court

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Adam C. Bevis; Assistant Council; Billy L. Walker; Senior Council; Office of Professional Conduct; Counsel for Petitioner/Appellant.

Jonathan W. Grimes; Appellee; Gregory G. Skordas; Rebecca Skordas; Daniel R. Strong; Skordas, Caston & Hyde; Counsel for Respondent/Appellee.

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Gregory G. Skordas (#3865)
SKORDAS, CASTON & HYDE
341 South Main Street
Suite 303, Salt Lake City, UT 84111
Telephone: (801) 531-7444
Facsimile: (801) 531-8885
Attorney for Respondent/Appellee

IN THE SUPREME COURT OF UTAH

**In the Matter of the
Discipline of:**

Jonathan W. Grimes, #10462

Respondent.

**BRIEF OF THE RESPONDENT/
APPELLEE**

Supreme Court No. 20110171

District Court No. 080910239

Appeal from the Third District Court, Salt Lake County

Judge L.A. Dever

Adam C. Bevis
Assistant Council
Billy L. Walker
Senior Counsel
Office of Professional Conduct
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Counsel for the Petitioner/Appellant

Jonathan W. Grimes
455 East 400 South
Salt Lake City, Utah 84111
Respondent/Appellee

Gregory G. Skordas
Rebecca Skordas
Daniel R. Strong
Skordas, Caston, and Hyde LLC
341 South Main Street, Suite 303
Salt Lake City, Utah 84111
Counsel for Respondent/Appellee

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STATEMENT OF ISSUES AND STANDARD OF APPELLATE REVIEW

- I. Whether the district court erred when it imposed a three-year suspension upon the Respondent, Jonathan W. Grimes, when the court found that Mr. Grimes had committed misconduct when handling the funds of his client, but also found compelling mitigating circumstances.
- II. In reviewing sanctions imposed for attorney discipline actions, the Court should presume the findings of fact in the lower court are correct. *See Matter of Discipline of Babilis*, 951 P.2d 207 (Utah 1997). The court should not overturn findings of fact unless “unless they are arbitrary, capricious, or plainly in error.” *See id.* If the evidence warrants, the Court may make an independent judgment regarding the appropriate level of discipline, but the Court should “always give serious consideration to the findings and rulings of the district court.” *See id.*

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following rules of professional conduct are at issue in this action:

Rule 1.2 (Scope of Representation), Rules of Professional Conduct

Rule 1.3 (Diligence), Rules of Professional Conduct

Rule 1.4 (Communication), Rules of Professional Conduct

Rule 1.5 (Fees), Rules of Professional Conduct

Rule 8.4 (Misconduct), Rules of Professional Conduct

Rule 14-603 (Sanction), Standards for Imposing Lawyer Sanctions

Rule 14-604 (Imposition of Sanctions), Standards for Imposing Lawyer Sanctions

Rule 14-607 (Aggravation and Mitigation), Standards for Imposing Lawyer Sanctions

STATEMENT OF THE CASE

Nature of the Case: This is an appeal from an attorney discipline action in which the district court suspended the Respondent, Jordan W. Grimes, for three years after finding that he engaged in misconduct when handling \$7,070 in fees paid by one of his clients. Although Judge L.A. Dever recognized that the presumptive sanction for Mr. Grimes' conduct was disbarment, Judge Dever found the mitigating circumstances compelling enough to warrant imposing a three-year suspension with specific probationary terms instead. The Office of Professional Conduct (OPC) initiated this appeal, arguing Judge Dever erred when departing from the presumptive sanction in response to mitigating circumstances.

The Course of Proceedings: The OPC filed a complaint against Mr. Grimes on June 20, 2008. On June 2, 2010, the district court presided over a trial to determine whether Mr. Grimes violated the Rules of Professional Conduct ("Rules"). The district court found that Grimes violated Rules 1.2(a) (Scope of Representation); 1.3 (Diligence); 1.4(a) (Communication); 1.5(a) (Fees); 8.4(a),(c), and (d) (Misconduct), and issued Findings of Fact and Conclusions of Law. The matter then proceeded to a sanctions hearing on November 8, 2010.

Disposition in the Trial Court: At the Sanctions hearing, the district court heard evidence of the mitigating circumstances at issue during the period of Mr. Grimes' misconduct. On February 4, 2011, the court issued an Order of Sanction imposing a three-year suspension

rather than disbarment, in light of the mitigating circumstances and in the interest of justice. The court also imposed probation on Mr. Grimes, during which he was to reimburse his client for the misused funds, complete an ethics and professional conduct course acceptable to the OPC, and report to a supervising attorney selected by OPC. Upon returning to active practice, Mr. Grimes' client funds are to be monitored by the supervising attorney.

STATEMENT OF RELEVANT FACTS

1. Mr. Grimes became a member of the Utah State Bar in 2005.
2. In June 2005, Mr. Bill Riordan hired Mr. Grimes to represent him in a discrimination case. Mr. Riordan was Mr. Grimes' first client.
3. At the time, Mr. Grimes worked for attorney J. Kent Holland.
4. Mr. Riordan paid Mr. Grimes a \$10,000 retainer, which was placed in Mr. Holland's attorney trust account.
5. Mr. Grimes left Mr. Holland's firm sometime in 2006.
6. Mr. Riordan indicated he wanted to continue working with Mr. Grimes, so Mr. Grimes retrieved Mr. Riordan's file from Mr. Holland.
7. On June 9, 2006, Mr. Holland's secretary gave Mr. Grimes a check in the amount of \$7,070.
8. The Memo line of the check bore Mr. Riordan's name, but Mr. Grimes believed some portion of the money was owed to him by Mr. Holland for Mr. Grimes' work on other cases. (R.174-175.)
9. Mr. Grimes failed to communicate with Mr. Riordan from approximately January

2007 to December 2007.

10. During that time, Mr. Grimes experienced a number of personal and financial problems.
11. Mr. Grimes did not effectively pursue Mr. Riordan's case, resulting in its dismissal.
12. On December 17, 2007, Mr. Grimes sent a letter to Mr. Riordan explaining the situation and apologizing for not pursuing the case more effectively. (R. 169.)
13. Mr. Grimes then timely re-filed Mr. Riordan's case. (R. 177.)
14. Mr. Grimes failed to return the \$7,070 to Mr. Riordan, as Mr. Grimes believed he was owed the funds for services rendered to Mr. Riordan and in previous cases for Mr. Holland.
15. On December 22, 2008, Mr. Riordan sent a letter to Mr. Grimes asking for an accounting of his retainer and requesting the unused portion be sent to his new attorney.
16. The OPC filed a Notice of Informal Complaint (NOIC) on Mr. Grimes on January 17, 2008.
17. Mr. Grimes did not respond to the NOIC.
18. A hearing was held before a Screening Panel of the Ethics and Discipline Committee of the Utah State Bar on March 28, 2008.
19. The Screening Panel directed the OPC to file a formal complaint against Mr. Grimes in the District Court in this matter.

20. The District Court found that Mr. Grimes' mishandling of Mr. Riordan's retainer violated the following Rules of Professional Conduct: 1.2(a) (Scope of Representation); 1.3 (Diligence); 1.4(a) (Communication); 1.5(a) (Fees); 8.4(a),(c), and (d) (Misconduct).
21. The District Court concluded that the presumptive sanction for Mr. Grimes' conduct was disbarment, but recognized that this sanction could be reduced if there were compelling mitigating circumstances.
22. The District Court found the following mitigating factors:
 - a. Mr. Grimes had no prior record of discipline before the bar.
 - b. Mr. Grimes had did not have experience in the practice of law before taking on Mr. Riordan's case, as he had only just received his license.
 - c. Mr. Grimes faced emotional problems during the period of his misconduct. He experienced marital problems, extreme financial difficulties, depression, suicidal ideation, and the hospitalization and passing away of his infant child in a short span of time.
 - d. Mr. Grimes has removed himself from the area of civil law and concentrates on criminal defense.
 - e. Mr. Grimes now has a good reputation as a criminal defense attorney, is hard working, and is considered to be honest.
 - f. Mr. Grimes no longer handles client funds.
23. In light of the evidence presented, the District Court concluded that justice would

not be served by disbarment.

24. Instead, the District Court suspended Mr. Grimes from the practice of law for three years, with all but 181 days of the suspension stayed, and imposed probation subject to various terms.

SUMMARY OF ARGUMENT

The district court's decision to suspend Mr. Grimes, rather than disbar him, is consistent with established law. The district court correctly recognized that the presumptive sanction for Mr. Grimes' misconduct was disbarment, and also correctly recognized that this sanction can be reduced in light of compelling mitigating circumstances. The court found compelling mitigating circumstances in this case and appropriately reduced the sanction in the interest of justice. The OPC's argument that this runs contrary to established law is without merit, as no Utah court has specifically defined what mitigating factors are "compelling" enough to warrant departing from disbarment. Furthermore, Mr. Grimes' conduct is distinguishable from those cases in which disbarment has been imposed, and his mitigating factors are more numerous. Many out of state courts have imposed suspension rather than disbarment in cases with mitigating circumstances similar to those at issue. Finally, the district court correctly applied this Court's reasoning in *Crawley* to craft an appropriate sanction that takes into account all the circumstances of Mr. Grimes' case. Accordingly, Mr. Grimes asks the Court to uphold the ruling of the district court.

ARGUMENT

I. The District Court's Decision to Reduce the Presumptive Sanction of Disbarment to a Lesser Sanction was Consistent with Established Law and Appropriate to Mr. Grimes' Individual Case.

The presumptive standard for Mr. Grimes' actions under the Standards for Imposing Lawyer Sanctions is disbarment, but this Court has repeatedly held that departure from this sanction may be warranted in light of compelling mitigating circumstances. The district court expressly recognized this rule and correctly applied it, finding mitigating factors compelling enough to warrant imposing a three-year suspension rather than disbarment. Furthermore, the district court properly applied the reasoning of the Crawley decision to craft an appropriate sanction that serves the purposes of attorney discipline in Mr. Grimes' individual case.

a. The District Court correctly recognized that departure from the presumptive disbarment sanction was warranted upon a finding of compelling mitigating circumstances.

The OPC is correct that in cases of intentional misappropriation of client funds, the presumptive sanction is disbarment. *See* Brief of the Petitioner/Appellant at p. 6; Standards for Imposing Lawyer Sanctions Rule 14-605; *Babilis*, 951 P.2d at 216. The key word, however, is “presumptive.” Rule 14-605, cited by the OPC as the rule requiring disbarment in this case, begins by explaining “Disbarment is *generally appropriate* when a lawyer . . .,” suggesting a degree of flexibility. *See* Rule 14-605(a) (emphasis added). Moreover, Rule 14-602, which sets out the framework for using the Standards for Imposing Lawyer Sanctions, states the rules “permit[] flexibility and creativity in assigning sanctions in particular cases of lawyer

misconduct” and are “designed to promote consideration of *all factors relevant* to imposing the appropriate level of sanction in an *individual case*.” See Rule 14-602(d) (emphasis added). To that end, the rules provide a procedure for departing from the presumptive sanction in light of mitigating or aggravating circumstances. See Rule 14-607; *Babilis*, 951 P.2d at 215. Finally, this Court has emphasized:

[A]lthough they are extremely useful guidelines and will be accorded deference in the vast majority of cases, this court is not restricted by the Rules of Professional Conduct in evaluating whether an attorney should be disbarred. Rather, [it] examine[s] *all relevant facts and circumstances* in attempting to determine what punishment, if any, is appropriate to deter similar conduct and to protect the public.

In re Discipline of Harding, 2004 UT 100, ¶ 22 104 P.3d 1220, 1225 (emphasis added).

Accordingly, although the presumptive sanction for misappropriation of funds is disbarment, that presumption is far from dispositive.

In each case cited by the OPC where disbarment was ordered for misappropriation of funds, the court emphasized that “significant” or “compelling” mitigating circumstances could warrant departure from that presumptive sanction. See *Babilis*, 951 P.2d at 216; *Matter of Discipline of Ince*, 957 P.2d 1233, 1238 (Utah 1998); *In re Discipline of Ennenga*, 2001 UT 111, ¶ 10, 37 3 P.3d 1150, 1154; *In re Discipline of Johnson*, 2001 UT 110, ¶ 9, 48 P.3d 881, 884. Therefore, the OPC’s contention that “the district court did not have discretion to reduce the sanction in this case” is without merit. The caselaw expressly gives the court permission to reduce the sanction in light of compelling mitigating circumstances, and Judge Dever correctly annunciated this standard before considering the mitigating circumstances in this case. See Order

of Sanction at p. 9 (“Pursuant to the standards, the intentional misappropriation of a client’s funds will result in disbarment absent ‘truly compelling mitigating circumstances.’”)

b. The District Court correctly found compelling mitigating circumstances to warrant departing from the presumptive sanction.

1. Mr. Grimes’ Mitigating Factors

After correctly annunciating the standard for departing from presumptive disbarment in cases of misappropriation, the district court recognized a number of compelling mitigating circumstances in this case.

First, Mr. Riordan was Mr. Grimes’ very first client. Mr. Grimes had little experience in the practice of law prior to handling Mr. Riordan’s funds. He had no prior experience with employment discrimination cases, like Mr. Riordan’s. (R. 164.). Due to his lack of experience, Mr. Grimes had to make extra effort to diligently research every aspect of the case before performing work for Mr. Riordan. (R. 164.) This contributed to the delay in pursuing Mr. Riordan’s case. Mr. Grimes informed Mr. Riordan of his lack of prior experience in such matters, but Mr. Riordan chose to continue to be represented by Mr. Grimes, even after he had left Mr. Holland’s employ

Second, Mr. Grimes had no record of prior discipline before the bar.

Third, Mr. Grimes suffered a number of personal problems during the period of misconduct. During his time working for Mr. Holland, Mr. Grimes was rarely paid for his work. (See R. 351:78:15-18.) This led to extreme financial hardship. Mr. Grimes made \$13,000 in one year, while he had five children including a newborn baby, and his wife was not working. (R.

351:78:21-23.) Mr. Grimes borrowed money from his brother for living expenses and to cover rent on a new office for his private practice. (R. 164, 167.) During this time, Mr. Grimes left Mr. Holland's employ and took on Mr. Riordan's case. Mr. Grimes' first months as a solo practitioner were no kinder, however. He had a hard time finding clients and income. At Christmas, Mr. Grimes was unable to afford presents for his children. (R. 167.)

Mr. Grimes' financial problems were compounded by troubles at home. He so dreaded discussing finances with his wife that he began to sleep elsewhere. (R. 168.) He and his wife entered into marriage counseling, and Mr. Grimes sought treatment for his own depression. (R. 351:79:7-14.) He broke his ankle and had to cover hospital bills. (R. 168.) Worst of all, Mr. Grimes' youngest son was born with pneumonia and hospitalized in the intensive care unit for nearly a month. (R. 164, 174-5.) As a result of the personal, emotional, and financial troubles weighing on him, Mr. Grimes became severely depressed. (R. 168.) He even contemplated suicide (R. 168.) Mr. Grimes' personal, financial, and emotional difficulties coincided with the period where he failed to keep in touch with Mr. Riordan. (R. 351:81:1-13.)

Fourth, Mr. Grimes had developed a good reputation for hard honest work in the field of criminal defense since handling Mr. Riordan's case. At Mr. Grimes' sanction hearing, a number of attorneys testified to his sterling reputation as a lawyer in the criminal defense bar. (*See* R. 312; *see also* R. 351:13-69.) Mr. Grimes has also become a pillar of the defense community through his volunteer work. He serves on the legislative committee of the United Association of Criminal Defense Lawyers (UACDL), gives CLE presentations on victims' rights in domestic violence cases, sits on a panel that provides free legal advice to victims of domestic violence, and

often takes cases pro bono or on a reduced fee. (R. 351:96-98.)

Fifth, Mr. Grimes has made interim reform to the way he practices law. He has removed himself completely from the practice of civil law in the wake of his misconduct and no longer handles client funds. (R. 351:98-99.) Mr. Grimes has also learned a lot more about how to practice law since his mishandling of the Riordan matter. He no longer falls into patterns of avoidance, and he has a support network to contact in the rare instance where he does not know how to handle a case. (R. 351:100-101.)

Finally, Mr. Grimes expressed remorse by admitting to his misdeeds, that he was not honest with Mr. Riordan, that he has no excuse for his conduct, that he was morally and ethically wrong, and that he owes Mr. Riordan \$7,070 plus interest. *See* Order of Sanction at pp. 9-10. Mr. Grimes understands that he was wrong to let his disputes with Mr. Holland over finances affect Mr. Riordan. (R. 351:101.)

2. Mr. Grimes' case is distinguishable from Utah misappropriations cases where disbarment has been issued.

Although a handful of cases have repeated the rule that presumptive disbarment for misappropriation of funds may be overcome by compelling mitigating circumstances, no Utah case has specifically defined a set of circumstances that would be considered compelling enough to warrant departure. Nonetheless, Mr. Grimes' misconduct is distinguishable from each case where disbarment was issued, including those cited by the OPC. In each case, the misconduct was more severe than that of Mr. Grimes and the mitigating circumstances less compelling.

The OPC relies on *Matter of Discipline of Babilis*, 951 P.2d 207. In that case, Babilis

misrepresented himself as an expert in probate law despite having little experience in the field. *See id.* at 208. He also set himself up both as personal representative of his client's estate and as the attorney for an action involving that estate, a clear conflict of interest. *See id.* at 210. Ultimately, he misappropriated a total of \$78,659.43 from his client's estate. *See id.* He covered his misdeeds with dishonest billing practices and also lied to the probate court as to the extent of his client's assets. *See id.* The Court found "the record is replete with examples of deceit, dishonesty, and misrepresentation, all motivated by Babilis' desire to enrich himself." *See id.* at 216. Additionally, the conduct was part of "an established pattern of misconduct that encompassed not only the [present] case but also his dealings with other clients, so that this was one of multiple instances of misconduct." *See id.* Notably, the district court in *Babilis* found no mitigating factors to justify departing from the presumptive sanction. *See id.* at p. 216, fn 19.

Mr. Grimes' misconduct was much less severe than that of Babilis. Babilis misappropriated more than ten times the amount of money as Mr. Grimes. Babilis engaged in a pattern of deceit before his client and the court to cover his misdeeds, while Mr. Grimes stopped communicating with his client but did not continue to deceive him for additional financial gain. Babilis's misconduct was part of a pattern that encompassed multiple cases and dealings with other clients, while Mr. Grimes' mishandling of funds was a one-time occurrence in the beginning of his career. Finally, the court in *Babilis* found no mitigating circumstances sufficient to warrant departure from the presumptive sanction. The district court in Mr. Grimes' case enumerated several such factors, described above. While Babilis did present evidence of personal and emotional difficulties, the court was unwilling to treat them as mitigating because "those

problems were of Mr. Babilis' own making" and did not excuse his behavior. See *id.* Here, in contrast, Mr. Grimes was dealing with the hospitalization of his infant child and depression, external problems that were not of his own making.

At the opposite end of the spectrum is *In re Discipline of Johnson*. 48 P.3d 881 (Utah 2001). There, Mr. Johnson's misconduct was admittedly more similar to that of Mr. Grimes. Mr. Johnson refused to return an unused portion of a client's retainer in the amount of \$28,880 and converted it to his personal use. See *id.* at 883. Mr. Johnson also allegedly settled a case without his client's permission, which caused the dispute over the retainer. See *id.* The Court recognized that Mr. Johnson's conduct was less severe than that of other attorneys who had been disbarred for misappropriating funds, but held "disbarment was the appropriate remedy under our case law because there were no substantial mitigating circumstances." See *id.* at 884 (emphasis added).

Mr. Johnson's case represents the least severe instance of misappropriation for which the Utah Supreme Court has upheld disbarment, and Mr. Grimes' misconduct was significantly less egregious. Mr. Johnson misappropriated more than four times more money than Mr. Grimes and continued to dispute that his client was owed the money even after disciplinary action was initiated. Furthermore, the district court in *Johnson* found no substantial mitigating factors and, indeed, cited the lack of mitigating factors as the reason disbarment was appropriate despite the relative lack of severity of Mr. Johnson's conduct. See *id.* at 884. Here, in contrast, the court enumerated several mitigating factors it considered significant enough to warrant departure from the presumptive sanction.

Accordingly, although this Court has never stated a bright line rule for what mitigating

circumstances would be considered compelling enough to warrant departing from disbarment in a misappropriation case, Mr. Grimes' misconduct, while serious, falls below even the least severe instance of misappropriation for which this Court has upheld disbarment. Moreover, the numerous significant mitigating circumstances relied on by the district court set Mr. Grimes' case apart from other precedent where fewer or no significant mitigating factors were found.

3. Mr. Grimes' case is similar to misappropriation cases from foreign jurisdictions where suspension was imposed.

A number of courts in foreign jurisdictions have imposed suspension rather than disbarment when a lawyer engaged in misconduct similar to that of Mr. Grimes. For example, in *Edwards v. State Bar of California*, 801 P.2d 396 (Cal. 1990), Mr. Edwards, an attorney with no prior record of discipline before the bar, misappropriated approximately \$3,000 of his client's money from a trust fund in order to save his own home from foreclosure. *See id.* at 398-9. When Mr. Edwards' client tried to deposit a check drawing on the trust, it bounced. *See id.* at 398. Mr. Edwards informed his client that he had drawn from the account and eventually repaid the money, but the delay caused his client harm in that she was unable to start a business while the money was missing. *See id.* The disciplinary hearing panel found that Mr. Edwards had failed to maintain proper trust account records and to promptly repay his client. *See id.* at 399. The Supreme Court separately concluded that Mr. Edwards' conduct amounted to willful misappropriation. *See id.* at 401. In mitigation, Mr. Edwards testified to his financial difficulties at the time of the misappropriation and that he had ceased all comingling of funds and now employed a certified public accountant to manage his trust account. *See id.* at 399.

The California Supreme Court reiterated the rule that the usual penalty for willful misappropriation was disbarment. *See id.* at 402. But the court also cautioned that “‘willful misappropriation’ covers a broad range of conduct varying significantly in the degree of culpability”, and “extenuating circumstances” or “compelling mitigating circumstances relating to the attorney’s background or character or to unusual difficulties the attorney was experiencing at the time” could be sufficient to warrant a lesser punishment. *See id.* In Mr. Edwards’ case, the Court held disbarment was unnecessary to serve the purposes of attorney discipline. *See id.* at 403. “Petitioner had not been disciplined before, and therefore . . . we have no evidence that a sanction short of disbarment is inadequate to deter future misconduct and protect the public.” *See id.* Additionally, Mr. Edwards had repaid the money owed, been candid and cooperative throughout the proceedings, and voluntarily took steps to improve his management of client funds in the wake of his misconduct. *See id.* Accordingly, the Court held suspension was sufficient to protect the public, the courts, and the standards of the legal profession. *See id.*

Mr. Grimes’ case is similar to Mr. Edwards’ in a number of respects. Neither attorney had a prior record of discipline before the bar, and the amount of misappropriated funds in each case was comparably low. Also, Mr. Grimes, like Mr. Edwards, has taken numerous voluntary steps to correct his behavior, including removing himself from civil law and the management of client funds all together. Although California courts have not recognized the “compelling mitigating circumstances” test as a hard-line rule in misappropriation cases, the *Edwards* court did start with a presumption of disbarment before considering the “extenuating circumstances” that made

suspension more appropriate. *See id.* at 402-403. Accordingly, it applied a similar test to Mr. Edwards' misconduct as the district court in this case applied to Mr. Grimes'.

In contrast to Mr. Edwards, however, Mr. Grimes suffered an extreme amount of emotional turmoil at the time of his misconduct, resulting from marital difficulties, financial hardship, the hospitalization of his infant son, and severe depression, which further serves to mitigate his actions. In the Washington D.C. case *In re Cappell*, 866 A.2d 784 (D.C. 2004), Mr. Cappell used funds from his clients' trust accounts for business and personal expenses. *See id.* at 784. At the time, Mr. Cappell suffered from major depression caused by the breakup of his marriage and significant health problems. The review Board found that Mr. Cappell's misconduct would not have occurred but for his depression. *See id.* at 785. Mr. Cappell had candidly admitted to and taken responsibility for his actions, and he was seeking treatment for the depression. *See id.* He had also begun working with a financial monitor to avoid further mismanaging his trust funds. *See id.* Considering those mitigating circumstances, the Board issued probation instead of disbarment, and the D.C. Court of Appeals upheld the ruling. *See id.* The Court relied on a line of cases involving alcoholism that held departure from disbarment was warranted where an attorney's misconduct was caused by alcohol abuse, if the attorney had since gained control of his alcoholism sufficient to suggest the misconduct would not occur again. *See id.*; *see also In Re Kersey*, 520 A.2d 321 (D.C. 1987). The Court deemed the same reasoning appropriate in cases where severe depression had caused the misconduct. *See id.*

That reasoning applies equally well to Mr. Grimes' case. Mr. Grimes was suffering from severe depression when he engaged in his misconduct. Mr. Grimes' emotional problems were so

severe that he had even considered suicide. (R. 168.) The district court expressly cited evidence of Mr. Grimes' depression and the hospitalization of his infant son as mitigating circumstances weighing in favor of departure from disbarment. *See* Order of Sanction at p. 10. Mr. Grimes, like Mr. Cappell, has sought counseling to address his emotional issues and prevent further instances of misconduct. The district court did not expressly find that Mr. Grimes' emotional turmoil caused his misconduct, as would be required under D.C. caselaw, but Utah has never applied such a causation standard. Instead, the Standards for Lawyer Sanctions specifically mention "personal and emotional problems" as a mitigating circumstance that may "justify a reduction in the degree of discipline used." *See* Rule 14-607(b)(3). The district court correctly identified Mr. Grimes' emotional issues at the time of his misconduct as compelling mitigating circumstances weighing in favor of departure from the presumptive sanction.

c. The District Court properly considered Crawley and the interest of justice in imposing its sanction.

The district court applied reasoning from this Court's decision in *In re Discipline of Crawley*, 2007 UT 44, 164 P.3d 1232, when crafting its sanction in this case. The OPC argues the court's invocation of *Crawley* indicates it departed from the "compelling mitigating circumstances" test described above, and that any use of *Crawley* in crafting sanctions is not allowed when willful misappropriation is at issue. *See* Brief of the Petitioner/Appellant at p. 13. Both of the OPC's arguments related to *Crawley* are without merit.

First, the OPC argues the district court departed from the "compelling mitigating circumstances" test by relying on *Crawley* to craft its sanction. The district court's order,

however, indicates the opposite. Judge Dever's order explains that the Standards presume disbarment absent "truly compelling mitigating circumstances" in cases of misappropriation and, indeed, cites to *In re Ennega* when explaining this rule—the same case relied on by the OPC in much of its Brief. *See* Order of Sanction at p. 9. The court then goes on to identify the mitigating circumstances at issue in Mr. Grimes' case, suggesting the court was applying those mitigating circumstances to the test it had just annunciated. *See* Order of Sanction at p. 9-11. The OPC is correct that the court never expressly states that it has found those circumstances "truly compelling," but the logic of the court's order is clear. First, the district court explains that the presumptive sanction in misappropriation cases is disbarment absent "compelling mitigating circumstances;" then it lists a series of mitigating circumstances weighing against disbarment; and finally, it concludes by departing from disbarment and issuing suspension and probation with terms tailored to serve the interest of justice. A sensible reading of that order suggests that Judge Dever considered the mitigating factors he listed sufficiently compelling to meet the test. The OPC would have this Court believe that, by invoking *Crawley* in the Conclusion of its order, the district court had somehow forgotten the test it annunciated and applied just two pages prior.

It is much easier to believe that the court deliberately used *Crawley* in conjunction with the "compelling mitigating circumstances" test to craft an appropriate individualized sanction for Mr. Grimes' particular case. Indeed, this is the very purpose for which the *Crawley* decision was intended. There, the OPC challenged the district court's ability to issue probation in cases calling for more severe forms of discipline and asked this Court to adopt specific guidelines detailing when probation could be used. *See Crawley*, 2007 UT 44 ¶ 21. Specifically, the OPC asked the

Court to deny probation in cases where the misconduct was “knowing or intentional,” such as this one. The Court declined to do so, holding:

We are satisfied—indeed pleased—with the discretion currently being exercised by district courts in sanctioning attorneys for misconduct. It is a delicate and often difficult task to craft sanctions appropriate for individual attorneys, no two of which have engaged in the same misconduct under the same aggravating and mitigating circumstances. The standards permit flexibility and creativity in assigning sanctions, and the district courts have embraced this approach.

...

Our district court judges do a remarkable job of fulfilling a stated purpose of the standards—protecting the public and the administration of justice—while still providing the opportunity, when appropriate, for attorney rehabilitation. Were we to limit the circumstances under which probation is available, we would very likely undermine the ability of the district courts to so effectively maintain this balance.

Id. at ¶ 22 (internal quotations omitted).

The Court in *Crawley* expressly declined to place any limit on the circumstances under which probation might be an appropriate part of an individualized sanction. Accordingly, the OPC’s contention that *Crawley* “is not correctly applicable to misappropriation cases” is without merit and contrary to the Court’s ruling. Indeed, as *Crawley* was decided after the misappropriation cases relied on by the OPC, the Court would likely have made it clear if it intended *Crawley* to stand separately from those other cases. It did not do so.

The district court, then, was entirely justified in using *Crawley*’s “triangle of justice, protection, and rehabilitation” in crafting its sanction in this case, after detailing the mitigating circumstances that warranted departure from presumptive disbarment. The district court appropriately ordered suspension and used *Crawley*’s logic to craft probationary terms that


protect the public while still giving Mr. Grimes a chance to rehabilitate himself. The probationary terms require Mr. Grimes to report to a supervising attorney approved by the OPC, who will monitor all retainers received by Mr. Grimes and report to the court and the OPC monthly for six months and quarterly thereafter on Mr. Grimes' rehabilitation. It is difficult to fathom how Mr. Grimes could be a danger to the public under these probationary terms, nor what the public would gain from his disbarment.

CONCLUSION

Although Mr. Grimes misconduct was serious, it is tempered by a number of mitigating circumstances that distinguish his case from those where disbarment has been ordered. The district court recognized the specific circumstances weighing on Mr. Grimes and imposed a sanction tailored to meet them. The district court's sanction appropriately serves the purposes of attorney discipline and honors the prior rulings of this Court. Accordingly, Mr. Grimes requests this Court uphold the district court's ruling.

DATED this 4th day of August, 2011.

SKORDAS, CASTON & HYDE, LLC

 for Greg Skordas,

Gregory G. Skordas
Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 4 day of August, 2011, I caused a true and correct copy of the foregoing **BRIEF OF THE RESPONDENT/APPELLEE** to be delivered to the following:

Adam C. Bevis
Assistant Council
Billy L. Walker
Senior Counsel
Office of Professional Conduct
Utah State Bar
645 South 200 East
Salt Lake City, Utah 84111
Counsel for the Petitioner/Appellant



Skordas, Caston & Hyde