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In re Steven J. Lever

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Which is more important: Protecting minors from sexual predators or protecting client funds from theft? The answer seems obvious, but inconsistencies in the respective sanctions imposed on attorneys who commit these crimes imply otherwise.[1] Attorneys who engage in dishonest or criminal acts that violate their clients' trust have been publicly met with the strictest sanctions.[2] But attorneys who violate the public's trust by engaging in socially deviant behavior, such as actual or attempted sex with minors, have been sanctioned quietly and their sanctions have been inconsistent in severity. What *is* the appropriate sanction for an attorney convicted of such crimes? And, more specifically, does an attorney deserve "the privilege of admission to the bar and the elevated status of . . . officer of the court" if he *intended* to have sex with a minor but did not do so *only* because he was the subject of a police investigation?[3] The New York Code of Professional Responsibility (the "Code") instructs that "an attorney shall not engage in illegal or any other conduct that adversely reflects on the lawyer's *honesty*, *trustworthiness* or *fitness*."[4] But because the Code does not provide a clear definition of "fitness,"[5] sanctions vary greatly from case to case.[6]

In *In re Lever*, the Appellate Division, First Department, held that the appropriate sanction for an attorney convicted of an attempted criminal sex act in the third degree with a minor was suspension of his license to practice law for the longer of three years or his criminal probationary period.[7] The First Department agreed with the Hearing Panel that Lever had engaged in conduct that reflected poorly on all attorneys in general, and New York attorneys in particular.[8] But based on mitigating

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1. For example, the outcomes in New York for such crimes range from short-term suspensions to disbarment. *See infra* discussions of *In re* Lever, 869 N.Y.S.2d 523 (1st Dep't 2008) (Catterson, J., dissenting); *In re* Singer, 738 N.Y.S.2d 38 (1st Dep't 2002); *In re* Harlow, 720 N.Y.S.2d 645 (3rd Dep't 2001); and *In re* Wong, 710 N.Y.S.2d 57 (1st Dep't 2000).

2. Most notably, in recent years the ENRON scandal represents perhaps the most highly publicized such situation. *See* Richard Acello, *Enron Lawyers in the Hot Seat: Bankruptcy Examination Outlines Possible Causes of Action*, ABA Journal, June 2004, http://www.abajournal.com/magazine/article/enron_lawyers_in_the_hot_seat/.

3. *See Lever*, 869 N.Y.S.2d at 530 (Catterson, J., dissenting). By design, the Model Rules of Professional Responsibility provide a minimum standard that attorneys must meet, but the Rules neither specifically define all terms nor mandate specific sanctions. *See generally* N.Y. Rules of Prof'l Responsibility (2010)

4. N.Y. State Bar Ass'n. Lawyer's Code of Prof'l Responsibility DR 1-102(A)(3), (7) (2007), *incorporated into* N.Y. Rules of Prof'l Responsibility R. 8.4(b), (h) (emphasis added). Effective April 1, 2009, the New York State Bar Association adopted the Model Rules of Professional Conduct numbering system. Hereinafter, all references to the New York State Bar Association Lawyers Code of Professional Responsibility will contain a parallel citation to the new New York Rules of Professional Responsibility.

5. Although the term "fitness" appears in rules 8.3 and 8.4, it is not specifically defined in either, nor in rule 1.0, which sets forth definitions of relevant terminology. *See* N.Y. Rules of Prof'l Responsibility R. 1.0, 8.3, 8.4.

6. *See infra* discussions of *Lever*, 869 N.Y.S.2d at 530 (Catterson, J., dissenting); *Singer*, 738 N.Y.S.2d at 39; *Harlow*, 720 N.Y.S.2d at 645; and *Wong*, 710 N.Y.S.2d at 57.

7. 869 N.Y.S.2d at 524, 529.

8. *Id.* at 529.

factors surrounding the crime, in particular, the lack of any actual sexual contact between Lever and the minor,[9] disbarment was not the appropriate sanction.[10] This case comment contends that the court missed an opportunity to send a clear message to both the New York State Bar and the public that a registered sex offender is not fit to practice. The court's application of an "actual sexual contact" test, whereby disbarment is appropriate only if the individual engages in actual sexual contact with a minor, is flawed. Specifically, the court should have followed the dissent's reasoning and applied a test for fitness based on the nature of the crime committed and disbarred Lever because of his conviction and registration as a sex offender.

In July 2004 Lever entered an Internet chat room designed to allow older men and younger women to connect.[11] At the time, he was a thirty-year-old associate in the patent department of a New York City law firm.[12] For three months, Lever engaged in several "sexually explicit conversations" with a person he believed to be a thirteen-year-old girl.[13] In October 2004 he arranged to meet the "girl" at a train station for the purpose of engaging in an "oral sexual act."[14] But when he arrived, Lever learned that he had actually been communicating with an undercover police officer, and was arrested.[15] He was charged with six counts of disseminating indecent material to a minor in the first degree, a felony, and with attempted criminal sexual act in the third degree, a misdemeanor.[16] In September 2005 Lever pled guilty to an attempted criminal sex act in the third degree; he was later sentenced to six years' probation and required to register as a level-one sexual offender.[17]

As a result of his conviction, the First Department Disciplinary Committee[18] "served [Lever] with a notice and statement of charges alleging that he engaged in illegal conduct that adversely reflected on his honesty, trustworthiness or fitness as a

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9. *Id.* at 524–25.

10. *Id.* at 524.

11. *Id.* at 530. A chat room is a "real-time online interactive discussion group." *Chat Room Definition*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/chat%20room (last visited Jan. 10, 2011).

12. *Lever*, 869 N.Y.S.2d at 530.

13. *Id.*

14. *Id.* According to the record, Lever planned to meet the "girl" at a Long Island train station, approximately ninety minutes from New York City's Pennsylvania Station. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* Lever was also ordered to participate in and successfully complete a sex offender treatment program, which carried with it over $1200 in fees. *Id.*

18. The First Department Disciplinary Committee

> is charged with the day-to-day administration of the Attorney Disciplinary System for the more than 55,000 lawyers who work in Manhattan and the Bronx . . . . [The Committee] handles approximately 3,500 complaints against First Department lawyers annually. . . . If, after a full due process hearing, charges are sustained, the case is filed with the Court for a final determination as to whether discipline should be imposed.

lawyer."[19] A disciplinary hearing ensued. Because of the mitigating evidence presented by Lever and the fact that there was "no actual sexual contact with a minor," the referee presiding over the resulting disciplinary hearing recommended a six-month suspension of his law license.[20] But the Hearing Panel considering Lever's appeal of that decision found the referee's recommendation of a six-month suspension too lenient,[21] and instead recommended that the suspension last for the longer of three years or the duration of his criminal probation.[22] The panel felt that using the Internet to "prey on minors" should carry a harsher sentence that would "send a strong message to both the bar and public that sexual misconduct involving minors will be met with a significant sanction."[23]

Treating this case as one of first impression,[24] the First Department held that the Panel's recommendation was proper.[25] Relying on *Attorney Grievance Commission of Maryland v. Childress*[26] and *Office of Lawyer Regulation v. Engl*,[27] the court held that because Lever's actions did not involve any sexual contact, he should not be disbarred.[28] Despite consideration of the serious "nature and severity of respondent's offense,"[29] the First Department concluded that disbarment was not appropriate because of the significant mitigating circumstances.[30] Specifically, the court considered that: Lever committed the crime at a time when he was under extreme personal and professional stress; he later accepted responsibility for his actions and showed remorse; and, most importantly, there was a complete lack of actual sexual

Character and Fitness, N.Y. St. Sup. Ct. App. Div. First Dep't, http://www.nycourts.gov/courts/ad1/centennial/disciplinary.shtml (last visited Jan. 13, 2011).

19. Lever received this notice in November 2006. *Lever*, 869 N.Y.S.2d at 524. In addition, the Committee charged Lever with engaging "in conduct that adversely reflected on his fitness as a lawyer." *Id.*

20. *Id.* at 524–25.

21. *Id.* at 525.

22. *Id.*

23. *Id.* at 525–26. This case comment questions whether a three-year suspension will send such a message to the public. While the majority believes that a "registered sex offender" remains fit to practice, I suspect his clients may feel otherwise.

24. *Id.* at 526. The majority agreed with the dissent that there were no New York disciplinary cases "directly on point"; therefore, the court had to rely on the "most analogous precedents [in New York] and other jurisdictions." *Id.*

25. *Id.* at 528–29.

26. Attorney Grievance Comm'n of Md. v. Childress (*Childress II*), 770 A.2d 685 (Md. 2001).

27. Office of Lawyer Regulation v. Engl (*Engl*), 698 N.W.2d 821 (Wis. 2005).

28. *Lever*, 869 N.Y.S.2d at 528–29.

29. *Id.* at 528.

30. *Id.* at 529. The majority opinion stated that "even if we agreed with the dissent that the offense, by itself, would ordinarily require disbarment, the substantial and credible mitigation evidence offered by respondent in this case requires us to consider a lesser sanction." *Id.* It went on to express that "[i]n urging disbarment as the only appropriate sanction in this case, the dissent relies on factually distinguishable cases which involved an attorney's actual sexual contact with a minor." *Id.* at 527.

contact between Lever and the minor.[31] The dissent disagreed, however, arguing that conviction and registration as a sex offender "merits disbarment, even when the crime, as in the [case of Lever's], is inchoate."[32]

The *Lever* court's balancing of the nature of the act with mitigating circumstances was influenced by the *Childress* court's treatment of similar facts and circumstances.[33] James Childress was admitted to the Maryland and District of Columbia bars in 1989.[34] From 1993 to 1995 Childress engaged in sexually explicit conversations with underage girls via Internet chat rooms and met on several occasions with girls who were generally between the ages of thirteen and sixteen.[35] While these meetings apparently did not involve sexual contact, Childress presented sex as the reason for the meetings.[36] During his conversation with an undercover police officer posing as a fourteen-year-old girl, Childress described in "lurid detail the sexual activity in which he desired to engage" with her.[37] Childress was subsequently arrested and convicted in the U.S. District Court for the District of Maryland, Southern Division, in violation of 18 U.S.C. § 2423(b): travelling interstate with "intent to engage in a sexual act with a minor."[38] Childress was also charged in Maryland state court with violating Maryland Rule of Professional Conduct 8.4(d), which prohibits an attorney from "engaging 'in conduct that is prejudicial to the administration of justice.'"[39] As a result of his conviction in federal court, the Maryland Court of Appeals held that although the respondent engaged in sexually explicit chat room conversations with several young girls over the course of three years, he should not be disbarred because of mitigating factors, including that "Childress did not sexually touch the victims involved."[40] The court instead suspended Childress from the practice of law indefinitely, without the opportunity to apply for cancellation of the suspension for one year.[41] After the one-year period, Childress's reinstatement would be dependent

31. *Id.* at 524–25, 529.

32. *Id.* at 533 (Catterson, J., dissenting).

33. *Id.* at 527 ("[W]e agree with the Maryland Court's willingness to at least examine the facts underlying the crimes, as well as the aggravating and mitigating circumstances, before deciding on an appropriate sanction.").

34. Attorney Grievance Comm'n of Md. v. Childress (*Childress I*), 758 A.2d 117, 118 (Md. 2000).

35. *Childress II*, 770 A.2d 685, 688 (Md. 2001) (quoting *Childress I*, 758 A.2d at 119).

36. *Id.*

37. *Id.*

38. *Id.* at 687.

39. *Id.*

40. *Id.* at 695–96.

41. *Id.* at 696. Because Childress's crime involved interstate travel, he was convicted of a federal crime. He was then charged with violating Maryland's Rules of Professional Conduct. The Circuit Court for Prince George's County in Maryland determined that he had "engag[ed] in conduct prejudicial to administration of justice" by using Internet to solicit sex with young teenage girls. *See id.* at 687–89 (internal quotation marks omitted). Childress filed exceptions, and the Maryland Court of Appeals remanded; on remand, the Circuit Court reversed his conviction due to a "drafting error in 18 U.S.C.

upon a satisfactory psychological evaluation of his mental state at the time of the application and an explanation of all psychiatric treatment he received.[42]

The *Lever* majority also relied on *Office of Lawyer Regulation v. Engl* to support its sanction of Lever through suspension rather than disbarment.[43] Joseph Engl, like Lever, was a young attorney who was the focus of a police undercover operation.[44] In April 2004 Engl entered a chat room and engaged in a conversation with someone he believed to be a fourteen-year-old girl.[45] After expressing interest in having sex with the girl, he arranged to meet her later that evening.[46] In reality, Engl had propositioned a police detective posing as a fourteen-year-old girl, and he was arrested when he arrived at the meeting location.[47] He pled guilty to the charge of using a computer to commit a child sex crime, a class D felony in Wisconsin, and was sentenced to four years' probation.[48] The Supreme Court of Wisconsin held that, in light of the mitigating circumstances, the appropriate sanction was a public reprimand.[49] The court also required Engl to undergo a psychological evaluation and sex offender treatment, and limited both his exposure to children and his use of computers—but his license was not suspended.[50]

In both *Childress* and *Engl*, the respective courts acknowledged that preying on children via the Internet for purposes of sex is particularly damaging to the legal profession and warrants severe sanctions.[51] But in each case the sanctions were reduced in light of the remorse shown by the attorneys, their participation in a psychological treatment program, and the lack of previous disciplinary actions against them.[52] Relying on the outcomes in these cases, the *Lever* court held that, especially where mitigating circumstances exist, "misdemeanor convictions involving sexual solicitation" usually result in suspension, not disbarment. Therefore, Lever's

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§2423(b)," but the reversal was based on "technical grounds unrelated to the facts of the case." *Id.* at 687. Upon retrial (*Childress II*), the Maryland Court of Appeals suspended Childress from the practice of law in Maryland indefinitely and without the right to reapply for one year. *Id.* at 696–97.

42. *Id.* at 696–97.

43. *Engl*, 698 N.W.2d 821, 822–23 (Wis. 2005).

44. *In re* Lever, 869 N.Y.S.2d 523, 526 (1st Dep't 2008).

45. *Engl*, 698 N.W.2d at 822.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 823.

50. *Id.* Engl was placed on four years' probation with "conditions that he undergo counseling and evaluation for sex offender treatment; that he have no unsupervised contact with females under the age of 18 except for relatives; that he not visit chat rooms or sexual websites; that he not engage in instant messaging; that he submit a DNA sample; and that he not possess firearms." *Id.*

51. *Childress II*, 770 A.2d 685, 695 (Md. 2001); *Engl*, 698 N.W.2d at 822.

52. *Childress II*, 770 A.2d at 695–96; *Engl*, 698 N.W.2d at 822–23.

suspension was appropriate.[53] Specifically, the court pointed to Lever's remorse, his participation in therapy, and his lack of a prior disciplinary record.[54] However, *Childress* is distinguishable from *Lever* in that Childress apparently did not intend to have sex with the minors, whereas Lever admitted that his intention was to engage in a sexual act with the thirteen-year-old girl.[55]

In the dissenting opinion in *Lever,* Justices Catterson and Saxe contended,[56] as does this case comment, that disbarment is the only appropriate sanction for an attorney who is convicted of a sex crime related to a minor.[57] The dissent agreed with the majority that no New York decision was exactly on point, however Justice Catterson identified two cases that were "strikingly similar" and supported disbarring Lever.[58] In *In re Harlow*, the Appellate Division, Third Department, disbarred the respondent, without comment, based on his felony conviction for "injury or risk of injury to, or impairing the morals of, children" in Connecticut.[59] And in *In re Singer*, the First Department rejected the Disciplinary Committee's recommendation to suspend Singer, and chose instead to disbar him based on the nature of the crime and the aggravating circumstances surrounding his conviction in Virginia of aggravated sexual battery.[60] In both of these cases, the respective court focused on the "nature of the offense" in conjunction with the mitigating factors involved and found that disbarment was appropriate.[61]

In support of disbarring Lever, the dissent cited *Harlow,* the facts of which are virtually identical to *Lever* with one exception: Harlow was not conversing over the

53. *In re* Lever, 869 N.Y.S.2d 523, 528–29 (1st Dep't 2008).

54. *Id.* at 529. In all three cases, the court considered mitigating evidence that the attorneys were remorseful, attending therapy, and had no prior disciplinary records. In addition, each had recently endured a personal "tragedy" such as the loss of a parent, grandparent, or the end of a relationship. This implies that dealing with such a trauma while under serious professional stress is a justification for preying on juveniles for sex. If this is the case, one would expect many more cases such as this one among attorneys and others in high-pressure careers.

55. *Lever*, 869 N.Y.S.2d at 532; *Childress II*, 770 A.2d at 691.

56. Justice James M. Catterson and Justice David B. Saxe dissented in the opinion written by Justice Catterson.

57. *Lever*, 869 N.Y.S.2d at 531 ("I do not believe that we can reconcile the status of registered sex offender with that of a member of the bar in good standing.").

58. *Id.* at 532. The dissent discusses two reciprocal disciplinary cases as relevant but not controlling. *See In re* Maiorino, 750 N.Y.S.2d 264 (1st Dep't 2002) (attorney convicted in Connecticut of improper touching of minor and publicly reprimanded in New Jersey and New York); *In re* Wong, 710 N.Y.S.2d 57 (1st Dep't 2000) (attorney publicly reprimanded in New York for sexual contact with minor that occurred in New Jersey two years before he was admitted to the bar in both New York and New Jersey). A third case, *In re Cunningham*, 841 N.Y.S.2d 879 (1st Dep't 2007), was also cited by the *Lever* court to support the premise that the court has accepted the resignation of an attorney convicted for corresponding with a minor via the Internet where the content of the exchanges included sexual content.

59. 720 N.Y.S.2d 645 (3rd Dep't 2001).

60. 738 N.Y.S.2d 38, 39–40 (1st Dep't 2002).

61. *Id.* at 40; *Harlow*, 720 N.Y.S.2d at 645 ("In view of respondent's conviction of a serious crime . . . .").

Internet with an undercover police officer.[62] Instead, he was corresponding with an actual thirteen-year-old girl and engaged in sexual relations with her. Harlow was subsequently convicted in Connecticut of the felony of injury or risk of injury to, or impairing the morals of, a child.[63] The Connecticut court sentenced Harlow to ten years' probation and suspended him from practice.[64] In a one-page decision, the Third Department simply stated that, "under the circumstances presented, we conclude that respondent should be disbarred."[65]

In *Singer*, the attorney pled guilty to and was convicted of one count of aggravated sexual battery in Virginia, a felony in Virginia but a class A misdemeanor in New York.[66] The First Department disagreed with the Disciplinary Committee's recommendation of a five-year suspension with application for reinstatement predicated on Singer being "independently evaluated by a therapist attesting to his continued rehabilitation and abstinence from any illegal conduct,"[67] and his commitment to ongoing treatment.[68] The court held that disbarment was the appropriate sanction "[b]ased upon the disturbing nature of the crime and the aggravating factors,"[69] as well as the fact that *Harlow* was controlling.[70]

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62. *Harlow*, 720 N.Y.S.2d at 645.

63. *Id.*

64. *Id.*

65. *Id.*

66. *In re* Singer, 738 N.Y.S.2d 38, 39 (1st Dep't 2002). The specific facts of the criminal case are unreported. In Virginia, one is guilty of aggravated sexually battery when

> he or she sexually abuses the complaining witness, and 1. The complaining witness is less than 13 years of age, or; 2. The act is accomplished through the use of the complaining witness's mental incapacity or physical helplessness, or; 3. The offense is committed by a parent, step-parent, grandparent, or step-grandparent and the complaining witness is at least 13 but less than 18 years of age, or; 4. The act is accomplished against the will of the complaining witness by force, threat or intimidation, and: a. The complaining witness is at least 13 but less than 15 years of age, or; b. The accused causes serious bodily or mental injury to the complaining witness, or; c. The accused uses or threatens to use a dangerous weapon.
>
> B. Aggravated sexual battery is a felony punishable by confinement in a state correctional facility for a term of not less than one nor more than 20 years and by a fine of not more than $100,000.

VA. CODE ANN. § 18.2-67.3(A), (B) (2010). Because the court states that there was no "forcible conduct involved" in Singer's actions, subsection (A)(4) does not apply. *Id.* § (A)(4); *Singer*, 738 N.Y.S.2d at 39. Therefore, Singer's crime would have had to involve the sexual abuse of a child under thirteen, who may or may not have been mentally or physically helpless, or who was related to him in some way. *See Singer*, 738 N.Y.S.2d at 39.

67. *Singer*, 738 N.Y.S.2d at 39.

68. *Id.*

69. *Id.* at 40.

70. *Id.* Among these aggravating factors, the court cited the nature of the sentence imposed by the Virginia court, Singer's admission that his crime exhibited "moral turpitude," Singer's admission that he had engaged in similar conduct with other children over a ten-year period, a lack of letters attesting to his

According to the dissent in *Lever*, the test for disbarment should be conviction and registration as a sex offender.[71] In distinguishing Lever from both Singer and Harlow, the *Lever* majority held that in the absence of actual sexual contact, disbarment was not appropriate.[72] The dissent argued, however, that a test for disbarment based on actual sexual contact was insufficient to protect the courts and public from an attorney who is unfit to practice.[73] An attorney who intends to engage in a sexual act with a minor, and does not do so only because of police intervention, is still a danger to the public. The majority distinguished Lever from Harlow because Lever was convicted of *attempted* sexual contact, but Harlow was convicted of *actual* sexual contact.[74] While this distinction is often determinative of the charges brought and at sentencing in criminal proceedings, it is not necessary to determine the fitness of an individual to practice law, nor is it a standard that the court must adhere to in a disciplinary proceeding.[75]

An attorney's fitness is based on his honesty, uprightness, and trustworthiness as evidenced by his actions and behavior.[76] It is the court's "duty, since attorneys are its officers, to insist upon the maintenance of the integrity of the bar and to prevent the transgressions of an individual lawyer from bringing its image into disrepute."[77] Both Harlow and Lever engaged in long-term efforts to solicit a minor (Lever believed that he was corresponding with and meeting a thirteen-year-old girl), and both intended to engage in a sexual act with a minor.[78] The facts of *Harlow* are identical to *Lever* except that: (1) Harlow engaged in verbal and physical sexual contact; and (2) Harlow was in contact with a thirteen-year-old girl, not a police detective.[79] The fact that one was the object of a police undercover operation while the other was not is irrelevant to a proper determination of the attorney's fitness to practice law. The purpose of a disciplinary proceeding is to protect the public from an attorney who

good character, the court's disbelief that five years of treatment would change his behavior, and the fact that his behavior severely undermined the public's trust in the profession. *Id.*

71. *See In re* Lever, 869 N.Y.S.2d 523, 533 (1st Dep't 2008) (Catterson, J., dissenting).

72. *Id.* at 524–25.

73. *Id.* at 533 (Catterson, J., dissenting).

74. *Id.* at 527. In addition, the court distinguished *Harlow* based on the lack of mitigating evidence in favor of Harlow, reasoning that Harlow was, unlike Lever, not deserving of any leniency. *Id.*

75. The court's responsibility in disciplinary hearings is to review the recommendation of the referee in order to determine the attorney's fitness to practice. *See* N.Y. State Bar Ass'n Lawyer's Code of Prof'l Responsibility, Preliminary Statement (2007). "Disciplinary proceedings are not for the purpose of punishment, but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministration of persons unfit to practice." *In re* Wong, 710 N.Y.S.2d 57, 61 (1st Dep't 2000) (quoting Office of Disciplinary Counsel v. Zdrok, 645 A.2d 830, 834 (Pa. 1994)).

76. *See* Code of Prof'l Responsibility DR 1-102; N.Y. Rules of Prof'l Conduct R. 8.4.

77. *Childress II*, 770 A.2d 685, 695 (Md. 2001) (quoting Md. State Bar Ass'n v. Agnew, 318 A.2d 811, 814 (Md. 1974)).

78. *See Lever*, 869 N.Y.S.2d at 524; *In re* Harlow, 720 N.Y.S.2d 645 (3d Dep't 2001).

79. *See Lever*, 869 N.Y.S.2d at 523; *Harlow*, 720 N.Y.S.2d at 645.

uses his position to prey upon the weak and impressionable. And when the intent to harm a minor is clear, culmination of the intended harmful act is irrelevant to a determination of fitness.

The *Lever* case illustrates that current case law is inconsistent and lacks a clear test for disbarment in cases where attorneys prey on minors for sex. By applying an "actual sexual contact" test to determine whether Lever should have been disbarred,[80] the majority missed a significant opportunity to send a clear message to members of the New York State Bar and the public that a convicted, registered sex offender is not fit to practice law. Instead, the court's decision implies that an attorney may prey on minors via the Internet for sex and, so long as there is no "actual sexual contact,"[81] he will not be disbarred. Application of the dissent's "conviction and registration" test would provide a far more consistent outcome for disciplinary cases in which an attorney solicits a minor via the Internet for sex. Based on the majority's analysis, had an actual teenage girl been unlucky enough to have engaged in conversation with Lever instead of the detective, there is little doubt that he would have had sexual contact with her at the train station.[82] How can actual sexual contact be the measure for determining an attorney's fitness to practice and the court's baseline for protecting the public from those unfit to practice? While all crimes by attorneys represent a violation of the public's trust, it is difficult to imagine a crime more deserving of disbarment than the preying on minors for sex.

New York courts have been willing to take the position that certain acts by attorneys should generally result in disbarment. The case law in New York related to sanctions for conversion of client funds is far more consistent than it is for attorneys who engage in sexual misconduct with minors. "It [is] well settled that, 'absent extreme mitigating circumstances,' attorneys who have intentionally converted client funds have committed serious professional misconduct, which warrants disbarment."[83] While the courts have not provided a clear definition of "extreme," they have stated that "financial pressure cannot constitute an excuse for misuse of client funds and a strong message to that effect is required to protect the public."[84] For example, in *In re Birnbaum*, the attorney did not cause any client to suffer a loss, nor did he take any funds that he was not ultimately due in fees—and yet neither of these facts, nor his "unblemished 30-year career," protected him from disbarment.[85] The First Department held that even though Birnbaum "immediately repaid the stolen funds to the penny before his clients requested the funds," the fact remained that he "repeatedly used his clients' escrow funds to subsidize his personal and business

80. *See Lever*, 869 N.Y.S.2d at 527. The court refers to the threshold standard that it applies as "actual sexual contact," meaning that physical contact took place. *See id.* The true nature of the test is whether or not the defendant engaged in a sexual act with the minor. *Id.*

81. *Id.*

82. *Id.* at 532.

83. *In re* Sheehan, 847 N.Y.S.2d 543, 545 (1st Dep't 2007).

84. *In re* Birnbaum, 762 N.Y.S.2d 75, 77 (1st Dep't 2003).

85. *Id.* at 78.

expenses and his ultimate repayment of the misappropriated funds [did] not excuse the wrongful conduct."[86] If any of Birnbaum's clients had been harmed, he could have made them whole by repaying the funds; the same could not be said of the object of Lever's "affection."

In cases of client fund conversion, the court requires "extremely unusual" mitigating factors to warrant a sanction less severe than disbarment.[87] But in cases such as *Lever,* the standard is based on unqualified mitigating factors.[88] Without a doubt, Lever had experienced a combination of serious personal issues prior to his crime,[89] but is preying on teenage girls via the Internet the natural response to such events, such that these events should excuse Lever's behavior? Why is Lever more "fit to practice" than an attorney with thirty years of experience who moves money back and forth from a client escrow account without harming anyone? If one act warrants disbarment, why not the other? By not finding that conviction and registration as a sex offender is an absolute for disbarment, the *Lever* majority sent the message to the bar and the public that attorney misconduct related to fiduciary matters is a more reprehensible violation, warranting a more severe sanction, than sexual misconduct related to children.[90]

The *Lever* majority erred by using an "actual sexual contact" test when determining the sanction for an attorney convicted of attempted sexual contact with a minor. The court reasoned that *Childress* and *Engl* were the most factually analogous cases to *Lever*, but in so doing ignored *Lever's* factual similarities to *Harlow*.[91] The court's objective in disciplinary hearings is to determine the fitness of an individual to practice. Lever's conviction and subsequent registration as a level-one sex offender clearly warranted the sanction of disbarment. An application of the *Lever* dissent's reasoning—basing the sanction on the attorney's actions, intent, and conviction—

86. *Id.*

87. *Id.* at 77.

88. *In re* Lever, 869 N.Y.S.2d 523, 525 (1st Dep't 2008).

89. *See id.* at 531 (Catterson, J., dissenting). The *Lever* majority considered several mitigating factors, specifically, that respondent was "under great stress from work and social and family relationships," that he was "working 80-hour work weeks," he had recently broken up "with his girlfriend of one year, [his] father [had been] diagnosed with cancer, and [his] grandfather [had committed] suicide the previous year." *Id.*

90. *See Childress II*, 770 A.2d 685, 697 (Md. 2001) (Cathell, J., dissenting). In his dissent, Judge Cathell concluded:

> Today the majority says that an adult sexual predator who has used the Internet as a means to entice young females away from their homes and families to meet with him for sexual purposes, and has actually met with those young girls for sexual purposes, is, or may be after a period of suspension, fit to practice law and has not engaged in conduct prejudicial to the administration of justice. The majority, given that the oft-stated primary function of attorney disciplinary proceedings is to protect the public, in essence holds that it is more important to protect the general public in respect to their money matters, than in respect to their children.

Id.

91. *In re* Harlow, 720 N.Y.S.2d 645 (3d Dep't 2001).

would provide a clear test and therefore result in more consistent sanctions for attorneys convicted of such crimes and, ultimately, better protect the public from attorneys who are unfit to practice. Where an attorney preys on minors for sex, the sanction must be disbarment.