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ATTORNEY GRIEVANCE COMMISSION V. CHILDRESS: EXCESSIVE FOCUS ON MITIGATING FACTORS IN ATTORNEY MISCONDUCT CASE FAILS TO PRESERVE PUBLIC CONFIDENCE IN THE LEGAL PROFESSION

In *Attorney Grievance Commission v. Childress* (*Childress II*),[1] the Court of Appeals of Maryland held that James F. Childress, a practicing attorney in Maryland and the District of Columbia, violated Virginia Code section 18.2-370(A)(4) by entering chat rooms on America Online, engaging in sexual conversations with teenage girls, and then meeting with those girls on several occasions.[2] Having found that Childress violated section 18.2-370(A)(4), the court further held that Childress violated Maryland Rule of Professional Conduct (MRPC) 8.4(d).[3] The court suspended Childress from practicing law indefinitely, but granted him the right to apply to terminate the suspension after one year.[4] The court recognized the social dangers of adults preying on children through Internet use and the effect Childress's misconduct had on the public's perception of the legal profession.[5] However, the court reasoned that various factors, including Childress's acknowledgement of his misconduct, expression of remorse, and successful participation in a treatment program, mitigated the sanction.[6] By placing extensive weight on these mitigating factors and the factual differences between this case and others involving attorney sexual misconduct with children, the court failed to protect the public and preserve public confidence in the legal profession.

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1. 364 Md. 48, 770 A.2d 685 (2001).

2. *Id.* at 64, 770 A.2d at 694; *see also* VA. CODE ANN. § 18.2-370 (Michie Supp. 2001). Section 18.2-370(A)(4) states:

> A. Any person eighteen years of age or over, who, with lascivious intent, shall knowingly and intentionally commit any of the following acts with any child under the age of fourteen years shall be guilty of a Class 5 felony:
>
> . . . .
>
> (4) Propose to such child the performance of an act of sexual intercourse or any act constituting an offense under § 18.2-361 . . . .

Id.

3. *Childress II*, 364 Md. at 64, 770 A.2d at 694. MRPC 8.4(d) states: "It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice . . . ." MD. RULES OF PROF'L CONDUCT R. 8.4(d) (2002).

4. *Childress II*, 364 Md. at 67, 770 A.2d at 696.

5. *Id.* at 65, 770 A.2d at 695.

6. *Id.* at 65-66, 770 A.2d at 695-96.

I. THE CASE

On May 11, 1995, a federal grand jury in the District of Maryland indicted James F. Childress, a practicing attorney in Maryland and the District of Columbia, and charged him with violating 18 U.S.C. § 2423(b), which forbids traveling in interstate commerce for the purpose of engaging in a sexual act with a minor.[7] The charges stemmed from Childress's conduct during the years 1993 to 1995.[8] During this time, Childress used his home computer to enter "chat rooms" on America Online and converse with girls between the ages of thirteen and sixteen.[9] On occasion, Childress asked the girls whether they were interested in meeting and having sex.[10] He persuaded five girls to meet with him.[11] Childress also encouraged the girls to keep the conversations and meetings secret from their parents.[12] According to Childress and the girls who met him, however, no sexual contact ever took place, and the conversations during these encounters were not of a sexual nature.[13]

On April 12, 1995, Childress entered an online chat room and arranged a meeting at the Montgomery Mall in Bethesda, Maryland, with a person he believed to be a fourteen-year-old girl.[14] In fact, Childress had arranged a meeting with a FBI special agent.[15] On April 14, 1995, Childress traveled from his home in Arlington, Virginia to the Montgomery Mall.[16] At the mall he was arrested.[17] Following a jury trial in the United States District Court for the District of Maryland, Childress was convicted and sentenced to "five months of incarceration, five months home detention, a $5,000 fine, a period of supervised release, and a special assessment of $50."[18] As a result of

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7. United States v. Childress, 104 F.3d 47, 49 (4th Cir. 1996); *see also* 18 U.S.C. § 2423(b) (1994) (amended 1995).

8. Att'y Griev. Comm'n v. Childress, 360 Md. 373, 377, 758 A.2d 117, 119 (2000). For purposes of this Note, the author will refer to this case as *Childress I.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 383, 758 A.2d at 122.

13. *Id.* at 377, 758 A.2d at 119.

14. *Id.* at 377-78, 758 A.2d at 119.

15. *Id.* at 378, 758 A.2d at 119.

16. *Id.*

17. *Id.*

18. United States v. Childress, 104 F.3d 47, 48 (4th Cir. 1996).

his conviction, Childress was suspended from the practice of law in the District of Columbia.[19]

On appeal to the United States Court of Appeals for the Fourth Circuit, Childress argued that his conduct was not a crime under 18 U.S.C. § 2423(b), and that the District Court improperly corrected what it determined to be a congressional drafting error in the statute.[20] The Fourth Circuit agreed and held that the District Court erred in treating a cross reference in § 2423(b) as a mistake.[21] Thus, as a result of the language of the statute at the time Childress engaged in the misconduct, the Fourth Circuit determined that a criminal conviction was not warranted.[22]

The Attorney Grievance Commission of Maryland then filed a petition for disciplinary action in the Court of Appeals of Maryland, alleging that Childress violated Rule 8.4(d).[23] In accordance with Maryland Rule 16-709(b),[24] the Court of Appeals referred the case to the Circuit Court for Prince George's County.[25] After an evidentiary hearing, Judge Johnson found that Childress violated 18 U.S.C. § 2423(b) by clear and convincing evidence, notwithstanding the reversal of his criminal conviction by the Fourth Circuit.[26] As a result, Judge Johnson concluded that Childress had also violated MRPC 8.4(d).[27]

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19. *Childress I*, 360 Md. at 376, 758 A.2d at 118. The District of Columbia Court of Appeals subsequently reinstated Childress as a member of the District of Columbia Bar on January 30, 1997. *Id.* at 377, 758 A.2d at 119.

20. *Childress*, 104 F.3d at 49. At the time of Childress's conviction, § 2423(b) defined a "sexual act" through a cross-reference to 18 U.S.C. § 2245. 18 U.S.C. § 2423(b) (1994) (amended 1995). Section 2245, however, did not define the term "sexual act." *Id.* § 2245. Rather, § 2245 stated that "[a] person who, in the course of an offense under [chapter 109A], engages in conduct that results in the death of a person, shall be punished by death or imprisoned for any term of years or for life." *Id.*

21. *Childress*, 104 F.3d at 53.

22. *Id.*

23. *Childress I*, 360 Md. at 375, 758 A.2d at 117.

24. Maryland Rule 16-709(b) states:

> Charges against an attorney shall be filed on behalf of the Commission in the Court of Appeals. The Court of Appeals by order may direct that the charges be transmitted to and heard in any court and shall designate the judge or judges to hear the charges and the clerk responsible for maintaining the record in the proceeding.

MD. RULE 16-709(b) (2002).

25. *Childress I*, 360 Md. at 375, 758 A.2d at 118.

26. *Id.* at 381, 758 A.2d at 121.

27. *Id.* at 381-82, 758 A.2d at 121 (finding "Childress's behavior . . . prejudicial to the administration of justice" and thus "likely to impair public confidence in the legal profession").

Childress filed two exceptions to Judge Johnson's findings with the Court of Appeals of Maryland. The most significant was an exception to the conclusion that he violated MRPC 8.4(d).[28] Childress first reasserted his claim that his conduct did not violate 18 U.S.C. § 2423(b).[29] Second, Childress argued that his conduct was not prejudicial to the administration of justice under MRPC 8.4(d) because the conduct was purely private and unrelated to the practice of law.[30] The Court of Appeals first held that the clear determination by the Fourth Circuit that Childress's conduct did not constitute a crime under federal law should have precluded the hearing judge from concluding otherwise.[31] At the same time, however, the Court of Appeals noted that this determination did not end the inquiry.[32] Childress's conduct could, in fact, have constituted a crime under applicable Maryland or Virginia state law.[33] Thus, an ultimate determination of whether Childress's conduct was prejudicial to the administration of justice under MRPC 8.4(d) was premature.[34] The court specifically emphasized that an attorney is subject to disciplinary action for conduct outside his or her professional role as an attorney, and that "a criminal conviction is not a condition precedent for finding a violation of Rule 8.4(d)."[35] Leaving the question of a disciplinary sanction open, the Court of Appeals remanded the case back to Judge Johnson for further inquiry into whether Childress's conduct was criminal under state law.[36]

Subsequent to the second evidentiary hearing, Judge Johnson found that Childress's conduct violated both section 3-831 of the Maryland Courts and Judicial Proceedings Article and Virginia Code

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28. *Id.* at 379, 758 A.2d at 120. Childress also excepted to Judge Johnson's finding that he had engaged in sexually graphic conversation with more than one young girl. *Id.* In particular, Childress argued that he only had a sexually graphic conversation with one female minor, and that the only other sexually graphic conversation he had was with the FBI special agent, who was not a young girl. *Id.* The court dismissed this exception because it believed Judge Johnson was referring to conversations with "females [Childress] *believed* to be minors." *Id.* at 380, 758 A.2d at 120.

29. *Id.* at 382, 758 A.2d at 121.

30. *Id.*

31. *Id.*

32. *Id.* at 386, 758 A.2d at 123.

33. *Id.* at 386-87, 758 A.2d at 123-24.

34. *Id.* at 387, 758 A.2d at 124.

35. *Id.* at 384-85, 758 A.2d at 123. The court specifically noted that it "need not address the margins of Rule 8.4(d) and whether a lawyer's non-criminal, purely private conduct might be a basis for discipline under the Rule" because Childress's misconduct was "arguably criminal" and the harm or potential harm was "patent." *Id.* at 385-86, 758 A.2d at 123.

36. *Id.* at 387, 758 A.2d at 124.

section 18.2-370(A)(4).[37] As a result of these violations, Judge Johnson once again reached the conclusion that Childress's conduct violated MRPC 8.4(d).[38] Childress filed exceptions to Judge Johnson's findings that he had violated either state statute and, as he did in his appeal in *Childress I,* to Judge Johnson's conclusion that he violated MRPC 8.4(d).[39] The Court of Appeals then heard the case for the second time to review Childress's exceptions to Judge Johnson's findings and, if allowing the disciplinary charge to stand, to determine the appropriate sanction.[40]

II. LEGAL BACKGROUND

The primary goal of attorney disciplinary proceedings is to protect the public, not to punish the offending attorney.[41] Maryland has adopted the Model Rules of Professional Conduct promulgated by the American Bar Association (ABA) as the governing standard for professional conduct.[42] These rules, however, create only a basic regulatory framework, which fails to provide specific instruction on appropriate sanctions to further the goal of protecting the public.[43] In Maryland, the decision to sanction an attorney—and the type of sanction to impose—ultimately rests with the highest court of the state.[44] In determining the appropriate sanction for a violation of Rule 8.4,[45] the Court of Appeals of Maryland generally focuses on such factors as the nature of harm caused by the misconduct, the relationship of the misconduct to the practice of law, and whether there are any mitigating circumstances. The approach of the Court of Appeals in cases involving sexual misconduct, particularly sexual misconduct involving children, highlights the court's increasing emphasis on mitigating factors.

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37. *Childress II,* 364 Md. at 52, 770 A.2d at 687-88.

38. *Id.*, 770 A.2d at 688.

39. *Id.*

40. *Id.*

41. *See, e.g.*, Att'y Griev. Comm'n v. Owrutsky, 322 Md. 334, 355, 587 A.2d 511, 521 (1991).

42. The Maryland Rules of Professional Conduct, 13 Md. Reg. 3 (May 23, 1986).

43. *See, e.g.*, MD. RULES OF PROF'L CONDUCT R. 8.4 (2002). Although Rule 8.4 states that it is professional misconduct for an attorney to engage in conduct that is prejudicial to the administration of justice, the rule is silent on the appropriate sanction for such misconduct. *Id.*

44. *See* Att'y Griev. Comm'n v. Kent, 337 Md. 361, 371, 653 A.2d 909, 914 (1995) (noting that "this Court has original and complete jurisdiction over disciplinary proceedings").

45. Rule 8.4 covers a wide range of misconduct that may or may not be a direct violation of the Maryland Rules of Professional Conduct, but nonetheless reflects adversely on an attorney's fitness to practice law. MD. RULES OF PROF'L CONDUCT R. 8.4.

A. *The Purpose of Attorney Disciplinary Proceedings and Factors Considered by the Court of Appeals of Maryland*

The Court of Appeals of Maryland has consistently stated that the purpose of attorney disciplinary proceedings is to protect the public rather than to punish the misbehaving attorney.[46] The Court of Appeals has also stated that general and specific deterrence is consistent with the overall objective of protecting the public.[47] The determination of an appropriate sanction to further these two goals depends on the facts of each case.[48] Ultimately, in cases involving Rule 8.4 violations, the court imposes a sanction after weighing all factors present in a particular case.[49] Generally, the court has focused its attention on three overlapping factors: the nature of the harm caused by the attorney's misconduct, the relation of the misconduct to the practice of law, and whether any factors mitigate the harm caused by the misconduct.

Prior to January 1, 1987, the nature of the harm caused by an attorney's misconduct was of significant importance in attorney disciplinary cases.[50] Prior to this date, the Maryland Code of Professional Responsibility (MCPR) governed professional misconduct in Maryland.[51] Included in the MCPR was Disciplinary Rule (DR) 1-102, the precursor to Rule 8.4. Disciplinary Rule 1-102(A)(3) stated that "[a] lawyer shall not . . . [e]ngage in illegal conduct involving moral turpitude."[52] In *Fellner v. Bar Ass'n of Baltimore City*,[53] the court focused on the nature of the harm caused by the attorney's misconduct in deciding to disbar an attorney for placing slugs in parking meters.[54] The court determined that the act of stealing funds from the city was "morally . . . as great as though he had stolen money deposited by others in

46. *Owrutsky*, 322 Md. at 355, 587 A.2d at 521; *see also* Att'y Griev. Comm'n v. Gilbert, 356 Md. 249, 254, 739 A.2d 1, 4 (1999) (noting that a sanction for an attorney convicted of possessing crack cocaine was required "for the protection of the public").

47. *Owrutsky*, 322 Md. at 355, 587 A.2d at 521.

48. *Gilbert*, 356 Md. at 255, 739 A.2d at 4.

49. Att'y Griev. Comm'n v. Goldsborough, 330 Md. 342, 365, 624 A.2d 503, 514 (1993).

50. *See* Md. State Bar Ass'n v. Agnew, 271 Md. 543, 550-51, 318 A.2d 811, 815 (1974) ("A willful and serious malefaction committed by a lawyer-public servant brings dishonor to both the bar and the democratic institutions of our nation, and its destructive effect is thereby magnified.").

51. The Code of Professional Responsibility was replaced by the Maryland Rules of Professional Conduct in 1987. The Maryland Rules of Professional Conduct, 13 Md. Reg. 3 (May 23, 1986).

52. MD. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (1984) (repealed 1987).

53. 213 Md. 243, 131 A.2d 729 (1957).

54. *Id.* at 247, 131 A.2d at 731-32.

the meters"[55] and, therefore, justified a severe sanction.[56] Also, in *Maryland State Bar Ass'n v. Agnew*,[57] the court determined that an attorney's willful attempt to evade federal income taxes was conduct involving moral turpitude,[58] and that such conduct should result in disbarment unless accompanied by compelling extenuating circumstances.[59]

Since January 1, 1987, Maryland Rule of Professional Conduct 8.4 has been the guideline for sanctioning misconduct that reflects adversely on an attorney's fitness to practice law.[60] Unlike the MCPR, the MRPC does not include the language "moral turpitude" when specifying what is professional misconduct for a lawyer.[61] The drafters of Rule 8.4 broadened the professional misconduct standard to "conduct prejudicial to the administration of justice."[62] In *Attorney Grievance Commission v. Bereano*,[63] the court stated that, under the MRPC, an attorney's misconduct is subject to disciplinary sanctions "irrespective of whether the crime is *also* one of moral turpitude."[64] Thus, while the realm of sanctionable misconduct has increased under Rule 8.4 by virtue of the broadened standard, the court no longer generally analyzes the egregiousness of an attorney's misconduct.[65]

The Court of Appeals of Maryland also considers the relationship of the attorney's misconduct to the practice of law when determining

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55. *Id.*, 131 A.2d at 731.

56. *Id.*, 131 A.2d at 732.

57. 271 Md. 543, 318 A.2d 811 (1974).

58. *Id.* at 551, 318 A.2d at 815.

59. *See id.* at 550-51, 318 A.2d at 815. The court stated: "In the absence of a compelling exculpatory explanation, we think that the answer to [the question of whether it is proper for the attorney to continue as a member of the legal profession] must be no when an attorney is found guilty of a crime which is deemed to involve moral turpitude." *Id.* at 550, 318 A.2d at 815; *see also* Md. State Bar Ass'n v. Hirsch, 274 Md. 368, 377, 335 A.2d 108, 113, *cert. denied*, 422 U.S. 1012 (1975) (explaining that the court has "repeatedly held that conduct involving moral turpitude will result in disbarment in the absence of compelling circumstances justifying a lesser sanction").

60. The Maryland Rules of Professional Conduct, 13 Md. Reg. 3 (May 23, 1986).

61. MD. RULES OF PROF'L CONDUCT R. 8.4 (2002).

62. MD. RULES OF PROF'L CONDUCT R. 8.4(d).

63. 357 Md. 321, 744 A.2d 35 (2000).

64. *Id.* at 335, 744 A.2d at 42 (quoting Att'y Griev. Comm'n v. Casalino, 335 Md. 446, 451, 644 A.2d 43, 45 (1994)). In *Casalino*, the court stated that "[t]he fact that 'crime of moral turpitude' was removed as a factor in disciplinary proceedings does not mean that there now is no such thing as a crime of moral turpitude." *Casalino*, 335 Md. at 451, 644 A.2d at 45.

65. *See* Att'y Griev. Comm'n v. Hollis, 347 Md. 547, 560, 702 A.2d 223, 230 (1997) (disbarring an attorney for misappropriation after finding simply that he acted "knowingly and intentionally"). *But see* Att'y Griev. Comm'n v. Protokowicz, 329 Md. 252, 263, 619 A.2d 100, 105 (1993) (noting that "the egregious nature of [the attorney's] conduct warrants the imposition of a significant sanction").

an appropriate sanction.[66] In *Attorney Grievance Commission v. Gilbert*, the court implied that misconduct closely related to the attorney's law practice deserves a harsher sanction.[67] The *Gilbert* court, by imposing only a thirty-day suspension for an attorney convicted for possession of crack cocaine, placed added weight on the fact that the misconduct was private and "not directly related to the practice of law."[68]

However, in cases where an attorney has misappropriated funds or engaged in similar fraudulent activity, the court does not make a distinction between misconduct occurring outside the attorney's professional capacity and misconduct occurring in a professional setting.[69] In *Attorney Grievance Commission v. Silk*,[70] the court disbarred an attorney who misappropriated funds while serving as the Treasurer and President of a high school Father's Club.[71] The court explained that "there appears to be no sound reason for regarding misappropriations committed in a non-professional capacity more leniently than those committed in a professional capacity."[72] In abandoning the distinction between misconduct occurring outside the scope of the practice of law and misconduct in the professional setting, the court noted that the misappropriation of funds, both in a professional and non-professional context, "bear[s] equally on the fitness of a lawyer to practice his profession."[73]

The court also considers whether any factors mitigate a possible sanction.[74] In *Attorney Grievance Commission v. Gilbert*, the court considered several mitigating factors in imposing a thirty-day suspension on an attorney convicted of cocaine possession.[75] The court specifically relied on the fact that the attorney had never been subject to a disciplinary proceeding, the attorney's misconduct was not directly related

66. Att'y Griev. Comm'n v. Gilbert, 356 Md. 249, 255, 739 A.2d 1, 4 (1999) (stating "[i]t is also an important consideration whether the [misconduct] is directly connected to the attorney's practice of law").

67. *See id.* at 253, 739 A.2d at 3 (noting that "to the extent that conduct of a lawyer adversely affects that lawyer's fitness to practice law, it necessarily prejudices the administration of justice").

68. *Id.* at 256, 739 A.2d at 5.

69. *See Casalino*, 335 Md. at 452, 644 A.2d at 46.

70. 279 Md. 345, 369 A.2d 70 (1977).

71. *Id.* at 349, 369 A.2d at 72.

72. *Id.* at 348, 369 A.2d at 71.

73. *Id.*; *see also Casalino*, 335 Md. at 452, 644 A.2d at 46 ("Cheating one's client and defrauding the government are reprehensible in equal degree.").

74. *See* Att'y Griev. Comm'n v. Gilbert, 356 Md. 249, 256, 739 A.2d 1, 5 (1999) (indicating that "rehabilitative efforts by an attorney may mitigate" a sanction).

75. *Id.*

to the practice of law, and the attorney had made efforts to rehabilitate himself.[76]

However, the court's approach in considering various mitigating factors has been inconsistent. In *Attorney Grievance Commission v. White*,[77] the court placed little weight on such factors. In *White*, the court disbarred an attorney who misappropriated funds from a client despite the fact that the attorney subsequently replaced the money, and that the attorney was an alcoholic at the time of the misappropriation.[78] In determining an appropriate sanction, the Court of Appeals stated that misappropriation of funds by an attorney "is an act infected with deceit and dishonesty and ordinarily will result in disbarment in the absence of *compelling* extenuating circumstances justifying a lesser sanction."[79] Thus, in misappropriation cases, a typical mitigating factor such as an attorney's substance abuse must be shown to be the cause of the misconduct "to a substantial extent" in order to lessen the severity of a sanction.[80]

Two other cases highlight the inconsistent attention the court has given to mitigating factors when administering a sanction. In *Attorney Grievance Commission v. Greenspan*,[81] the court allowed the emotional stress an attorney suffered after the death of his father and illness of his mother to mitigate the severity of a sanction, despite upholding the hearing judge's conclusion that the attorney had willfully misrepresented facts in his dealings with a savings and loan association.[82] In *Attorney Grievance Commission v. Protokowicz*,[83] however, the court refused to allow the hearing judge's findings that an attorney's misconduct[84] resulted from his intoxication, his emotional involvement in the case, and his "otherwise unstable psychological state at the time" to mitigate the attorney's indefinite suspension.[85]

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76. *Id.*

77. 328 Md. 412, 614 A.2d 955 (1992).

78. *Id.* at 415, 421, 614 A.2d at 957, 960.

79. *Id.* at 417, 614 A.2d at 958 (emphasis added) (quoting Att'y Griev. Comm'n v. Ezrin, 312 Md. 603, 608-09, 541 A.2d 966, 969 (1988)).

80. *Id.* at 418, 614 A.2d at 958 (quoting Att'y Griev. Comm'n v. Miller, 301 Md. 592, 608, 483 A.2d 1281, 1290 (1984)).

81. 313 Md. 180, 545 A.2d 12 (1988).

82. *Id.* at 188, 545 A.2d at 16-17.

83. 329 Md. 252, 619 A.2d 100 (1993).

84. The hearing judge found that Protokowicz entered the home of his client's ex-wife without her knowledge or permission, stole personal property from the house, and killed the family cat in a microwave. *Id.* at 256, 619 A.2d at 102.

85. *Id.* at 262-63, 619 A.2d at 104-05. The court noted that "[a]lthough [the attorney's] conduct . . . was an aberration, the egregious nature of that conduct warrants the imposition of a significant sanction." *Id.* at 263, 619 A.2d at 105.

B. *The Court of Appeals of Maryland's Approach to Sanctions in Sexual Misconduct Cases*

The Court of Appeals has had only two opportunities to apply MRPC 8.4 to attorney disciplinary proceedings involving sexual misconduct, and only one of these cases specifically involved sexual misconduct with children.[86] These cases, similar to other attorney disciplinary proceedings considered by the court, highlight the court's increasing emphasis on the mitigating factors of a particular case.[87] In *Attorney Grievance Commission v. Mitchell*, the Court of Appeals agreed with the recommendation of Bar Counsel to indefinitely suspend from the practice of law an attorney convicted of performing sexual acts upon a thirteen-year-old boy on several occasions.[88] The Bar Counsel's recommendation for an indefinite suspension rested on the determination that the crime involved moral turpitude,[89] and that no mitigating factors were present.[90] The Court of Appeals agreed with the recommendation of Bar Counsel without providing further explanation.[91] In his dissent, Judge Cole argued that indefinite suspension had been the appropriate sanction in cases only when the misconduct had been "caused" by mental illness.[92] Because the crime involved moral turpitude, Judge Cole believed disbarment was the appropriate sanction.[93]

In *Attorney Grievance Commission v. Goldsborough*,[94] the court relied heavily on mitigating factors. The court explained that it must consider the causes of an attorney's misconduct and the "prospects for rehabilitation" when determining the appropriate sanction for an at-

86. *See* Att'y Griev. Comm'n v. Mitchell, 308 Md. 653, 654-55, 521 A.2d 746, 747-48 (1987) (imposing an indefinite suspension on an attorney convicted of performing sexual acts on a thirteen-year-old boy); *see also* Att'y Griev. Comm'n v. Goldsborough, 330 Md. 342, 366, 624 A.2d 503, 514 (1993) (imposing an indefinite suspension on an attorney engaging in sexual misconduct with his secretary and two female clients).

87. *See Goldsborough*, 330 Md. at 365, 624 A.2d at 514 (indicating that the court must consider the "underlying causes of an attorney's misconduct and the prospects for rehabilitation").

88. 308 Md. 653, 655, 521 A.2d 746, 748 (1987).

89. Under the Maryland Code of Professional Responsibility, a crime involving moral turpitude constituted a violation of the disciplinary rules. MD. CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (1984) (repealed 1987).

90. *Mitchell*, 308 Md. at 655, 521 A.2d at 747-48.

91. *Id.*, 521 A.2d at 748.

92. *Id.* at 657, 521 A.2d at 748 (Cole, J., dissenting). Judge Cole explained that the court imposes an indefinite suspension in cases where the misconduct has been caused by mental illness because if the illness can be treated, the attorney may be fit to practice law in the future. *Id.* at 656, 521 A.2d at 748.

93. *Id.* at 658, 521 A.2d at 749.

94. 330 Md. 342, 624 A.2d 503 (1993).

torney who violated MRPC 8.4(a) and 8.4(d) by engaging in sexual misconduct with his secretary and two female clients.[95] The court also considered the attorney's refusal to acknowledge the wrongfulness of his conduct and his refusal to admit to any kind of behavioral problem.[96] Finally, the court noted the attorney's professional accomplishments and demonstrated legal ability, essentially balancing the harm caused by the attorney's conduct against the benefit of allowing a competent attorney to continue to practice law.[97] After considering these factors, the *Goldsborough* court ultimately rejected Bar Counsel's recommended sanction of disbarment and suspended the attorney indefinitely with a right to reapply two years from the date of the opinion.[98] In dissent, Judge Bell argued that the attorney's refusal to admit to his misconduct should have prevented the majority from imposing a sanction designed to encourage the attorney to seek help for his disorder.[99] Judge Bell believed that the attorney's refusal to admit a problem aggravated, rather than mitigated, his misconduct and justified disbarment.[100]

C. *Other Jurisdictions' Approach to Sanctions in Sexual Misconduct Cases*

Other jurisdictions follow an approach similar to that of the Court of Appeals of Maryland in determining appropriate sanctions in attorney disciplinary proceedings involving sexual misconduct,[101] particularly cases involving sexual misconduct with children. These jurisdictions focus more on the mitigating circumstances than on the nature of the misconduct or the relationship of the misconduct to the

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95. *Id.* at 365-66, 624 A.2d at 514. The attorney had on several occasions spanked his secretary and a client and on one occasion had kissed a client on the cheek without her consent. *Id.* at 348-51, 624 A.2d at 505-07.

96. *Id.* at 363, 624 A.2d at 513.

97. *See id.* at 363, 624 A.2d at 513 (listing the attorney's professional accomplishments and weighing them against the "emotional, psychological, and social" harm caused by the attorney's conduct).

98. *Id.* at 366, 624 A.2d at 514.

99. *Id.* at 374, 624 A.2d at 518-19 (Bell, J., dissenting) (stating that "because the [attorney] does not admit the conduct, I am puzzled as to how [he] can aggressively seek help when he has indicated, emphatically, that he not only does not need help, but that he did not commit the acts alleged").

100. *Id.* at 375, 624 A.2d at 519. Judge Bell predicated this conclusion on determining that the hearing judge's conclusion that the attorney provided false testimony was not clearly erroneous. *Id.*

101. In other jurisdictions, this type of misconduct is governed by Rule 8.4 or its equivalent. *See, e.g., In re* Conn, 715 N.E.2d 379, 381 (Ind. 1999) (finding an attorney's criminal conviction for conveying and receiving child pornography to be a violation of Professional Conduct Rule 8.4(b)).

practice of law.[102] In *In re Safran*,[103] the Supreme Court of California suspended an attorney for three years after the attorney was convicted of two counts of annoying or molesting a child under the age of eighteen, but subsequently suspended the order and placed the attorney on probation.[104] The court reduced its sanction because the attorney was in a psychiatric treatment program, the attorney's doctor testified to a remote possibility of repeated conduct, and the attorney expressed remorse for his acts.[105] Similarly, in *Iowa Board of Professional Ethics v. Blazek*, the court imposed a two-year suspension on an attorney who had engaged in improper sexual conduct with his eleven-year-old nephew rather than the three-year suspension recommended by the grievance commission.[106] The court imposed the lighter sanction, in part, because the attorney accepted responsibility for his actions, sought counseling, and had taken measures to ensure that his misconduct would not be repeated.[107] Finally, in *In re Conn*,[108] the Supreme Court of Indiana sanctioned an attorney for not disclosing a federal investigation into his child pornography activities to the state's Board of Law Examiners.[109] The court cited mitigating factors, such as admitting the misconduct and voluntarily seeking psychiatric treatment, as justification for a relatively mild sanction.[110]

III. THE COURT'S REASONING

In a case of first impression in Maryland, the Court of Appeals suspended James F. Childress, a practicing attorney in Maryland and the District of Columbia, indefinitely from the practice of law with a

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102. *See, e.g.*, Iowa Bd. of Prof'l Ethics v. Blazek, 590 N.W.2d 501, 504 (Iowa 1999) (discussing several mitigating circumstances that would lessen the severity of a sanction for an attorney who sexually assaulted his eleven-year-old nephew).

103. 554 P.2d 329 (Cal. 1976).

104. *Id.* at 330.

105. *Id.* at 329-30. The court also relied on testimony from the chief trial attorney at the firm where the misbehaving attorney practiced. The chief trial attorney stated that "the petitioner's performance as a lawyer was of the highest professional caliber," and that he would be allowed to continue to practice at the firm. *Id.* at 330.

106. *Blazek*, 590 N.W.2d at 504.

107. *Id.* In *Blazek*, the court also relied on the fact that the attorney's ability to practice had not been questioned, and that the misconduct had not adversely affected his clients. *Id.* at 503.

108. 715 N.E.2d 379 (Ind. 1999).

109. *Id.* at 381.

110. *Id.* at 382. The court, however, rejected the attorney's argument that his ignorance as to the criminal nature of his conduct should serve as a mitigating factor, stating that "respondent either knew, or reasonably should have known," that his conduct was illegal. *Id.*

right to terminate the suspension after one year.[111] The suspension followed the court's decision to uphold the conclusion of the hearing judge that Childress's solicitation of sex from minor females using the Internet and subsequent in-person meetings violated MRPC 8.4(d).[112]

Judge Rodowsky, writing for the majority,[113] first addressed Childress's exceptions to the hearing judge's findings that he violated section 3-831(a) of the Maryland Courts and Judicial Proceedings Article, which states that "[i]t is unlawful for an adult wilfully to contribute to, encourage, cause or tend to cause any act, omission, or condition which results in a violation, renders a child delinquent, in need of supervision, or in need of assistance."[114] The court held that despite the fact that Childress encouraged young girls to meet with him and had, in fact, met with the girls, there was no clear and convincing evidence[115] to establish that Childress had rendered the girls in need of "guidance, treatment, or rehabilitation."[116]

The court then addressed Childress's exception to the hearing judge's finding that Childress violated Virginia Code section 18.2-370(4), which prohibits persons eighteen years of age or older from knowingly and intentionally proposing an act of sexual intercourse to any child under the age of fourteen.[117] Childress argued that he could not have violated the statute because he did not know with certainty that the girls were under the age of fourteen, and that he did not "propose" sexual intercourse as the word is used in the statute.[118] The court rejected Childress's arguments and held that he did violate the Virginia statute.[119] As a result, the court overruled Childress's ex-

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111. *Childress II*, 364 Md. at 67, 770 A.2d at 696.

112. *Id.* at 64, 770 A.2d at 694.

113. Chief Judge Bell, Judge Wilner, and Judge Harrell joined in the majority opinion. *Id.* at 51, 770 A.2d at 687.

114. *See id.* at 53-54, 770 A.2d at 688-89; *see also* MD. CODE ANN., CTS. & JUD. PROC. § 3-831 (1998). Section 3-801(f) of the Courts and Judicial Proceedings Article further defines a child "in need of supervision" as one "who requires guidance, treatment, or rehabilitation." *Id.* § 3-801.

115. *See Childress II*, 364 Md. at 55, 770 A.2d at 689 (stating that in an attorney disciplinary proceeding, Bar Counsel seeking to have a sanction imposed has the burden of proving that a Maryland Rule of Professional Conduct has been violated by clear and convincing evidence). The court further noted that the standard is maintained regardless of whether the attorney's conduct has resulted in a criminal conviction. *Id.*

116. *Id.* at 56, 770 A.2d at 690.

117. *Id.* at 57, 770 A.2d at 691; *see also* VA. CODE ANN. § 18.2-370(A)(4) (Michie Supp. 2001).

118. *Childress II*, 364 Md. at 58, 770 A.2d at 691.

119. *Id.* at 64, 770 A.2d at 694.

ception that he violated MRPC 8.4(d) and determined that a sanction was warranted.[120]

In determining the appropriate sanction, the court first addressed the nature of Childress's misconduct in light of the overall goals of protecting the public and deterring the errant attorney.[121] The court recognized that Childress's conduct had "seriously undermined public confidence in the legal profession" and concluded that a sanction more severe than Childress's recommendation of a reprimand was necessary.[122] In addition to the harm caused, the court considered factors that could mitigate a possible sanction.[123] In particular, the court noted that Childress had been a member of the bar for more than ten years without prior incident when the offenses occurred, had acknowledged the inappropriateness of his conduct, had expressed remorse, and had undergone extensive counseling since his arrest in 1995.[124] In considering Childress's psychiatric treatment, the court relied heavily on the testimony of Doctor Susan Feister.[125] Dr. Feister testified at both Childress's criminal proceeding and the evidentiary hearings that Childress's treatment had been a "rousing success."[126] She further noted that Childress still had "a few anxieties," but there was "an insignificant risk" that Childress would engage in similar behavior again.[127]

The court then examined one Maryland case and several out-of-state cases involving sexual misconduct with children to seek guidance on the issue of an appropriate sanction.[128] The court listed the facts of several cases in which attorneys were convicted of sexual misconduct with children and the resulting sanctions imposed by the respective courts;[129] however, the court failed to discuss the reasoning

120. *Id.*

121. *See id.*, 770 A.2d at 695 (explaining that the purpose of attorney disciplinary proceedings is to protect the public, and that concepts of general and specific deterrence are consistent with this goal).

122. *Id.* at 65, 770 A.2d at 695. The court specifically noted that a more severe sanction was necessary "to deter similar future conduct" by Childress and "to serve notice on the members of the Bar . . . that this type of conduct . . . will not be tolerated." *Id.*

123. *Id.*

124. *Id.*

125. *See id.* at 65-66, 770 A.2d at 695-96.

126. *Id.* at 65, 770 A.2d at 696.

127. *Id.* at 66, 770 A.2d at 696.

128. *Id.* at 66-67, 770 A.2d at 696.

129. *Id.* The court relied on *Attorney Grievance Commission v. Mitchell*, 308 Md. 653, 655, 521 A.2d 746, 747-48 (1987) (finding that an indefinite suspension was the appropriate sanction for an attorney who had been convicted of a second degree sexual offense for performing sexual acts on a thirteen-year-old boy); *In re Safran*, 554 P.2d 329, 329-30 (Cal. 1976) (suspending an attorney for a three-year period and placing him under supervision

behind the decisions in the cases it listed.[130] The court distinguished Childress's case, stating that "[u]nlike the cited cases, Childress did not sexually touch the victims involved in this case."[131] The court then followed the recommendation of Bar Counsel and suspended Childress indefinitely without a right to apply for termination of the suspension until one year from the effective date of the suspension.[132]

Judge Cathell, joined by Judge Raker, filed a dissenting and concurring opinion.[133] Judge Cathell agreed with the majority that Childress's conduct violated Virginia Code section 18.2-370(A)(4), and thus violated MRPC 8.4(d).[134] However, Judge Cathell strongly disagreed with the majority's ruling that Childress's conduct did not violate Maryland Courts and Judicial Proceedings section 3-831. He wrote that a child younger than fifteen who engages in sexually related Internet conversation with older men and eventually meets with those men is "in need of guidance."[135] Judge Cathell also disagreed with the sanction imposed by the court and with the court's determination that "an adult sexual predator" is "fit to practice law and has not engaged in conduct prejudicial to the administration of justice."[136] He compared the facts of the case with a line of cases in which the court continuously disbarred attorneys for misappropriation of funds.[137] In his view, enticing young females away from their homes for sexual purposes was "far more serious" than stealing

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after his conviction for molesting a child under the age of eighteen); *In re Conn*, 715 N.E.2d 379, 382 (Ind. 1999) (giving an attorney a minimum of a two-year suspension after his conviction for sexual exploitation of minors); *In re Wells*, 572 N.E.2d 1290, 1293 (Ind. 1991) (suspending an attorney for three years for conduct that included touching male high school students between the ages of sixteen and eighteen, displaying videotapes depicting sex acts to them, and conversing with them about sexual matters); *Iowa Bd. of Prof'l Ethics v. Blazek*, 590 N.W.2d 501, 504 (Iowa 1999) (suspending indefinitely an attorney for sexually assaulting his eleven-year-old nephew); *In re Herman*, 527 A.2d 868, 871 (N.J. 1987) (suspending an attorney for three years for sexually assaulting a ten-year-old boy); *In re Wong*, 710 N.Y.S.2d 57, 61 (N.Y. App. Div. 2000) (finding public censure an appropriate reprimand for an attorney who admitted to sexually touching a ten-year-old female); and *Office of Disciplinary Counsel v. King*, 523 N.E.2d 857, 860 (Ohio 1988) (imposing a one-year suspension for an attorney engaging in sexual relations with a fifteen-year-old girl).

130. *See Childress II*, 364 Md. at 66-67, 770 A.2d at 696.

131. *Id.* at 67, 770 A.2d at 696.

132. *Id.*

133. *Id.* at 67 (Cathell, J., dissenting and concurring).

134. *Id.* at 67-68, 770 A.2d at 697.

135. *Id.* at 68, 770 A.2d at 697. Judge Cathell stated that he "simply [could not] comprehend how any person [could] conclude otherwise." *Id.*

136. *Id.*

137. *Id.* at 68-69, 770 A.2d at 697-98.

money; therefore, he felt Childress should be disbarred.[138] Judge Cathell also dismissed the majority's notion that somehow a lesser sanction was warranted because Childress had not actually engaged in sexual conduct with any of the girls.[139] Judge Cathell reasoned that the evidence was clear as to Childress's intention to engage in sexual conduct, and that Childress remained a sexual predator. As a result, "the mere fact that he made no 'kill' should not be considered as a mitigating factor."[140]

IV. ANALYSIS

In *Attorney Grievance Commission v. Childress*, the Court of Appeals of Maryland should have disbarred Childress from the practice of law. This would have been the only way to accomplish the court's stated goal of protecting the public and preserving public confidence in the legal system.[141] In opting for an indefinite suspension with a right to terminate the suspension after only one year, the court failed to adequately address the egregiousness of Childress's conduct. Instead, the Court focused too much on the factual differences between this case and prior cases involving sexual misconduct and gave too much weight to mitigating factors. The court's sanction suggests that Rule 8.4 does not necessarily prohibit the misconduct of attorneys that has the potential to undermine confidence in the profession if that misconduct is not related to the practice of law. Furthermore, although the court recognized the inherent danger in adults preying on children via the Internet, it failed, via its inadequate sanction, to resolve what it determined to be a "grave social problem,"[142] thereby undermining public trust in the legal community.

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138. *Id.* at 69, 770 A.2d at 699 ("Steal money, you are disbarred. Steal a quarter's worth of parking time and you are disbarred. Forever steal a child's innocence and you're suspended. In my view, the Court has a serious problem with its priorities.").

139. *Id.* at 74, 770 A.2d at 700.

140. *Id.* at 74 n.4, 770 A.2d at 701 n.4. Judge Cathell further illustrated this point by noting that "[e]ven a lion, I am told, misses in four out of five hunts. Nonetheless, the lion remains a lion." *Id.*

141. *Childress II*, 364 Md. at 64, 770 A.2d at 695 (stating that "[t]he purpose of disciplinary proceedings is to protect the public and preserve public confidence in the legal system"); *see also* Stephen G. Bené, Note, *Why Not Fine Attorneys?: An Economic Approach to Lawyer Disciplinary Sanctions*, 43 STAN. L. REV. 907, 912 (1991) ("Modern attorney discipline cases mechanically recite the following goals and purposes for attorney discipline proceedings: 1. To protect the public . . . 3. To preserve public confidence in the legal profession.").

142. *Childress II*, 364 Md. at 65, 770 A.2d at 695.

A. *The Court's Focus on Distinguishing Facts Failed to Address the Effect of the Misconduct on Public Perception of the Legal Profession*

The court focused on the factual differences between Childress's case and other cases involving sexual misconduct by lawyers rather than the generally egregious nature of sexual misconduct and its potential to undermine public confidence in the legal profession.[143] If the court adhered to its goal of preserving public trust in the legal profession, it would have analyzed the egregiousness of Childress's conduct. Instead, the court chose to limit its analysis to how Childress's misconduct varied from prior cases of attorney misconduct,[144] thus avoiding a discussion of the dangerous and immoral nature of Childress's misconduct. In so doing, the court failed to maintain an adequate connection between its analysis of the misconduct and its stated goal of preserving public confidence in the legal profession.

In its reasoning, the court inadequately attempted to justify a more lenient sanction in the present case because, unlike prior cases involving sexual misconduct, Childress "did not sexually touch the victims."[145] The court's focus on this specific distinguishing characteristic seems misplaced in light of the court's prior determination that preying on children over the Internet is a "grave social problem."[146] Reasoning that Childress's misconduct was egregious, but could have been worse, served to avoid addressing the nature of Childress's harm—a harm that the court realized existed when it deemed Childress's act part of a social disorder. Judge Cathell explicitly addressed the nature of Childress's action in his dissent. In his view, the fact that Childress did not sexually touch his victims did not detract from the egregiousness of his using the Internet to prey on young girls: "The hunting itself . . . sufficiently warrant[ed] the sanction of disbarment."[147]

The gravity of the harm caused by Childress's misconduct warranted a more extensive analysis—one based on prior cases involving the highest concern for public confidence in the legal profession. For example, the court has recognized the effect on public confidence in the legal profession when attorneys have misappropriated client funds and willfully evaded paying income taxes.[148] In *Attorney Grievance Com-*

143. *Id.* at 66-67, 770 A.2d at 696.

144. *Id.*

145. *Id.* at 67, 770 A.2d at 696.

146. *Id.* at 65, 770 A.2d at 695.

147. *Id.* at 74, 770 A.2d at 700 (Cathell, J., dissenting and concurring).

148. *See, e.g.*, Att'y Griev. Comm'n v. Williams, 335 Md. 458, 474, 644 A.2d 490, 497 (1994) (emphasizing the egregious nature of misappropriating client funds); *see also* Md.

mission v. Williams, the court disbarred an attorney for the misappropriation of client funds even though the attorney's misconduct stemmed from his cocaine addiction.[149] The court focused on the nature of the harm as being "an act infected with deceit and dishonesty" and, therefore, refused to let anything short of compelling extenuating circumstances justify a lesser sanction.[150] Similarly, in *State Bar Ass'n v. Agnew*, the court disbarred an attorney for willful tax evasion because, although the misconduct was not directly related to the practice of law, it was a "willful and serious malefaction" that brought "dishonor to both the bar and the democratic institutions of our nation."[151] Furthermore, in *Fellner v. Bar Ass'n of Baltimore City*,[152] the court recognized the importance of public confidence in the legal profession when it concluded that an attorney who placed slugs in parking meters—misappropriating a miniscule amount of money—deserved to be disbarred.[153] The court realized it had a duty to protect the public confidence in the legal profession from even the slightest assault on the public's financial well-being.[154]

Childress's conduct in the present case was a serious assault on the public's confidence in the legal profession.[155] The majority even explicitly recognized this fact.[156] In order to protect public confidence the court should have analyzed the present case like others in which the court found that attorney misconduct seriously undermined public confidence in the profession. Had it done so, the court would have concluded that disbarment was the appropriate sanction.

B. *The Court Placed Inordinate Weight on Mitigating Factors*

The court again erred when it shifted its analysis from the nature of the harm caused by Childress's misconduct and focused extensively on mitigating factors.[157] In so doing, the court furthered the inherently arbitrary process of according weight to these factors, thereby further weakening public confidence in the legal profession and sys-

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State Bar Ass'n v. Agnew, 271 Md. 543, 550-51, 318 A.2d 811, 815 (1974) (describing the effect lawyer misconduct has on the public perception of the profession).

149. *Williams*, 335 Md. at 474, 644 A.2d at 497-98.

150. *Id.*, 644 A.2d at 497.

151. *Agnew*, 271 Md. at 550-51, 318 A.2d at 815.

152. 213 Md. 243, 131 A.2d 729 (1957).

153. *Id.* at 247, 131 A.2d at 732.

154. *See id.*, 131 A.2d at 731.

155. *Childress II*, 364 Md. at 65, 770 A.2d at 695 (noting that "Childress's misconduct *seriously* undermined public confidence in the legal profession" (emphasis added)).

156. *Id.*

157. *Id.* at 65-66, 770 A.2d at 695-96.

tem.[158] Balancing mitigating factors is inherently arbitrary because the extent to which the court considers them is particular to the facts of each case[159] and within the discretion of the court.[160] The court's added focus on the particular mitigating factors in *Childress II* highlights the lack of consistency that results from an approach which allows for the individual mitigating circumstances of a particular case to be considered.[161]

In *Childress II*, the court failed to disbar Childress after considering that he was a ten-year member of the Bar, that he acknowledged the inappropriateness of his conduct, and that he expressed remorse.[162] One result of the court's heightened consideration of these factors has the potential to increase the misapplication of these factors.[163] Attorneys facing a disciplinary proceeding, for example, may

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158. *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, 49 (1998). In her article, Professor Levin thoroughly examines many of the current problems with the way sanctions are imposed in attorney disciplinary cases. She points out that the lack of well-defined standards followed by courts in imposing sanctions raises serious questions about the fairness, consistency, and overall effectiveness of the sanctions imposed. *Id.* at 5-6. In particular, Professor Levin argues that various aggravating and mitigating factors are "reflexively—and inconsistently—invoked by the courts, even though some of the factors would appear to deserve little, if any, consideration." *Id.* at 49. The logical next step in her reasoning is that the inconsistency generated by a haphazard application of mitigating factors fails to accomplish the goal of protecting public confidence in the legal profession.

159. *Compare* Att'y Griev. Comm'n v. Protokowicz, 329 Md. 252, 262-63, 619 A.2d 100, 104-05 (1993) (suspending an attorney indefinitely with the right to apply for reinstatement after one year after consideration of the offending attorney's voluntary alcohol abuse treatment and his being a "competent, ethical, and respected attorney, and a caring member of his community"), *with* Att'y Griev. Comm'n v. White, 328 Md. 412, 421, 614 A.2d 955, 960 (1992) (disbarring an attorney for misappropriating client funds despite the attorney's claim that alcoholism had caused his behavior).

160. *See* Att'y Griev. Comm'n v. Bereano, 357 Md. 321, 329 n.7, 744 A.2d 35, 40 n.7 (2000) (recognizing that the beneficial acts of an attorney and the minor degree of the harm caused, "may be considered by the Court of Appeals in establishing [an] appropriate sanction").

161. *See* Levin, *supra* note 158, at 66 (stating that "routine and unrestrained" consideration of mitigating factors "presents increased opportunities for bias and unwarranted inconsistency to creep into the decision-making process").

162. *Childress II*, 364 Md. at 65, 770 A.2d at 695.

163. *See* Levin, *supra* note 158, at 50-58 (discussing some of the problems that result from the added focus and misapplication of mitigating factors such as an attorney's experience in the practice of law, the absence of a prior disciplinary record, and an attorney's character and reputation). In addressing the issue of whether an attorney's character and reputation should be allowed to mitigate a particular sanction, Professor Levin points out that a good reputation could help to predict the attorney's future conduct or it could simply be the result of the "bad facts" about the attorney being difficult to detect. *Id.* at 55. Although the court in *Childress II* did not expressly rely on Childress's character as a mitigating factor, the court did rely on the fact that Childress is now married and engaged in a normal and healthy sexual relationship. *Childress II*, 364 Md. at 66, 770 A.2d at 696. How-

simply admit to their misconduct and apologize in order to create mitigating factors to which the attorney can point to avoid disbarment. This creates the possibility that attorneys will not truly acknowledge the wrongfulness of their misconduct. The court in *Childress II*, in giving consideration to Childress's remorse and acknowledgement of his misconduct, implicitly decided that Childress's numerous attempts to avoid a criminal conviction and disciplinary sanction on the basis of technicalities[164] did not offset his acknowledgement of misconduct.[165] In future cases where attorneys express remorse, the ability of the court to determine when a mitigating factor deserves consideration becomes more problematic and necessarily more inconsistent because the court will have to determine when an attorney is truly expressing remorse and when he or she is simply attempting to avoid a harsh sanction.[166] Ultimately, the court's consideration of mitigating factors becomes further detached from the consideration of the egregiousness of the attorney's misconduct. As a result, the public's confidence in attorneys adhering to a higher standard of moral conduct is undermined because the public will be unsure whether attorneys are being adequately sanctioned for their misconduct or are avoiding a harsh sanction by offering empty expressions of remorse.[167]

The court's focus on these mitigating factors creates an additional problem in determining an appropriate sanction because it necessarily shifts the focus from the effect of the egregious conduct on public confidence to the benefits the public receives from having a

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ever, the same dangers that Levin highlights are present. The fact that Childress is now in a healthy relationship could be a prediction of future behavior or it simply could be that the "bad facts" about whether he will revert to past behavior are undetectable.

164. *See Childress II*, 364 Md. at 57-58, 770 A.2d at 691 (discussing Childress's challenge to Judge Johnson's finding that he violated Virginia Code § 18.2-370(A)(4) on the basis that he did not "know" the girl was thirteen and did not "propose" an act of sexual intercourse as the term is construed by Virginia courts).

165. *See id.* at 65, 770 A.2d at 695 (describing the various mitigating factors considered by the court).

166. *See* Levin, *supra* note 158, at 49 (discussing how the courts' application of mitigating factors has allowed bias and inconsistency to become part of the decision-making process).

167. *See* State Bar Ass'n v. Agnew, 271 Md. 543, 549, 318 A.2d 811, 814 (1974) ("[T]he presence of [truth, candor, and honesty] in members of the bar comprises a large portion of the fulcrum upon which the scales of justice rest. Consequently, an attorney's character must remain beyond reproach."); *see also* Levin, *supra* note 158, at 5-6 (suggesting that the lack of well defined standards raises "serious questions about how well the sanctions imposed on lawyers achieve the basic goals of lawyer discipline: protection of the public, protection of the administration of justice and preservation of confidence in the legal profession").

competent attorney returned to the practice of law.[168] The net result is that the goal of protecting the public from attorneys engaging in serious misconduct and preserving confidence in the legal profession becomes a secondary concern.[169] The *Childress II* court allowed this result to occur by focusing on the underlying causes of Childress's misconduct and allowing such factors to mitigate a sanction.[170] In *Goldsborough,* the court, after relying on similar mitigating factors to impose a two-year suspension, explicitly emphasized that it is "not unmindful of the benefits of returning a rehabilitated attorney to the practice of law."[171] The court must be especially cautious, when attempting to return an attorney to the practice of law, that the potential benefit to the public of having a skilled attorney practice law does not become a greater concern than the need to protect the public from the harm caused by the attorney's misconduct. In *Childress II,* the focus on mitigating factors and Childress's fitness to practice law distracted the court from its initial observation that Childress's misconduct "seriously undermined public confidence in the legal profession" such that "a penalty more significant than a reprimand [was] needed."[172]

The court could have more effectively framed its consideration of mitigating factors by first analyzing the nature of the harm, and then focusing on the extent to which these factors relate to or cause the harm. For instance, in *Attorney Grievance Commission v. Casalino,* the court related the attorney's cooperation with authorities back to the attorney's misconduct.[173] The court found that, although commendable, the attorney's "after-the-fact cooperation does not make his tax evasion any less fraudulent, deceitful, or misrepresentative."[174] The nature of the harm in *Childress II* was the use of the Internet by an attorney to "arrange criminal sexual liaisons" and cross state lines with

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168. *See* Att'y Griev. Comm'n v. Goldsborough, 330 Md. 342, 366, 624 A.2d 503, 514 (1993) (stating that "in light of [the attorney's] long and otherwise exemplary professional career, we would be doing a disservice by forever barring him from returning to the practice of law").

169. *See id.* (discussing the majority's hope that, in imposing a sanction of suspension rather than disbarment, the "possibility of being reinstated will motivate him to aggressively seek appropriate help"). The court further indicated that the termination of the suspension for the attorney in *Goldsborough* was dependent upon "assurance that similar incidents will not be repeated." *Id.*

170. *See Childress II,* 364 Md. at 65-66, 770 A.2d at 695-96 (describing the mitigating factors relied upon by the court).

171. *Goldsborough,* 330 Md. at 365, 624 A.2d at 514.

172. *Childress II,* 364 Md. at 65, 770 A.2d at 695.

173. Att'y Griev. Comm'n v. Casalino, 335 Md. 446, 452, 644 A.2d 43, 46 (1994).

174. *Id.*

the purpose of carrying out this criminal activity[175]—an act even the majority recognized as having a serious effect on the public's confidence in the legal profession.[176] The court should have adopted the approach used in cases involving the highest concern for public confidence, such as cases involving misappropriation of funds, which require disbarment absent "*compelling* extenuating circumstances."[177] In addition, the attorney engaging in misconduct in these cases has the burden of proving that mitigating factors have affected his behavior to a substantial extent.[178] Thus, the appropriate consideration would be whether the treatment program and remorse expressed by Childress in this case substantially offsets the effect of his misconduct on the public's confidence. Framed in this manner, it is difficult to see how Childress's treatment program and expression of remorse detracts from the public's increasing awareness and perception that adults preying on children via Internet use is a "grave social problem."[179] In fact, failing to disbar Childress as a result of these factors only increases the public perception that adults engaging in such egregious conduct will remain undeterred and unpunished.

Establishing such an analytical framework would give the court's determination of an appropriate sanction more certainty and consistency.[180] At the same time, connecting the various mitigating factors to the harm itself works to further the goal of protecting public confidence in the legal profession because the public is assured that attorneys engaging in serious misconduct will not escape harsh sanctions when the court feels an attorney has the potential to be rehabilitated. In addition, the court's desire to return a rehabilitated attorney to the practice of law remains intact, but is subordinated to the more important goal of protecting the public and preserving public confidence in the legal profession.

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175. *Childress II*, 364 Md. at 72, 770 A.2d at 700 (Cathell, J., dissenting and concurring).

176. *See supra* note 122 and accompanying text (discussing the court's view of the nature of the harm caused by Childress's misconduct).

177. Att'y Griev. Comm'n v. Bereano, 357 Md. 321, 336, 744 A.2d 35, 43 (2000) (emphasis added).

178. *See* Att'y Griev. Comm'n v. White, 328 Md. 412, 418, 614 A.2d 955, 959 (1992) (noting that for a physical or mental malady to be a compelling extenuating circumstance, the illness must be, to a substantial extent, responsible for the attorney's misconduct).

179. *Childress II*, 364 Md. at 65, 770 A.2d at 695.

180. *See generally* AMERICAN BAR ASS'N, STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986) (providing an analytical framework for imposing sanctions in attorney disciplinary proceedings in order to develop consistency among the various jurisdictions).

V. CONCLUSION

In *Childress II*, the Court of Appeals of Maryland, after recognizing that using the Internet to sexually prey on children was a "grave social problem" and deserving of "a penalty more significant than a reprimand,"[181] should have disbarred Childress. In opting for an indefinite suspension with a right to apply to terminate the suspension after only one year, the court failed to take advantage of an opportunity in a case of first impression to set a tone for protecting the public and the public's perception of the legal profession. The court limited its use of precedent to those cases involving sexual misconduct with children and failed to broaden its analysis to cases involving the utmost concern for the public and the public's perception of the legal profession. By shifting its analysis away from the nature of the harm caused, the court failed to maintain a connection between the harm caused and the sanction imposed. In addition, the court focused excessively on mitigating factors, shifting its inquiry to Childress's ability to be rehabilitated and successfully returned to the practice of law. The court allowed the benefits of returning a rehabilitated attorney to the practice of law to overshadow its initial determination that adults preying on children via the Internet is a "grave social problem."[182] As a result, the court failed to accomplish its goal of protecting the public and preserving public confidence in the legal profession.

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181. *Childress II*, 364 Md. at 65, 770 A.2d at 695.
182. *Id.*