H B 120

STATE OF ALASKA
THE LEGISLATURE

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M January 10, 1990

SUBJECT: Board of Governors of the Alaska Bar (HB 120)

TO: Senator Pat Rodey

FROM: Terri Lauterbach TML
Legislative Counsel

You have asked this office questions about the general ramifications involved if the legislature does not enact HB 120 (or a similar bill) to extend the termination date of the Board of Governors of the Alaska Bar.

The short answer to your question is that the statutorily-created board would cease all activities by June 30 of this year. The Alaska Bar Rules governing admission to the bar would remain in effect because they have been adopted by the Alaska Supreme Court; the court would, no doubt, supplement the rules that already exist by establishing by rule a new board of governors, with the same or different composition as currently specified in AS 08.08. The legislature would continue to be free to enact legislation related to bar admission, but the Alaska Supreme Court would retain final authority to determine standards for admission to practice law in this state. The Supreme Court has this final authority even if the statutory board is extended by enactment of HB 120; in our opinion, no potential legislative power is gained or lost by either course of action other than, perhaps, the authority to determine the composition of the board. If the legislature chooses not to continue the board, it should clarify some sections in AS 08.08, particularly AS 08.08.136, 08.08.137, 08.08.205, 08.08.207, 08.08.210, and 08.08.230, so that their application remains clear upon cessation of the board.

The immediate legal effect of failure to extend the board is governed by AS 08.03.020. It provides that "One year after

the date of termination, a board not continued shall cease all activities." Since this board was scheduled for termination on June 30, 1989, it is already in its "wind-down year"; without an extension, it would cease to exist as a creature of statute on June 30, 1990.

Termination of the board would not mean automatic repeal of the Alaska Bar Rules. These rules govern admission to the practice of law. They would not be repealed upon cessation of the board because they are not rules adopted by the board. They were recommended by the board to the Alaska Supreme Court and have actually become court rules after adoption by order of the court.

The legislature has recognized that final authority over admission to the bar resides in the supreme court by its wording of AS 08.08.080, which reads, in pertinent part:

> Sec. 08.08.080. POWERS OF BOARD. (a) Except as may be otherwise provided in this chapter or the Alaska Bar Rules, the board may approve and recommend to the state supreme court rules
>
> (1) concerning admission, discipline, licensing, continuing legal education, and defining the practice of law;
>
> (2) providing for continuing legal education and for certification of a continuing legal education program;
>
> (3) establishing a program for the certification of attorneys as specialists. (Emphasis added.)

The legislature's recognition in AS 08.08.080 that the supreme court retains the power to approve rules relating to the admission of attorneys is well-founded. Our supreme court has interpreted our constitution in this manner for many years. For example, the court agreed to review a bar admission case in 1963 with the following language:

> We have taken jurisdiction pursuant to that provision of the Alaska Constitution vesting the judicial power of the state in this court and under the rule followed by the great majority of the states which holds that the supreme court of a state has the inherent and final power and authority to determine the standards for admission to the practice of law in that state.

> Application of Houston, 378 P.2d 644, 645 (Alaska 1963). (Footnote excluded.)

This stance by the court has been affirmed in Application of Brewer, 430 P.2d 150 (Alaska 1967), Application of Steelman, 448 P.2d 817 (Alaska 1969), Application of Stephenson, 511 P.2d 136 (Alaska 1973), and Application of Sullivan, 551 P.2d 531 (Alaska 1976).

Given the inherent authority of the court in this area, it is likely that if the statutory board ceases to exist, the court would adopt a rule establishing a similar (or different) board by court rule.

If the court establishes a board of governors by court rule, this does not mean that the legislature would lose the power to enact statutes affecting the practice of law in the state. The Houston court, when it first established that the court had inherent final authority in this area, also said

> In adopting the majority rule, we recognize that the legislature may enact laws governing admission to practice law but hold that it may not require this court to admit on standards other than those accepted or established by the court. Houston, at 645.

The Brewer court further refined this standard when it declared

> Whether or not we accept legislative standards or rules for admission to the practice of law depends upon whether they have a rational connection with one's fitness to practice law in Alaska. We will hold that there is such a rational connection if application of the legislative standards has a reasonable tendency to determine whether an applicant has a sufficient knowledge of law in Alaska to hold himself out to the public that he is adequately prepared to assume efficiently the obligations and responsibilities commensurate with representing persons in legal matters. Brewer, at 152.

Later, the Steelman court limited the Brewer holding as follows, when it stated:

> By [the Brewer] holding we did not intend to imply that legislative standards similar to and superimposed upon

> standards already established by the court would be accepted merely because they might have some relevancy to an applicant's fitness to practice law. The authority and responsibility for establishing clear and unambiguous standards for admission rests in this court and where the court has already established a standard it will not accept a legislative attempt to modify that standard which creates confusion and inconsistency without adding substantively to the standard. Steelman, at 819.

In a footnote, the Stephenson court explained this "confusion and inconsistency" standard further when it said

> Basically there are three situations that may arise: (1) A statute could conflict with the rules by imposing more stringent requirements for admission; (2) The statute could conflict with the rules by specifying a more lenient requirement; and (3) The statute could treat a subject not covered in the rule; i.e., if the rules did not define "practice of law", the statute could give such a definition. It is in this third category that the legislative standard may be acceptable to the court if it has a rational connection to the applicant's fitness to practice law. Stephenson, at footnote 14, p. 142.

Based on this interpretation of its authority, the supreme court, both in Steelman and in the later Stephenson case, chose to disregard certain legislative standards for admission to the practice of law and relied instead on the standards established in its court rules, the Alaska Bar Rules.

There continues to be controversy about the extent of the court's power to disregard a bar rule that it has, itself, adopted. This controversy is highlighted by the 3-2 decision in the Sullivan case. But, even in the Sullivan case, the majority and dissenting opinions both affirmed that, as between the legislature and the court, the court retained final authority over the standards for admission to practice law in the state.

In conclusion, whether or not HB 120 is enacted to continue the existence of the Board of Governors, the supreme court has final authority over standards for admission to the bar. The court has recognized the statutorily-created board as an administrative arm of the court, but the board's rules have

been advisory and ineffective until adopted as court rules by the supreme court. If the legislature discontinues the board, the legislature could still enact future bills relating to the practice of law. However, as is already the case now, the supreme court could exercise its inherent authority to either accept or disregard those legislative enactments, as it has done in the past.

If the legislature chooses not to continue the statutory board, it should clarify what is meant by the "Alaska Bar" in several sections of AS 08.08. For instance, the legislature would probably wish to retain AS 08.08.210 and 08.08.230 in some form, by referring to court rules perhaps. Similarly, you may wish to examine AS 08.08.136, 08.08.137, 08.08.205, and 08.08.207 to determine how they should read if there were no longer a statutory board and bar.

I hope you find this discussion helpful. Please let me know if I can provide you with further assistance on this matter.

TL:gc
G13/018

GILMORE & FELDMAN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501-2095

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(907) 279-4506
—
TELECOPIER
(907) 279-4507

November 9, 1989

The Honorable Jan Faiks
Alaska State Senator
3111 "C" Street
Anchorage, Alaska 99503

Dear Senator Faiks:

Thank you for the opportunity you accorded me to speak on behalf of the Alaska Bar Association at the recent hearing on our Sunset Bill. I was happy and more than a little surprised to observe the wide readership that apparently was enjoyed by my August column in the Bar Rag. My subsequent column really was much better, and I have enclosed a copy for you.

Thanks again for your help and consideration in connection with the Sunset Bill.

Very best regards,

Jeffrey M. Feldman

JMF:dw
Encl

Chris
FYI

303 K STREET
ANCHORAGE, ALASKA 99501
(907) 264-0618

Supreme Court
State of Alaska

November 30, 1989

Senator Jan Faiks, Chairman
Senate Judiciary Committee
3111 C Street, Suite 525
Anchorage, Alaska 99503

Dear Senator Faiks:

I have your letter of November 14, 1989, asking what the Supreme Court intends to do to regulate the practice of law in the event the bar association is sunsetted in 1990. Like all answers to hypothetical questions, my answer is best phrased in terms of probability because when and if the time to act arises unanticipated factors may exist which call for a different response.

My answer to your question is that the Supreme Court would probably create an integrated bar association by court rule. I think this would be necessary because at least two of the tasks presently performed by the bar association are essential to the justice system as we know it. These are the attorney admission and attorney discipline functions. Each year literally thousands of hours of volunteer attorney time is expended in administering these functions.

In addition to the essential work of admission and discipline, the bar association does other work of importance, including conducting continuing legal education programs, administering fee arbitration in disputes between lawyer and client, and assisting Alaska Legal Services through the Alaska Pro Bono project in providing counsel for the indigent. Again, this work is largely conducted by uncompensated attorney volunteers. We would expect that all of these functions would continue in a bar association integrated by court rule.

While the above is the answer to your question, my personal view is that the existing system is working well and there is no need for a structural change. In any case, we stand ready to work with you on this issue and will provide you with any information you may need to assist you in your deliberations.

Very truly yours,

Warren W. Matthews
Chief Justice

WWM/sbp

ALASKA BAR ASSOCIATION

RECEIVED
NOV 27 1989
JAN FAIKS
SENATE OFFICE

November 15, 1989

Senator Jan Faiks
Alaska State Senate
Pouch V
Juneau, AK 99811

RE: Alaska Bar Association Forms

Dear Senator Faiks,

Thank you again for the opportunity to address your committee concerning the Bar Association's sunset bill on November 9, 1989.

As I mentioned during my testimony, an earlier comment by another witness that the Bar Association had no grievance forms was unfortunately erroneous. In addition to the phamplets which I left with your aide, the Bar Association has a number of forms which we make available to persons with ethical complaints, fee arbitration matters or client security fund matters. I have enclosed a set of these forms for the committee's convenience.

If there is any further information which I can provide, please do not hestitate to contact me.

Sincerely,

ALASKA BAR ASSOCIATION

Stephen J. Van Goor

Stephen J. Van Goor
Bar Counsel

Enclosures

cc: Jeffrey M. Feldman, President
Deborah O'Regan, Executive Director

BC: 40

P.O. Box 100279 • Anchorage, Alaska 99510
907-272-7469 • FAX 907-272-2932

ATTORNEY GRIEVANCE FORM

FILE NO. _____
(ABA USE ONLY)

_____
ABA Date Rec'd Stamp

See attached instructions

1. This Attorney Grievance is made by:

_____
Complainant

_____
Address

_____
City State Zip Code

_____
Phone Number (Daytime)

concerning the following attorney:

_____
Attorney's Name

_____
Address

_____
City State Zip Code

_____
Phone Number (Office)

ALASKA BAR ASSOCIATION
BOX 100279
ANCHORAGE, ALASKA
99510
(907) 272-7469

2. I allege that this attorney has committed the following act(s) of misconduct:

STATEMENT*

I have reviewed this Attorney Grievance Form and the information I have provided is true and complete to the best of my knowledge.

DATE: _____

_____
Signature of Complainant

*Attach additional pages if needed

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ATTORNEY GRIEVANCE FORM

INSTRUCTIONS

---

1. Please type or print your statement in BLACK ink.
2. If there is any background information which would help us understand your grievance, please include it.
3. Please describe as precisely as you can what the attorney did or did not do which you believe was misconduct. Organize your statement with the dates(s) or time in chronological order and identify the place(s) where this activity took place. Use additional pages if needed.
4. Attach any letters, court papers, or other documents which may assist us in our investigation of your attorney grievance.
5. BE SURE TO SIGN YOUR NAME OF THE SECOND PAGE OF THE ATTORNEY GRIEVANCE FORM.
6. Please return the original Attorney Grievance Form and attachments to:

   Bar Counsel
   Alaska Bar Association
   P. O. Box 100279
   Anchorage, AK 99510

7. BE SURE TO KEEP A COPY of the Attorney Grievance Form and any attachments for yourself.
8. Under Alaska Bar Rule 22(b), complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of the investigation prior to the initiation of formal proceedings. It will be regarded as a contempt of court to breach this confidentiality in any way; however, it is not a breach of confidentiality for a person contacted to consult with an attorney.
9. Answers to common questions about the attorney discipline process can be found in the pamphlet entitled "Ethical Grievances Against Attorneys." If you have questions about the Attorney Grievance Form or the attorney discipline process, please contact the Bar Association at the address or phone number listed below.

ALASKA BAR ASSOCIATION
BOX 100279
ANCHORAGE, ALASKA
99510
(907) 272-7469

_____
Petitioner

_____
Mailing Address

_____
City State Zip Code

_____
Telephone Number (Daytime)

v.

_____
Attorney

_____
Mailing Address

_____
City State Zip Code

_____
Telephone Number (Office)

PETITION FOR ARBITRATION
OF FEE DISPUTE

FILE NO. FA_____
(ABA Use Only)

PLEASE FILL IN BLANKS OR CIRCLE APPROPRIATE WORDS:

* * * *

1. I request arbitration of a fee dispute between myself and the Attorney named above.

2. I hired the Attorney on _____.
(approximate date)

ALASKA BAR
ASSOCIATION
BOX 100279
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(907) 272-7469

3. I asked the Attorney to provide the following services:

4. The Attorney (DID) (DID NOT) tell me the fee to be charged for the services.

5. The fee arrangement was:

(a) $_____ per hour;

(b) $_____ lump sum fee;

(c) _____ (percent) % contingency fee;

(d) Other:

6. The fee arrangement (WAS) (WAS NOT) in writing. (If so, please attach a copy of the written agreement.)

7. I (DID) (DID NOT) receive billing statements from the Attorney. (If so, please attach copies of billing statements.)

8. I was charged the total amount of $_____.

9. I (DID) (DID NOT) pay money to the Attorney for services. I paid the Attorney a total of $_____. (Please attach copies of any receipts or cancelled checks.)

10. The Attorney (DOES) (DOES NOT) claim that I still owe him or her money for attorney fees. This amount is $_____.

11. I believe that I was overcharged in the amount of $_____.

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12. The reason I believe the fee was excessive is:

13. I have attached the following documents to this petition to support this claim: (Please list all documents attached in addition to the fee agreement or billing statements, if any.)

14. The following persons can support my claim:

NAME	He or She would say the following:

15. I (HAVE) (HAVE NOT) made efforts to resolve this dispute directly with the Attorney before filing this petition. (NOTE: THIS PETITION WILL BE RETURNED TO YOU UNLESS YOU HAVE MADE REASONABLE EFFORTS TO RESOLVE THIS DISPUTE WITH THE ATTORNEY.)

16. I have made the following efforts: (i.e. writing, phoning or meeting with the Attorney; please include dates if possible)

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17. The Attorney (HAS) (HAS NOT) sued me for the amount he or she claims I owe. The case number is _____. (See Alaska Bar Rule 39 for the procedure to stay a civil case until the outcome of a fee arbitration.)

a. I was served or received the Complaint in the civil action on (date)_____. (Please attach copy of the summons and complaint.)

b. At the time of service of the summons in the civil action, I (did) (did not) receive "Notice of Client's Right to Arbitrate."

18. I understand by filing this petition:

(1) that I agree to be bound by the determination of the hearing panel which considers this matter;

(2) that the determination may be reviewed by a court only for the reasons set forth in Alaska Statutes 09.43.120-170; and

(3) that the determination may be reduced to judgment. I have been furnished with a copy of Alaska Bar Rules 34 - 42 and Alaska Statutes 09.43.010-180.

19. I request that the hearing panel resolve this matter by granting me the following:

20. I have reviewed this petition, and it is true and complete to the best of my knowledge.

DATE: _____

_____
Signature of Petitioner

ID70:DFORM

ALASKA BAR ASSOCIATION
BOX 100279
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99510
(907) 272-7469

APPLICATION FOR REIMBURSEMENT FROM CLIENT SECURITY FUND

_____
Name of Applicant

_____
Address

_____
City, State, Zip

_____
Telephone

_____
Name of Attorney

_____
Address

_____
City, State, Zip

_____
Telephone

Under penalty of perjury, I make the following application for reimbursement from the Client Security Fund of the Alaska Bar Association:

I lost $_____ (amount) in money, property, or other things of value based on the dishonest conduct of the above-named attorney. This loss was incurred on _____

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BOX 100279
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99510
(907) 272-7469

(date or period of time); I discovered the loss on _____ (date). My loss was not covered by insurance, indemnity or bond, or if it was covered, the full extent of the coverage and the amount of payment was _____. (If the loss was covered, state the name and address of the insurance or bonding company: _____)

I have read Alaska Bar Rule 45(f), and I have a good faith basis for believing that the loss I have incurred meets all of the tests set out in that rule. The following statement explains the basis of my claim for reimbursement (use separate pages if necessary, and attach any supporting documents):

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(907) 272-7469

I have read Part V of the Alaska Bar Rules governing claims to the Client Security Fund and agree to be bound by them.

I assign to the Alaska Bar Association my rights, to the extent of any payment made to me from the Client Security Fund, against the named attorney, his personal representative, his estate or assigns.

THE ALASKA BAR ASSOCIATION HAS NO LEGAL RESPONSIBILITY FOR THE ACTS OF INDIVIDUAL LAWYERS. PAYMENTS FROM THE CLIENT SECURITY FUND SHALL BE MADE IN THE SOLE DISCRETION OF THE ALASKA BAR ASSOCIATION.

Date signed _____

_____
Signature of Applicant

SUBSCRIBED AND SWORN to before me this _____ day of _____, 1989.

(SEAL)

_____
Notary Public in and for Alaska
My Commission expires:
_____

ALASKA BAR ASSOCIATION
BOX 100279
ANCHORAGE, ALASKA
99510
(907) 272-7469

Alaska Court System
State of Alaska
OFFICE OF ADMINISTRATIVE DIRECTOR

JANALEE R. STRANDBERG
Staff Counsel

303 K Street
Anchorage, AK 99501
(907) 264-8228

January 16, 1990

Senator Patrick Rodey
Alaska State Legislature
P. O. Box V
Juneau, AK 99811

Re: Memo on inherent authority of the supreme court to regulate the practice of law

Dear Senator Rodey:

I have enclosed a memo on the general issue of the supreme court's inherent authority to regulate the practice of law.

Although I confined my research to other jurisdictions, the Alaska Supreme Court has also held that it has inherent power to discipline attorneys and to determine standards for admission to the practice of law in Alaska. See Application of Houston, 378 P2d 644 (Ak. 1963) and In re MacKay, 416 P2d 823 (Ak. 1964). A brief history of the court's actions is found in In re Stephenson, 511 P2d 136 (Ak. 1973).

Please let me know if I can provide further information on this topic.

Sincerely,

Jan Strandberg
Staff Counsel

Enclosure

cc: Arthur H. Snowden, II

Memorandum

Alaska Court System

TO: Arthur H. Snowden, II
Administrative Director

DATE: January 16, 1990

FROM: Jan Strandberg
Staff Counsel

SUBJECT: Power of Supreme Court to Regulate the Practice of Law in Alaska

You have asked for a memo delineating the authority of the supreme court to regulate the practice of law in Alaska.

The power of the supreme court to regulate the practice of law is "generally recognized as 'inherent' in the judicial branch in virtually all American states as an integral part of the tripartite system of government." Comment, Judicial Control over the Bar Versus Legislative Regulation of Governmental Ethics: The Pennsylvania Approach and a Proposed Alternative, 20 Duquesne Law Review 13 (1981). The United States Constitution and all state constitutions provide for the vesting of governmental power in separate and distinct departments. Art. IV, Sec. 1 of the Alaska Constitution vests the judicial power of the state in the supreme court, the superior court, and in the courts established by the legislature. The doctrine of separation of powers contemplates that each branch of government will perform distinct functions and not encroach on the domain of others. Thirty-six states further prohibit the separate branches of government from exercising each other's powers.

Inherent judicial powers are those not expressly granted by the constitution, but which arise from the "inherent right to accomplish all objects naturally within the orbit of that department, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution." 1 Andrews' American Law (2nd Ed.), Sec. 182, p. 221. With three exceptions, no express grant of authority is found in either state constitutions or the United States Constitution. Comment, Separation of Powers: Who Should Control the Bar?, 47 Journal of Urban Law 716 (1969).

"No court has held that the highest court of any state is without authority to unify its bar." Petition of Tennessee Bar Association, 532 SW2d 224, 299. This statement by the Supreme Court of Colorado represents the majority of jurisdictions:

> The judiciary has inherent and plenary powers with or without legislative enactment, to regulate and control the practice of law to the extent that it is reasonably necessary to the proper functioning of the judiciary.

Conway-Bogue Realty Investment Co. v. Denver Bar Assn., 312 P2d 998, 1002 (1957). See also Petition of Wright, 690 P2d 1134 (Wash. 1984), In re Integration of Bar of Hawaii, 432 P2d 887 (Ha. 1967). Nine states have integrated state bar associations by court rule in the exercise of the court's inherent power to control members of the bar and the practice of law. Petition to Tennessee Bar Association, supra.

Most courts that have considered statutes purporting to regulate the practice of law have viewed these statutes as "aids" to the judiciary. However, these courts generally agree that the statutes "will not be given the effect of circumscribing, restricting, or superseding the judicial prerogatives regarding the bar". 47 Journal of Urban Law, supra at 726.

Conclusion

The supreme court's authority to regulate the practice of law is derived from its constitutional power to control the judicial branch of government.

STATE OF ALASKA 1989 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version: HB 120
Publish Date: 1/27/89

Revision Date:
Title: An act extending the termination date of the Board of Governors ...
Sponsor: Judiciary Committee
Requestor: House Judiciary

Agency Affected: Alaska Court System
BRU: Trial Courts
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
FUNDING: (Thousands of Dollars)						
General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0
POSITIONS:						
Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 02/10/89

Approved by: Arthur H. Snowden, II, Administrative Director — Date: 02/10/89
Agency: Alaska Court System

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management & Budget
Impacted Agency(ies)
Senate Secretary

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 120
PUBLISH DATE: 1/27/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: "Extending termination date of Alaska Bar Association
Sponsor: House Judiciary
Requestor: House Judiciary

Agency Affected: Alaska Bar Association
BRU:
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL		0	0	0	0	0
REVENUE		0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME		0	0	0	0	0
TEMPORARY		0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

The Alaska Bar Association is wholly funded through dues paid by its members. No State funds are used for its operations.

Prepared by: Max Gruenberg
Phone: 465-4968
Division: Rep. Gruenberg, Co-Chair House Judiciary Committee
Date:

Approved by Commissioner:
Date:
Agency:

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

FROM THE PRESIDENT

Jeffrey Feldman

There are several issues currently brewing that are of importance to the Bar.

Mandatory CLE

The Juneau Bar Association submitted a resolution at the annual convention in June to establish a program of mandatory continuing legal education for all members of the Alaska Bar Association. The survey of the Bar recently completed by the Alaska Judicial Council concluded that slightly more than one half of the members of the Alaska Bar Association favored a program of mandatory CLE. This survey result was surprising. In years past, mandatory CLE proposals generally have been met with disfavor by the Bar.

The mandatory CLE proposal was the subject of vigorous debate at the annual business meeting at the convention. Those favoring the proposal pointed to the salutary effect it would have on the level of training, competence and the public's perception of the Bar. Proponents also contended that mandatory CLE would increase CLE attendance and, thereby, provide a basis for a stronger CLE program. Opponents of the proposal contended that a mandatory CLE program would work a hardship on non-urban practitioners (who are less accessible to CLE programs), that it was not productive to force any individual to become educated if he or she was not independently motivated to do so, and that a mandatory program was contrary to an Alaskan spirit of independent choice. Ultimately, those attending the business meeting voted to refer the matter to the Statutes, Rules and Bylaws committee of the Bar Association with directions that the committee prepare a proposed mandatory CLE rule for submissison to the membership for consideration and comment. After the period for comment has passed, the Board of Governors will determine whether the rule should be proposed to the Supreme Court for adoption. The final decision, as is always the case with Bar rules, will rest with the Supreme Court.

Northern Justice Conference

For the past year, the Board of Governors has been working with representatives of the state court judges, the federal court judges, the Ninth Circuit Court of Appeals and lawyers and judges in the western provinces of Canada to plan a conference of American, Soviet and Canadian lawyers and judges in Anchorage in June of 1990 to be called the Northern Justice Conference. The conference is intended to enable attorneys and judges in the geographical regions adjacent to Alaska to meet and discuss legal issues of mutual interest including issues relating to international trade, the adminisitration of justice in northern regions, problems associated with the legal treatment of native populations and criminal justice problems unique to the arctic and subarctic regions. The conference is planned to occur during the 1990 Alaska Bar Convention and the meeting of Alaska state court judges in Anchorage in June of 1990.

A planning meeting was held in Juneau in June and was attended by American, Soviet and Canadian representatives. The planning conference was productive and enabled the representatives of the three countries to begin the process of identifying and focusing both the topics and format of the discussions of programs that will occur. Chief Judge Alfred Goodwin of the Ninth Circuit Court of Appeals has shown considerable interest in the conference and has pledged his support. Chief Judge Goodwin has also extended an invitation to the conference to Chief Justice William Rehnquist and we are hopeful that the chief justice or another member of the United States Supreme Court will attend and participate.

The Board of Governors has not yet made a final decision on whether to go forward with the conference. The matter will be discussed at the Board of Governor's meeting on August 15. If you have questions about the 1990 conference please contact any of the members of the Board of Governors or Bob Wagstaff, who is the chairman of the 1990 planning committee. If you have opinions or thoughts about the conference please make them known so that they may be considered by the Board.

Sunset

Like other boards and commissions, the Alaska Bar Association is brought up for periodic sunset consideration and review by the Alaska legislature. Last year, a bill was submitted to extend the Bar Association for another three year period of time. The bill was held in committee by the chairman of the senate judiciary committee, Senator Jan Faiks, and the bill did not pass. As a result, the Bar Association is in the "wind up" phase and is scheduled to expire as a creature of legislative enactment as of July 1, 1990.

The failure of the legislature to pass legislation extending the Bar Association has trigigered a number of questions. For example it is not clear that legislative enactment is required. The Alaska state constitution refers in several places to the "organized bar" and some have argued that the Bar Association is actually a creature of a constitution and does not require legislative endorsement.

The Alaska Supreme Court has communicated its desire that the Bar Association continue in existence and has indicated that it will adopt a rule re-establishing the Alaska Bar Association in the event that the legislature fails to act during the upcoming session to extend the Bar Association by legislative enactment. The continuation of the Bar Association is a matter of importance to all lawyers. If the association were to be abandoned, matters relating to admissions and discipline could be assumed by the Divisions of Occupational Licensing of the Department of Commerce and the self-governance that is critical to an independent bar would be jeopardized. It does not appear that there is unanimity among Bar members on the issue of whether the association would be better off operating under a rule created by the supreme court or under legislative enactment. In discussing this issue with Bar members, I have received a range of thoughts and opinions about the perceived benefits of each course. Older attorneys, in particular, who recall the dispute between the Bar and the Supreme Court in 1964 disfavor the extension of the association by adoption of a supreme court rule. Members of the Board of Governors will be meeting with both the supreme court and members of the legislature to discuss the issue and chart an appropriate course. Your thoughts and opinions are solicited.

We look forward to a busy and productive year and encourage and solicit your help, support and criticism. Please send us your thoughts and comments on these issues, or on any other matter concerning the Association's activities.

The Alaska Bar Rag
Board of Governors
Alaska Bar Association
1989-1990

FROM THE PRESIDENT

Jeffrey Feldman

My column in the last edition of the Bar Rag triggered several complaints and letters. Some took me to task for some of the bar association's activities. Some found the column dull. And others disliked my picture. I have taken efforts to cure the objections to my photograph (which was, admittedly, pretty somber) and I thought I would share with you some of the incisive observations and letters I received from my brothers and sisters at the bar.

Dear Jeffrey,

I read your column in the last Bar Rag. How come it was so serious and lacking in humor? Lighten up, big guy. Show a little levity. This isn't brain surgery, you know. It's the Bar Rag.

N.G.
Anchorage

* * *

Dear Jeff,

What's with that picture of you in the Bar Rag? You look like you either just got out of 8 years in a Gulag or 4 hours of depositions at Hughes, Thorsness. I think you must really need a vacation.

S.W.
Anchorage

* * *

Dear Mr. President,

I don't understand all this concern about Sunset. What's the big deal? We get one a day. So what? Why is the Bar Association mucking around in things like sunrises and sunsets? How about putting the Bar to work on issues that are important,...like lowering bar dues for those of us out here on the street trying to scrape by and barely making it. Get on the stick.

E.T. Sanders
Anchorage

* * *

Dear Mr. Feldman,

I recently heard that the Bar is considering some program that would make it mandatory that we all See Ellie. Hey, I know Ellie. She lives in Wrangell. She's a nice person, but I am opposed to making it mandatory that we all have to go see her. Please give this some thought. I really think that this Mandatory See Ellie notion is a bad idea.

Buddy
Juneau

* * *

Dear Bar Nerd,

I think this idea to have Russians come to the bar convention is dumb. I think the Bar Association is dumb. I think you are dumb.

Respectfully yours,
R.S.
Fairbanks

* * *

I apppreciate the effort extended by those of you who expressed your thoughtful opinions in these letters. Having given the matter careful consideration, however, I have concluded that the president's column should be dedicated to substantive matters that are of importance to the bar and not be merely a forum for lame attempts at humor. So, having disposed of the complaints, let me move on to a quick look at what's happening with the bar.

Fee Arbitration Committee

Now that John Reese has ascended to the Superior Court bench, there is a vacancy on the Fee Arbitration Committee. Those seeking appointment to the committee must be familiar with the fee arbitration procedures, must be over 6 feet tall, must have a moustache and must be bald. A slight Oklahoma accent is also helpful. Those interested, contact Deborah O'Regan.

Media and The Law Seminar

Assistant District Attorney Bob Linton will be holding a seminar on the relationship between the media and the bar in October. Bob will discuss important areas such as how to effectively manage and manipulate the press. Sign-up forms are available at the bar office.

Bar-Bench Forum

As a follow-up to the Media and the Law Seminar, a special Bar-Bench Forum, focusing on improving relations between counsel and the court, will feature presentations by Superior Court Judge Karl Johnstone, defense attorney Phillip Weidner and Assistant District Attorney Elizabeth Sheley. Registration fee of $45 includes course materials and protective helmets and face guards.

1990 Northern Justice Conference

Bob ("Jr.") Wagstaff is looking for attorneys to serve as translators at the 1990 Conference with lawyers from the Soviet Union and Canada. Any bar members who speak Canadian and want to help out should contact Jr. Wagstaff.

Ninth Circuit News

The Ninth Circuit Court of Appeals has announced a revision in the way in which oral arguments will henceforth be scheduled. As has been the court's longstanding custom, counsel still will not be notified of the starting time of their argument. In addition, beginning next month, counsel will no longer even be notified of the specific day on which their case will be heard. Counsel will be expected to show up on Monday morning and wait out the week until their case is called. The court has rejected the suggestion that arguments be held during evening "night court" sessions and, therefore, counsel will be able to make good use of the sleeping bags they are encouraged to bring with them.

TVBA News

Finally, there was an error in the last Bar Rag's publication of the minutes of the Tanana Valley Bar Association. It was incorrectly reported that Dick Madson had noted, at a recent meeting attended by Mary Hughes, how nice Mary looked in basic black with appropriate pumps. Actually, at the meeting, Dick noted how nice Mary looked and asked her if he could borrow her black dress and patent pumps. Sorry for the error.

That's all the news from the front. Keep the cards and letters coming.

Article 1. The Alaska Bar Association.

Section
10. Creation of Alaska Bar Association
20. Members

Sec. 08.08.010. Creation of Alaska Bar Association. There is created an instrumentality of the state known as the Alaska Bar Association, referred to in this chapter as the Alaska Bar. The Alaska Bar shall have a common seal, may sue and be sued, and may, for the purpose of carrying into effect and promoting the objects of the Alaska Bar, enter into contracts and acquire, hold, encumber and dispose of real and personal property. (§ 2 ch 196 SLA 1955)

NOTES TO DECISIONS

The Alaska Bar Act is valid and must be complied with. In re Paul, 17 Alaska 360 (1957).

Applied in In re Alaska Supreme Court Orders No. 64, 68, 69, 70 & 71, Sup. Ct. Op. No. 265 (File No. 532), 395 P.2d 853 (1964).

Quoted in In re Petition of Moody, Sup. Ct. Op. No. 1065 (File No. 2035), 524 P.2d 1261 (1974).

Sec. 08.08.020. Members. (a) Every person licensed to practice law in the state shall become a member in the Alaska Bar. All active and inactive members in good standing as of September 14, 1976, shall be considered to be members.

(b) A person licensed to practice law in the state who, on September 14, 1976, is not enrolled on the membership rolls, shall be reinstated as a member only in accordance with the Alaska Bar Rules. (§ 4 ch 196 SLA 1955; am § 2 ch 181 SLA 1976)

Cross references. — For eligibility to take the bar examination, see AS 08.08.205.

NOTES TO DECISIONS

Quoted in In re Petition of Moody, Sup. Ct. Op. No. 1065 (File No. 2035), 524 P.2d 1261 (1974).

Article 2. The Board of Governors and Officers.

Section
30. Governance of the Alaska Bar
40. Board of Governors of the Alaska Bar
50. Selection of the board
60. Election of officers
70. Vacancies on the board
75. Meetings of the board
80. Powers of board
85. Annual report to legislature
90. Power of the bar to make or change bylaws and regulations
100. Administrative Procedure Act

Sec. 08.08.030. Governance of the Alaska Bar. The Alaska Bar is governed by the Board of Governors of the Alaska Bar. The board has the powers and duties conferred by this chapter and by the Alaska Bar Rules. Members of the board do not receive a salary. (§ 6 ch 196 SLA 1955; am § 3 ch 181 SLA 1976)

Sec. 08.08.040. Board of Governors of the Alaska Bar. (a) There is created a Board of Governors of the Alaska Bar to be elected under bylaws and regulations adopted by the board.

(b) The board consists of nine active members elected by the active members of the Alaska Bar and three persons appointed by the governor who are not attorneys. (§ 5 ch 196 SLA 1955; am § 1 ch 178 SLA 1960; am § 4 ch 181 SLA 1976; am § 2 ch 52 SLA 1981)

Sec. 08.08.050. Selection of the board. (a) Two members of the board shall be elected by and from among the members of the association resident in the first judicial district; four members of the board shall be elected by and from among the members of the association resident in the third judicial district; two members by and from among the members of the association resident in the combined area of the second and fourth judicial districts; and one member at large from the entire state. Three members who are not attorneys shall be appointed by the governor and are subject to confirmation by the legislature in joint session.

(b) Members of the Board of Governors shall hold office for three years and until their successors are elected or appointed and qualified.

(c) Four board members shall be selected on the following triennial rotation:

(1) in the first year, one member from the first judicial district, one member from the combined area of the second and fourth judicial districts, one member from the third judicial district, and one appointed member;

(2) in the second year, one member at large, two members from the third judicial district, and one appointed member; and

(3) in the third year, one member from the combined area of the second and fourth judicial districts, one member from the third judicial district, one member from the first judicial district, and one appointed member. (§ 5 ch 196 SLA 1955; am § 1 ch 178 SLA 1960; am §§ 1, 2 ch 9 SLA 1971; am §§ 3 — 5 ch 52 SLA 1981)

Sec. 08.08.060. Election of officers. The active members of the Alaska Bar who are in actual attendance at the association's annual convention shall elect by a majority vote during the convention the association's officers from the membership of the Board of Governors. (§ 5 ch 196 SLA 1955; am § 1 ch 178 SLA 1960)

Sec. 08.08.070. Vacancies on the board. (a) The board shall fill a vacancy in the elected membership of the board until the next annual election.

(b) The governor shall appoint a member to fill a vacancy in the appointed membership of the board for the unexpired term. (§ 5 ch 196 SLA 1955; am § 1 ch 178 SLA 1960; am § 6 ch 52 SLA 1981)

Sec. 08.08.075. Meetings of the board. AS 44.62.310 and 44.62.312 apply to the meetings of the board. Members of the Alaska Bar and the public shall be given 30 days' notice of meetings of the board except for emergency meetings. Meetings of the board shall take place in the state. (§ 7 ch 52 SLA 1981)

Sec. 08.08.080. Powers of board. (a) Except as may be otherwise provided in this chapter or the Alaska Bar Rules, the board may approve and recommend to the state supreme court rules

(1) concerning admission, discipline, licensing, continuing legal education, and defining the practice of law;

(2) providing for continuing legal education and for certification of a continuing legal education program;

(3) establishing a program for the certification of attorneys as specialists.

(b) The board may adopt bylaws and regulations consistent with this chapter and the Alaska Bar Rules

(1) concerning membership and the classification of membership in the Alaska Bar;

(2) fixing the annual membership fees;

(3) concerning annual and special meetings.

(c) Consistent with this chapter and the Alaska Bar Rules, the board may

(1) provide for employees of the Alaska Bar, the time, place and method of their selection, and their respective powers, duties, terms of office, and compensation;

(2) establish, collect, deposit, invest, and disburse membership and admission fees, penalties, and other funds;

(3) sue in the name of the Alaska Bar in a court of competent jurisdiction to enjoin a person from doing an act constituting a violation of this chapter;

(4) provide for all other matters affecting in any way the organization and functioning of the Alaska Bar. (§ 7 ch 196 SLA 1955; am §§ 2, 3 ch 178 SLA 1960; am § 5 ch 181 SLA 1976; am § 8 ch 52 SLA 1981)

Cross references. — See Alaska Bar Rules adopted by the Alaska supreme court.

NOTES TO DECISIONS

Final power and authority to determine standards for admission to the practice of law in Alaska resides in the supreme court, which has the inherent power to intercede at any time in admission matters. In re Luna, Sup. Ct. Op. No. 1503 (File No. 2789), 569 P.2d 789 (1977).

Practice of law not defined. — There is no rule defining the practice of law nor is there a statute defining the term except in the context of the requirements of active practice of law as a qualification for justices. In re Robson, Sup. Ct. Op. No. 1573 (File No. 3448), 575 P.2d 771 (1978). See also In re Babcock, Sup. Ct. Op. No. 178 (File No. 408), 387 P.2d 694 (1963), decided prior to the 1976 and 1981 amendments to this section.

For case construing board's power to define the practice of law prior to the 1976 amendment of this section, see In re Moody, Sup. Ct. Op. No. 1065 (File No. 2035), 524 P.2d 1261 (1974).

A superior court law clerk should be regarded as practicing law for the purposes of membership classification. In re Moody, Sup. Ct. Op. No. 1065 (File No. 2035), 524 P.2d 1261 (1974).

Activities constituted practice of law in violation of supreme court's suspension order. — Where a person held himself out as a lawyer; performed legal services and gave legal advice in setting up a prepaid legal service plan, completing and filing necessary forms; signed a letter of the type usually written by an attorney with "attorney at law" printed aside his name; permitted another person to refer to him in court as his attorney without making any clarifying comments and typed and edited a newsletter indicating his availability to serve as attorney for a union and its members, the cumulative effect of these activities leads to the inescapable conclusion that he was engaged in the practice of law in violation of the supreme court's order suspending him from practice. In re Robson, Sup. Ct. Op. No. 1573 (File No. 3448), 575 P.2d 771 (1978).

Board exceeded its authority in requiring a cash deposit before allowing an unsuccessful applicant to the Alaska Bar to exercise his right to discovery in an appeal to the board. In re Luna, Sup. Ct. Op. No. 1503 (File No. 2789), 569 P.2d 789 (1977).

Applied in Horowitz v. Alaska Bar Ass'n, Sup. Ct. Op. No. 2059 (File Nos. 4310, 4311), 609 P.2d 39 (1980).

Quoted in In re Houston, Sup. Ct. Op. No. 129 (File No. 325), 378 P.2d 644 (1963).

Cited in Skuse v. State, Ct. App. Op. No. 582 (File No. A-885), 714 P.2d 368 (1986).

Collateral references. — Procedural due process requirements in proceedings involving applications for admission to bar. 2 ALR3d 1266.

Criminal record as affecting applicant's moral character for purposes of admission to the bar. 88 ALR3d 192.

Violation of draft laws as affecting character for purposes of admission to the bar. 92 ALR3d 807.

Sec. 08.08.085. Annual report to legislature. (a) The Board of Governors shall report annually to the legislature on all matters concerning admissions, discipline of members, and disbarment proceedings, except for those matters defined as confidential by court rule.

(b) The annual report of the Board of Governors shall note

(1) each addition, modification, or repeal of a bylaw or regulation of the Alaska Bar;

(2) each addition, modification, or repeal of the Alaska Bar Rules proposed to or adopted by the state supreme court.

(c) The annual report of the Board of Governors may recommend to the legislature changes to this chapter and to the provisions of state law generally. (§ 6 ch 181 SLA 1976; am § 9 ch 52 SLA 1981)

Sec. 08.08.090. Power of the bar to make or change bylaws and regulations. Any bylaw or regulation adopted by the Board of Governors may be modified or rescinded, or a new bylaw or regulation may be adopted, by a vote of the active members of the association under bylaws and regulations to be adopted by the Board of Governors. (§ 7 ch 196 SLA 1955; am § 3 ch 168 SLA 1960; am § 7 ch 181 SLA 1976)

Sec. 08.08.100. Administrative Procedure Act. The bylaws and regulations adopted by the board or the members of the Alaska Bar under this chapter are not subject to the Administrative Procedure Act (AS 44.62). (§ 7 ch 196 SLA 1955; am § 3 ch 178 SLA 1960; am § 8 ch 181 SLA 1976)

NOTES TO DECISIONS

The language of this section exempts the bylaws and regulations themselves, not merely their method of adoption, from the Administrative Procedure Act, both by naming that act and by referring to the chapter number, AS 44.62. There is nothing in this language which hints that the exemption should be any narrower in scope. Horowitz v. Alaska Bar Ass'n, Sup. Ct. Op. No. 2059 (File Nos. 4310, 4311), 609 P.2d 39 (1980).

Stated in In re Simpson, Sup. Ct. Op. No. 2517 (File No. 5963), 645 P.2d 1223 (1982).

Secs. 08.08.110 — 08.08.120. Admission, suspension and disbarment; disqualification to hear disciplinary matters. [Repealed, § 11 ch 181 SLA 1976.]

Article 3. Admission to Alaska Bar.

Sec. 08.08.130. Eligibility for admission. [Repealed, § 11 ch 181 SLA 1976.]

Sec. 08.08.135. Study of law in office of practicing attorney. [Repealed, § 2 ch 135 SLA 1967; § 11 ch 181 SLA 1976.]

Sec. 08.08.136. Assistance from law enforcement officers. State and local law enforcement officers shall assist the Board of Governors in the processing of fingerprints of applicants seeking admission to the Alaska Bar Association and shall release the resulting information to the association. (§ 1 ch 8 SLA 1985)

Sec. 08.08.137. Fingerprints. The Board of Governors shall require an applicant for admission to be fingerprinted. The fingerprints shall be used to determine whether the applicant has a record of criminal convictions in this state or another jurisdiction. The Board of Governors may use the information obtained from the fingerprinting only in its official determination of the character and fitness of the applicant for admission to the Alaska Bar Association. (§ 1 ch 8 SLA 1985)

Cross references. — For effect of this section on Alaska Bar Rules 3 and 5, see § 2, ch. 8, SLA 1985 in the Temporary and Special Acts.

Secs. 08.08.140 — 08.08.200. Out-of-state attorneys; fee provisions; procedure for admission. [Repealed, § 11 ch 181 SLA 1976.]

Sec. 08.08.201. Administration of bar examination. (a) The Board of Governors shall administer the bar examination under the Alaska Bar Rules.

(b) The Board of Governors may contract with another state or a testing organization for the preparation and grading of a portion of the Alaska Bar examination.

(c) The Board of Governors shall contract with persons experienced in the administration of bar examinations for advice on the preparation and grading of the portion of the bar examination prepared under the direction of the board.

(d) The Board of Governors shall establish and maintain standards for experience and training of persons who administer the portion of the bar examination prepared under the direction of the board. (§ 10 ch 52 SLA 1981)

NOTES TO DECISIONS

Access to multistate bar examination. — **The Alaska Supreme Court interpreted Alaska Bar Rule 4(5) to allow a failing applicant access to multistate bar examination questions and answers and to the applicant's own answers. In re Obermeyer, Sup. Ct. Op. No. 3040 (File No. S-950), 717 P.2d 382 (1986).**

Challenge of examination administration and grading. — **With the exception of the argument that he was entitled to a representative sampling of overall passing and failing exams and to an opportunity to review multistate bar examination questions and answers, one who had failed the Alaska bar examination stated criticisms of the administration of the exam that amounted to no more than disputes with the Alaska Bar Association about the ideal way to handle the bar exam; they did not establish violations of equal protection or due process rights. In re Obermeyer, Sup. Ct. Op. No. 3040 (File No. S-950), 717 P.2d 382 (1986).**

Access to sampling of overall passing and failing exams. — An applicant who fails the Alaska bar examination is entitled to a representative sampling of the examination papers of other applicants who received overall passing and overall failing grades, not merely benchmark answers. In re Obermeyer, Sup. Ct. Op. No. 3040 (File No. S-950), 717 P.2d 382 (1986).

Sec. 08.08.205. Eligibility to take bar examination. Applicants who have not graduated from an accredited law school but are otherwise qualified may take the bar examination if they have completed a clerkship in the manner prescribed by AS 08.08.207. (§ 12 ch 181 SLA 1976)

Cross references. — For admission to practice law, see Alaska Bar Rule 5, adopted by the Alaska supreme court.

NOTES TO DECISIONS

Thirty-day residency requirement unconstitutional. — The 30-day residency requirement of Alaska Bar Rule 2(1)(e) violates the privileges and immunities clause of U.S. Const., art. IV, § 2, since it is a form of prohibited economic protectionism. Shelby v. Alaska Bar Ass'n, Sup. Ct. Op. No. 2191 (File No. 5148), 620 P.2d 640 (1980).

Collateral references. — Court review of bar examiners' decision on applicant's examination. 39 ALR3d 719.

Sec. 08.08.207. Law clerks. (a) Every person who desires subsequently to qualify as a general applicant for admission to the Alaska Bar without having been graduated from an approved law school shall register as a law clerk as provided by this section. The person shall present satisfactory proof that the person has been granted a bachelor's degree, other than bachelor of laws, by a college or university offering the degree on the basis of a four-year course of study and has successfully completed the first year of studies at a law school.

(b) The applicant shall obtain regular and full-time employment as a law clerk in the office of a judge of a court of record or an attorney or firm of attorneys licensed to practice law in Alaska and engaged in the general practice of law. The person by whom the applicant is employed, or, if the applicant is employed by a firm, the person under whose direction the applicant is to study, must have been admitted to practice law in this state for at least five years at the time the application for registration is filed, and be otherwise eligible to act as tutor. Before the commencement of the study of law under this section, the applicant shall file with the university an application to register as a law clerk. The application shall be made on a form to be provided by the university and shall require answers to interrogatories the university may determine from time to time to be relevant to a consider-

ation of the application. Proof of a fact stated in the application may be required by the university. If the applicant fails or refuses to furnish any information or proof or answer any interrogatory required by the application, or independently by the university, in a manner satisfactory to the university, the application may be denied.

(c) Accompanying the application there must be submitted a statement under oath of the person by whom the applicant is employed as a law clerk, or, if the applicant is employed by a firm, of the person under whose direction the applicant is to study, certifying to the fact of the employment and that that person will act as tutor for the applicant and will faithfully instruct the applicant in the branches of the law prescribed by the course of study adopted by the university. A person is not eligible to act as tutor while disciplinary proceedings (following the service of a formal complaint) are pending against the person, or if the person has ever been censured, reprimanded, suspended or disbarred. If a registered law clerk finds it necessary to change tutors during the period of study, a new application for registration as a law clerk is required and such credit given for study under a prior tutor as the university may determine.

(d) A law clerk whose registration has been approved by the university must pursue a course of study for three calendar years of at least 44 weeks each year, with a minimum each week of 35 hours of study (it being understood that the time actually spent in the performance of the duties of law clerk is to be considered as time spent in the study of law). The tutor must give personal direction regularly and frequently to the clerk, must examine the law clerk at least once a month on the work done in the previous month, and must certify monthly as to compliance with the requirements of this subsection and (e) and (g) of this section.

(e) The examinations shall be written and not oral, and shall be answered by the clerk without research or assistance during the examination. The monthly certificate of compliance submitted by the tutor shall be accompanied by the originals of all written examinations and answers given during the period reported. If the certificates, together with the required attachments, are not filed timely with the university, no credit may be given for any period of the default.

(f) If a registered law clerk does not furnish evidence of completion of law studies within a period of six years after registration, the university may cancel the registration.

(g) The course of study to be pursued by a registered law clerk shall cover subjects, text books, case books, and other material the university may from time to time require.

(h) A registered law clerk who has attended either an approved or a nonapproved law school may, in the discretion of the university, receive credit for work done and obtain advanced standing. In no event

will credit be given for fractional parts of semesters or terms, or for correspondence school work.

(i) In this section

(1) "law school" means a law school accredited, approved or meeting the standards of the Council of Legal Education of the American Bar Association or the Association of American Law Schools; or a school in Alaska offering a course of study which the university approves as the equivalent to a year's study in a law school under this section;

(2) "university" means the University of Alaska. (§ 12 ch 181 SLA 1976; am §§ 1 — 8 ch 119 SLA 1978; am § 4 ch 67 SLA 1983)

Cross references. — For effect of the 1978 amendment on Alaska Bar Rule 2, see § 9, ch. 119, SLA 1978 in the Temporary and Special Acts.

Effect of amendments. — The 1983 amendment in subsection (a) in the second sentence deleted "must be a bona fide resident of the state and" following "The person" and made other, minor punctuation changes.

NOTES TO DECISIONS

Quoted in In re Urie, Sup. Ct. Op. No. 2172 (File Nos. 4392, 4526, 4605), 617 P.2d 505 (1980).

Collateral references. — Activities of law clerks as illegal practice of law. 13 ALR3d 1137.

Article 4. Unlawful Acts.

Section
210. Who may practice law
230. Unlawful practice a misdemeanor

Sec. 08.08.210. Who may practice law. (a) A person may not engage in the practice of law in the state unless the person is licensed to practice law in Alaska and is an active member of the Alaska Bar. A member of the bar in good standing in another jurisdiction may appear in the courts of the state under the rules the supreme court may adopt.

(b) The practice of law shall be defined in the Alaska Bar Rules.

(c) This section and AS 08.08.230 do not apply to the practice of law for the legislature by a person employed by or under contract with the legislature until the results are released of the third Alaska Bar examination following that person's employment.

(d) Employees of the Department of Law whose activities would constitute the practice of law under this chapter and under Alaska Bar Rules are required to obtain a license to practice law in Alaska, no later than 10 months following the commencement of their employment. (§ 12 ch 196 SLA 1955; am § 9 ch 181 SLA 1976; am § 5 ch 59 SLA 1982)

Cross references. — For provisions relating to practice in state courts by attorneys from other jurisdictions, see Rule 81, Alaska Rules of Civil Procedure.

NOTES TO DECISIONS

Practice of law not defined. — There is no rule defining the practice of law nor is there a statute defining the term except in the context of the requirements of active practice of law as a qualification for justices. In re Robson, Sup. Ct. Op. No. 1573 (File No. 3448), 575 P.2d 771 (1978).

Applied in Skuse v. State, Ct. App. Op. No. 582 (File No. A-885), 714 P.2d 368 (1986).

Quoted in In re Houston, Sup. Ct. Op. No. 129 (File No. 325), 378 P.2d 644 (1963); In re Moody, Sup. Ct. Op. No. 1065 (File No. 2035), 524 P.2d 1261 (1974).

Stated in Noll v. Alaska Bar Ass'n, Sup. Ct. Op. No. 2546 (File No. 6782), 649 P.2d 241 (1982).

Collateral references. — 7 Am. Jur. 2d, Attorneys at Law, §§ 12-24.

7 C.J.S., Attorney and Client, §§ 19-24.

Validity and construction of statutes or rules conditioning right to practice law upon residents or citizenship. 53 ALR3d 1163.

Pardon as restoring public office or license or eligibility therefor. 58 ALR3d 1191.

Attorney's right to appear pro hac vice in state court. 20 ALR4th 855.

Right of attorney to act or become licensed to act as real estate broker. 23 ALR4th 230.

Sec. 08.08.220. Disciplinary proceedings and review. [Repealed, § 5 ch 94 SLA 1980.]

NOTES TO DECISIONS

Construction of former law. — For cases construing statutes, see United States v. Stringer, 15 Alaska 183, 124 F. Supp. 705 (D. Alas. 1954), rev'd on other grounds, 16 Alaska 305, 233 F.2d 947 (9th Cir. 1956); In re Paul, 17 Alaska 360 (1957); In re Mackay, Sup. Ct. Op. No. 279 (File No. ABA 8), 416 P.2d 823 (1965), cert. denied, 384 U.S. 1003, 86 S. Ct. 1907, 16 L. Ed. 2d 1016, rehearing denied, 385 U.S. 890, 87 S. Ct. 11, 17 L. Ed. 2d 121 (1966); In re Mackay, Sup. Ct. Op. No. 596 (File No. ABA 8), 464 P.2d 304 (1970); In re Crosby, Sup. Ct. Op. No. 782 (File No. 1567), 495 P.2d 1270 (1972); In re Moody, Sup. Ct. Op. No. 1065 (File No. 2035), 524 P.2d 1261 (1974).

Sec. 08.08.230. Unlawful practice a misdemeanor. (a) Any person not an active member of the Alaska Bar and not licensed to practice law in Alaska who engages in the practice of law or holds out as entitled to engage in the practice of law as that term is defined in the Alaska Bar Rules, or an active member of the Alaska Bar who wilfully employs such a person knowing that the person is engaging in the practice of law or holding out as entitled to so engage is guilty of a class A misdemeanor.

(b) This section does not prohibit the use of paralegal personnel as defined by rules of the Alaska supreme court. (§ 13 ch 196 SLA 1955; am § 10 ch 181 SLA 1976; am § 11 ch 52 SLA 1981)

Section 6 - Approval or Rejection.

Each supreme court justice and superior court judge shall, in the manner provided by law, be subject to approval or rejection on a nonpartisan ballot at the first general election held more than three years after his appointment. Thereafter, each supreme court justice shall be subject to approval or rejection in a like manner every tenth year, and each superior court judge, every sixth year.

Section 7 - Vacancy.

The office of any supreme court justice or superior court judge becomes vacant ninety days after the election at which he is rejected by a majority of those voting on the question, or for which he fails to file his declaration of candidacy to succeed himself.

* Section 8 - Judicial Council.

The judicial council shall consist of seven members. Three attorney members shall be appointed for six-year terms by the governing body of the organized state bar. Three non-attorney members shall be appointed for six-year terms by the governor subject to confirmation by a majority of the members of the legislature in joint session. Vacancies shall be filled for the unexpired term in like manner. Appointments shall be made with due consideration to area representation and without regard to political affiliation. The chief justice of the supreme court shall be ex-officio the seventh member and chairman of the judicial council. No member of the judicial council, except the chief justice, may hold any other office or position of profit under the United States or the State. The judicial council shall act by concurrence of four or more members and according to rules which it adopts.

Section 9 - Additional Duties.

The judicial council shall conduct studies for improvement of the administration of justice, and make reports and recommendations to the supreme court and to the legislature at intervals of not more than two years. The judicial council shall perform other duties assigned by law.

* Section 10 - Commission on Judicial Conduct.

The Commission on Judicial Conduct shall consist of nine members, as follows: three persons who are justices or judges of state courts, elected by the justices and judges of state courts; three members who have practiced law in this state for ten years, appointed by the governor from

nominations made by the governing body of the organized bar and subject to confirmation by a majority of the members of the legislature in joint session; and three persons who are not judges, retired judges, or members of the state bar, appointed by the governor and subject to confirmation by a majority of the members of the legislature in joint session. In addition to being subject to impeachment under Section 12 of this article, a justice or judge may be disqualified from acting as such and may be suspended, removed from office; retired, or censured by the supreme court upon the recommendation of the commission. The powers and duties of the commission and the basis for judicial disqualification shall be established by law. [Amendment approved August 27, 1968 - Effective October 11, 1968; Amendment approved November 2, 1982 - Effective December 24, 1982]

Section 11 - Retirement.

Justices and judges shall be retired at the age of seventy except as provided in this article. The basis and amount of retirement pay shall be prescribed by law. Retired judges shall render no further service on the bench except for special assignments as provided by court rule.

Section 12 - Impeachment.

Impeachment of any justice or judge for malfeasance or misfeasance in the performance of his official duties shall be according to procedure prescribed for civil officers.

Section 13 - Compensation.

Justices, judges, and members of the judicial council and the Commission on Judicial Qualifications shall receive compensation as prescribed by law. Compensation of justices and judges shall not be diminished during their terms of office, unless by general law applying to all salaried officers of the State. [Amendment approved August 27, 1968 - Effective October 11, 1968]

Section 14 - Restrictions.

Supreme court justices and superior court judges while holding office may not practice law, hold office in a political party, or hold any other office or position of profit under the United States, the State, or its political subdivisions. Any supreme court justice or superior court judge filing for another elective public office forfeits his judicial position.

A PERFORMANCE REPORT ON THE BOARD OF GOVERNORS OF THE ALASKA BAR ASSOCIATION

February 3, 1989

Audit Control Number

41-1352-89-R

Chief Justice, Alaska Supreme Court	Warren W. Matthews

Alaska Bar Association

Executive Director	Deborah O'Regan

Board of Governors

President	Larry R. Weeks
President-Elect	Jeffrey M. Feldman
Vice President	Ardith Lynch
Secretary	Andonia Harrison
Treasurer	Lew M. Williams
Member	Daniel R. Cooper, Jr.
Member	Kenneth P. Eggers
Member	Elizabeth Kennedy
Member	Susan C. Orlansky
Member	Sandra Stringer
Member	Michael A. Thompson
Member	Alex Young

STATE OF ALASKA

THE LEGISLATURE

BUDGET AND AUDIT COMMITTEE

AUDIT DIVISION
P.O. BOX W
JUNEAU, ALASKA 99811-3300

February 3, 1989

Members of the Legislative Budget
and Audit Committee:

In accordance with the provisions of Titles 24 and 44 of the Alaska Statutes (sunset legislation), the attached report is submitted for your review.

A PERFORMANCE REPORT ON THE BOARD OF GOVERNORS OF THE ALASKA BAR ASSOCIATION

February 3, 1989

Audit Control Number

41-1352-89-R

The purpose of this audit is to examine the activities of the Board of Governors of the Alaska Bar Association (ABA, the Bar, or the Association) to determine if there is a demonstrated public need for its continued existence, and if the Board has been operating in an efficient and effective manner.

The audit was conducted in accordance with generally accepted governmental performance auditing standards. Audit scope and methodology will be discussed in the Report Objectives, Scope, and Methodology section of this report. Audit results may be found in the Report Conclusion, Findings and Recommendations, and Analysis of Public Need sections of this report.

Randy S. Welker, CPA
Legislative Auditor
Division of Legislative Audit

TABLE OF CONTENTS

REPORT OBJECTIVES, SCOPE, AND METHODOLOGY

In accordance with the intent of Titles 24 and 44 of the Alaska Statutes (sunset legislation), we have examined the activities of the Board of Governors of the Alaska Bar Association to determine if there is a demonstrated public need for its continued existence, and if the Board has been operating in an efficient and effective manner.

Legislative intent requires consideration of this report during the legislative oversight hearings to determine whether the Board of Governors of the Alaska Bar Association should be reestablished. The law now specifies that the Board will terminate June 30, 1989 and have one year from that date to conclude its affairs.

The policy and audit approach utilized by the Division of Legislative Audit for performance reports can best be described as "audit by exception." This methodology focuses audit effort on areas of an auditee's operation that have been identified by a preliminary survey as having a high degree of probability for needing improvements.

Therefore, by design, finite audit resources are used to identify where and how improvement can be made and little time is devoted to reviewing well-run operations or programs. Consequently, this report highlights those areas needing improvement and does not emphasize those operations and programs that are properly functioning.

Discussion of the objectives, scope, and methodology of our review follows.

Objectives

The Alaska Bar Association was created in 1955 as an instrumentality of the State to ensure that only qualified members of the legal profession of good moral character are allowed to practice in this State. The primary objective of this audit, therefore, is to determine whether that need for protection of the public continues to exist today.

The secondary objective is to review the major processes instituted by the Alaska Bar, namely the examination of prospective members, admission, and discipline procedures, for effectiveness in meeting the public need. The tertiary objective is to evaluate those processes in particular, and Bar operations in general, for economy and efficiency of operation.

Scope and Methodology

Recent state and national trends in the legal profession (i.e., increases/decreases in numbers of: students attending law school, applicants for admission to practice, cases litigated, etc.) were analyzed to determine public need. Resources utilized to determine these trends included statistical information obtained from the Alaska Bar Association, the Alaska Court System, the American Bar Association, and assorted trade publications and HALT (an Organization of Americans for Legal Reform).

The review of Alaska Bar Association operations included all activities for calendar years 1986, 1987, and 1988. Examination and admission statistics (i.e., pass/fail rates, required passing scores, multi-state bar exam (MBE) scores, etc.) were obtained, reviewed, and compared with national statistics for consistency. Individual applicant records were reviewed for compliance with established Bar rules and procedures, accuracy of reporting, and timeliness of processing.

The attorney discipline process was analyzed for conformance with standards recommended by the American Bar Association and compared with procedures adopted by other states in the Pacific Northwest. A sample of individual discipline files were reviewed for compliance with established Bar rules and procedures, and timeliness. Current discipline statistics produced by the Alaska Bar were reviewed against historical data to determine trends in caseload and processing time.

Activities of the Board of Governors were examined through a review of meeting minutes and discussion with Association staff. Board composition and appointments were also reviewed for conformance with statutory requirements.

ORGANIZATION AND FUNCTION

The practice of law in the State of Alaska is regulated by the Board of Governors of the Alaska Bar Association. The Board consists of twelve members; nine attorneys elected by the active membership of the Association, and three non-attorney, public members appointed by the Governor and confirmed by the legislature in joint session.

The powers and duties of the Board are conferred by the Alaska Integrated Bar Act (AS 08.08) and the Alaska Bar Rules promulgated by the Supreme Court of Alaska.

The two primary functions of the Alaska Bar Association are the admission and discipline of its members. To accomplish these and other functions, the Association has a 1989 operating budget of $1,277,501. Funding is provided primarily by membership dues ($310 per year), admission fees, lawyer referral fees, continuing legal education, and interest income.

The Association's office in located in Anchorage and is staffed with twelve full-time employees and one temporary part-time employee.

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REPORT CONCLUSION

This review contains policy issues raised as a result of our evaluation of the Board of Governors of the Alaska Bar Association. The final policy decisions affecting ABA are not within the scope of this report, but require legislative consideration. In debating these issues, the oversight committees should take into consideration the findings and recommendations and other information presented in this report so the potential impact of policy changes can be evaluated.

Report Conclusion

In our opinion, the Board of Governors of the Alaska Bar Association should be reestablished. Since the first three attorneys were admitted to the practice of law in Alaska in 1884 membership has grown to the current level of 2,707. In addition to the number of applicants seeking admission to practice, court statistics indicate increasing numbers of lawsuits being filed annually. It would appear that more members of the general public are interacting with the legal profession and that financial resources both expended on and resulting from those interactions have greatly increased. These factors result in a greater potential for harm to the general public, thereby indicating a need for continuing governance of the profession.

The public interest requires that the public be secure in its expectation that those who are admitted to the bar are worthy of the trust and confidence clients may reasonably place in their attorneys. The Board of Governors provides this protection by reasonably assuring that persons licensed to practice law are qualified and by assuring that those licensed act in a competent and ethical manner through a sophisticated complaint investigation process.

Furthermore, nothing came to our attention during our review that showed the public's best interest would be better served by any different regulatory method.

Overall, it is our opinion that the Board operates in an effective and economical manner. However, we have made recommendations which, if implemented, will improve the efficiency and effectiveness of the Board's operations (see the Findings and Recommendations section of this report).

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FINDINGS AND RECOMMENDATIONS

Recommendation No. 1

The Board of Governors of the Alaska Bar Association should comply with Alaska Bar Rules governing appropriate sanctions in attorney discipline cases and public access to disciplinary proceedings.

In January 1988 the Board of Governors acting as the formal disciplinary board of the Bar violated several Alaska Bar Rules governing disciplinary enforcement. In concluding a disciplinary matter before them which had been heard in formal public hearing, the Board imposed a sanction of private reprimand for a violation of Alaska Bar Rule 15(4) (failure to respond to a grievance).

The disciplinary rules which the Board is currently operating under became effective January 1985. These rules were changed upon recommendation of the American Bar Association evaluation of Alaska procedures. Pertinent changes included Rule 21 which states that after the filing of a petition for formal hearing, hearings held before either a hearing committee or the Board will be open to the public. Under the new Rule 16, private reprimands are no longer possible at the Board level except in cases where the respondent and discipline counsel agree by stipulation to that sanction. Since the stipulation precludes the need for a petition for formal hearing, the proceeding remains confidential.

Subsequent to the Board's decision which was reaffirmed after discipline counsel's appeal, proposed changes to Bar Rule 16 allowing private reprimand by the disciplinary board were forwarded to the Supreme Court. Those proposed changes were recently referred back to the Association for reconsideration with the following comment. "It seems somewhat incongruous to have the hearing process open to the public but to allow a private reprimand following such a hearing."

This Board action was indeed incongruous and has generated confusion among Association staff as to public access to the outcome of this proceeding. Since private reprimands are maintained as confidential documents which the public does not have access to, it appears the intent of the Board was to seal these records as confidential after they became public under current Bar rules.

We recommend that in all future proceedings the Board of Governors strictly conform with adopted Rules of Court applicable to disciplinary proceedings.

Recommendation No. 2

The Board of Governors of the Alaska Bar Association should recommend a proposed change to Alaska Bar Rules clarifying and limiting the Board's authority to engage in lobbying and other political activities.

The Alaska Bar Association is a mandatory bar in that in order to practice law in Alaska a lawyer must be a member in good standing of the Association. This requirement makes it difficult for an attorney to disassociate himself/herself from a political stance adopted by the Board of Governors or the Association. In light of this fact, the appropriateness of lobbying and other political activities by the Board or Association is questioned.

Some of the actions taken by the Board and Association which would be considered questionable include a decision to lobby in support of the continuation of the Alaska Women's Commission and a resolution to cease all business dealings with the Republic of South Africa and Libya in protest of current political conditions.

The lobbying issue has been debated nationally by other mandatory bar associations and has been the subject of court proceedings in other states. The Wisconsin Supreme Court has responded to the concern by permitting attorneys who object to the bar's legislative activities to reduce their membership dues by a certain percentage. The Washington State Supreme Court recently took a more direct approach by amending general Bar Rule 12 governing Washington State Bar Association general purposes to include the following.

> (c) Activities Not Authorized. Among the specific actions which this rule and these Purposes do not authorize are:
>
> (1) Taking positions on issues concerning the politics or social positions of foreign nations;
>
> (2) Taking positions on political or social issues which do not relate to or affect the practice of law or the administration of justice;
>
> (3) Supporting or opposing, in an election, candidates for public office.

We recommend the Board of Governors propose a similar amendment to Alaska's bar rules to clarify and limit activities of the Board to those appropriate to a mandatory bar.

Recommendation No. 3

The Board of Governors of the Alaska Bar Association should take prompt action to reduce both the number of backlogged disciplinary investigation cases and the length of time it takes to bring an investigation to a conclusion.

At the time of our last audit (October 31, 1984) the Alaska Bar Association had 41 cases pending disciplinary or other proceedings and an additional 165 cases under investigation. As of December 31, 1988, the Alaska Bar Association's discipline section had 18 cases pending disciplinary or other proceedings and an additional 160 cases under investigation. Although the actual number of open cases has decreased slightly, the average number of days open has increased.

An analysis of the status and length of time these cases have been open showed the following.

	------1984------		------1988------	
Status	Cases	Avg. Days Open	Cases	Avg. Days Open
Pending Proceedings:				
Pending Supreme Court	5	636	5	1,082
Pending Disc. Board	6	425	2	787
Pending Hearing Comm.	10	720	4	771
Pending Admonition	3	422	5	618
Pending Fee Arb.	12	291	1	985
Pending Conciliation	5	332	1	219
Total	41	471	18	769
Under Investigation:				
Investigator on Case	11	606	--	--
Special Counsel	1	1,662	1	871
Under Review (Prelim.)	113	188	25	85
Investigation (Formal)	40	342	134	375
Total	165	261	160	333

In addition, an analysis of cases closed during 1986, 1987, and 1988 was made. The information presented was produced by Association staff and includes grievances not accepted, closed by admonition, closed by reprimand, closed by suspension, closed by disbarment, and dismissed. The overall processing time represents the average time from the date a grievance is filed until either a determination is made to decline an investigation or the case is completed. The results follow.

Analysis of Closed Cases

Year	Number of Cases Closed	Overall Processing Time (Avg. Days Open)
1986	251	207
1987	277	169
1988	244	187

Significant improvement was noted in reduction of case backlog during 1985, 1986, and 1987. During 1988, however, the backlog began to return to previous levels.

We encourage the Board to take prompt action to reduce the case backlog. In addition, we recommend that during the Board's deliberations of available options, consideration should be given to the length of time taken to conclude cases. It is in the best interest of ABA, the complainant, and the attorneys against whom the grievances were filed to take timely action in closing cases. The deterioration in processing time on open cases reflects, in part, the increase in complexity of cases coming before the Bar. However, a review of discipline files did reveal significant "dead" time in several proceedings. In one proceeding the dead time caused the investigation trail to become cold and resulted in the case being dismissed.

Therefore, we recommend that the Board's actions not only address the immediate need to reduce the case backlog, but also address the long-term staffing needs of the discipline section.

Recommendation No. 4

The Alaska Bar Association should comply with the public notice requirements of AS 08.08.075.

Chapter 52, SLA 1981 amended the Alaska Integrated Bar Act (AS 08.08) to bring meetings of the Board of Governors under the public meeting statutes, AS 44.62.310 and .312. More specifically, the Bar Act was amended to require that the public shall be given 30 days notice of meetings of the Board, except for emergency meetings.

Legislative Audit's 1984 audit of the Bar found that ABA had not publicly advertised meetings of the Board. Our current review found that the Board has properly noticed all face-to-face meetings of the Board, but has not publicly advertised teleconferenced meetings. A review of the minutes of these meetings demonstrated that these meetings were for the purpose of carrying out Board business which, in some cases, included discussion and voting on resolutions before that body.

We recommend that the Alaska Bar Association publicly advertise all meetings of the Board in conformance with applicable statutes and regulations.

Recommendation No. 5

The Alaska Bar Association should elect members of the Board of Governors in conformance with statutory guidelines.

AS 08.08.040-050 requires that members elected to the Board of Governors serve three-year terms subject to a specified triennial rotation. The purpose of this requirement is to maintain a level of experience on the Board which would be lost were a majority of members to rotate on any given year.

In recent years the Board of Governors has had several mid-term resignations. Statute allows the Board to appoint a replacement until the next annual election. The current rotation problem has arisen by election of a new Board member for a full three-year term rather than for the balance of the existing term.

We recommend that at the next annual meeting of the Alaska Bar Association those terms currently out of rotation be adjusted and, in the future, members elected to replace a resigning member be elected for the balance of the existing term.

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ANALYSIS OF PUBLIC NEED

Limited Analysis

The following analyses indicate both positive and negative factors as they relate to the public need as defined in the "sunset" law. These analyses are not intended to be comprehensive, but to address those areas we were able to cover during our examination.

I. The extent to which the board, commission, or program has operated in the public interest.

A. ABA admits applicants to practice law through a sophisticated examination process which was designed under consultation with a national expert. The exam has withstood a court challenge as to its adequacy as a test of competence. Admission is also contingent on the passage of the Multistate Professional Responsibility Examination and a character investigation to determine if the applicant is of good moral character.

The Alaska Bar Association has recently developed proposed changes to the Alaska Bar Rules which will facilitate the determination of "good moral character." At this time those rules changes have not been adopted by the Supreme Court of the State of Alaska.

B. Effective January 1, 1985 the Alaska Bar began admitting members under motion for reciprocity. That option is limited to attorneys in the active practice of law for five years in states with which Alaska has a reciprocal agreement.

C. ABA has a lawyer discipline process for the investigation of complaints of ethical misconduct. Sanctions are imposed on those found to be in violation of the rules of conduct. This process was developed through a cooperative effort of the Supreme Court, the Board of Governors, the ABA staff, and a review team from the American Bar Association's Standing Committee on Professional Discipline.

In response to the American Bar Association's recommendation, and to alleviate public concern that attorney discipline is not taken seriously by ABA, discipline rules provide that once a petition for formal hearing is filed, the disciplinary proceedings become open to the public.

D. ABA provides public notice of any attorney who has been disbarred or suspended.

E. In addition to the three public members who serve on the Board of Governors, the Board has also appointed a total of 34 non-attorney individuals to serve on disciplinary hearing committees and fee arbitration panels throughout the State.

F. If a complaint received by ABA does not constitute misconduct on the part of an attorney, but rather is primarily concerned with a fee dispute, ABA offers a fee arbitration process. This process provides for the dispute to be arbitrated by a third-party panel consisting of two attorneys and one public member.

Similarly, ABA offers a conciliation process to attempt to resolve disputes between attorneys and clients where the dispute is neither fee- nor misconduct-related. Failure by an attorney to participate in good faith in the conciliation process may be grounds for disciplinary action.

G. ABA operates an attorney referral service, funded by subscribing attorneys, whereby anyone from around the State or from outside the State can call a toll-free number and receive the names of three attorneys who practice law in certain disciplines. Subscribing attorneys agree to provide referred clients the first half hour of consultation at a reduced rate of $35. (See Appendix D for the number of referral calls received by discipline.)

H. ABA maintains a Client Security Fund for the purpose of making reimbursement to clients of attorneys who have suffered non-insured losses of money, property, or other things of value as a result of a dishonest act by an attorney. A portion ($10) of each ABA member's annual dues is deposited in the Fund.

I. ABA jointly sponsors with the Alaska Legal Services Corporation the Alaska Pro Bono Program which involves attorneys in the delivery of free legal services to low-income Alaskans.

II. The extent to which the operation of the board, commission, or agency program has been impeded or enhanced by existing statutes, procedures, and practices which it has adopted, and any other matter, including budgetary, resource, and personnel matters.

A. ABA has been impeded by the absence of Bar Rules governing the degree to which the Board of Governors may be involved in lobbying and other political activities (see Recommendation No. 2). They have also been impeded by the absence of guidelines as to "good moral character" which, as noted in I.A. above, proposed changes to the Bar Rules have been drafted, but have not yet been adopted.

B. The operations of the Board are enhanced by a substantial budget funded virtually entirely by the ABA membership through dues, admission fees, continuing legal education, lawyer referral fees, conventions, and interest income. The 1989 budget totals $1,277,501. (See Appendix A for a schedule of ABA revenues and expenditures.)

III. The extent to which the board, commission, or agency has recommended statutory changes which are generally of benefit to the public interest.

A. The Board has not recommended any statutory changes during our three-year audit test period. However, the Board's involvement in the process of evaluating and revising the Alaska Bar Rules governing Bar Association policies and procedures has been a dynamic one.

IV. The extent to which the board, commission, or agency has encouraged interested persons to report to it concerning the effect of its regulations and decisions on the effectiveness of service, economy of service, and availability of service which it has provided.

A. ABA is enhanced by an unprecedented involvement of the membership (in excess of one half) in its operations. That involvement may take the form of service on one of the eight standing committees or four bar rules committees. It may also take the form or participation in a section (group of members with similar specialization (i.e., bankruptcy law, criminal defense, etc). Each section is responsible for monitoring the law, suggesting revisions, and reporting annually to the membership. It may also take the form of participation in adjunct organizations (such as the Alaska Pro Bono Program) or special projects (such as the Statewide Lawyer Referral Service).

B. ABA publishes all proposed changes to the Alaska Bar Rules in its quarterly publication The Alaska Bar Rag which is distributed to all members of the Association. Members are asked to submit any and all comments on those proposed rule changes for review by the Board.

V. The extent to which the board, commission, or agency has encouraged public participation in the making of its regulations and decisions.

A. As previously noted, in addition to the three public members who serve on the Board of Governors, the Board has also appointed a total of 42 non-attorney individuals to serve on disciplinary hearing committees and fee arbitration panels throughout the State.

B. ABA has publicly advertised face-to-face meetings of the Board of Governors in major newspapers and the Alaska Bar Rag. They have not advertised teleconferenced meetings at Association business has been conducted (see Recommendation No. 4).

VI. The efficiency with which public inquiries or complaints regarding the activities of the board, commission, or agency filed with it, with the department to which a board or commission is administratively assigned, or with the Office of the Ombudsman have been processed and resolved.

A. ABA is an instrumentality of the State and not administratively assigned to any department. Five complaints have been filed against it with the Office of the Ombudsman during the last three years. Investigation into complaints filed with the Ombudsman have been somewhat stymied by a disagreement with ABA as to whether they have jurisdiction over it.

B. ABA has adopted rules governing appeal procedures for both the disciplinary and examination/admission processes. As noted in Recommendation No. 3, resolution of disciplinary proceedings in 1988 averaged a processing time of 187 days. ABA received two appeals of the July 1988 bar exam results which were released in November of that year. Both appeals were heard at the January 1989 meeting of the Board of Governors.

VII. The extent to which a board or commission which regulated entry into an occupation or profession has presented qualified applicants to serve the public.

A. We found no instances where the Board had licensed unqualified applicants.

B. Although many complaints are filed against attorneys, approximately fifteen percent result in sanctions against those attorneys. This represents sanctions against approximately one percent of the active membership of the Alaska Bar Association annually.

C. The Alaska Bar Association offers a continuing legal education program to its membership and also maintains an education library.

D. ABA sponsors and promotes the LEXIS program, a computer-assisted legal research service.

VIII. The extent to which state personnel practices, including affirmative action requirements, have been complied with by the board, commission, or agency to its own activities and the area of activity of interest.

A. Nothing came to our attention that showed the Board was in violation of any affirmative action or hiring requirements.

B. The Board has on several occasions voiced concern over the low minority pass rate of the Alaska Bar Exam. A national consultant on bar examinations was asked to review the exam in 1986 and found it not to be unusually biased. He recommended the problem be corrected through tutoring and remedial programs. At their June 1988 meeting the Board of Governors resolved to ask the Alaska Bar Foundation to develop a scholarship program for minorities; and to resurrect the Continuing Legal Education Opportunities Committee to tutor minority applicants.

IX. The extent to which statutory, regulatory, budgeting, or other changes are necessary to enable the agency, board, or commission to better serve the interests of the public and to comply with the factors enumerated in this subsection.

Please refer to the previous section, Findings and Recommendations.

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APPENDIXES

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APPENDIX A

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION
REVENUES COMPARED WITH EXPENSES
For the Calendar Years 1986, 1987, and 1988
(Note 1)

	1986	1987	1988
Revenues			
Membership Dues	$ 677,753	$ 705,347	$ 697,310
Admission Fees	148,575	105,675	94,875
Cont. Legal Ed.	122,549	112,596	140,318
Lawyer Refer. Fees	53,361	51,836	55,883
Annual Meeting	33,635	31,633	73,415
Interest on Invest.	82,399	75,687	59,772
Lexis Service	-0-	46,072	15,637
Other	100,332	65,606	92,653
Total Revenues	1,218,604	1,194,452	1,229,863
Expenses			
Admissions	150,832	151,686	136,905
Board of Governors	43,766	34,382	25,923
Discipline	286,714	281,488	294,600
Administration	251,004	253,791	255,241
Lawyer Referral Svc.	31,715	31,740	33,993
Cont. Legal Ed.	144,126	168,345	171,077
Annual Meeting	34,750	38,045	58,825
Fee Arbitration	30,888	41,002	38,896
The Bar Rag	36,468	39,688	35,335
Alaska Law Review	22,000	25,000	26,500
Lexis Service	-0-	58,074	19,488
Other	76,002	29,274	28,780
Total Expenses	1,108,265	1,152,515	1,125,563
Other Financing Sources (Uses):			
Loss on Sale of Investments		(47,553)	
Excess (deficit) of Revenues over Expenses and Other Financing Uses	$ 110,339	$ (5,616)	$ 104,300

Note 1: The 1986 and 1987 revenue and expense information was taken from audited financial statements of ABA. The 1988 information was obtained from the accounting records of ABA and has not been audited.

APPENDIX B

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION
DISCIPLINE STATISTICS
(Note 1)

Disposition of Cases Closed During 1986, 1987, and 1988

Disposition	1986	1987	1988
Disbarment by Supreme Court	2	1	0
Suspension by Supreme Court	2	0	2
Public Censure by Supreme Court	0	0	0
Public Reprimand by Disciplinary Board	-	-	1
Private Reprimand by Disciplinary Board	9	0	2
Private Admonition by Discipline Counsel	17	9	23
Dismissed	109	111	74
Total Closed Cases	139	121	102

Status of Cases Open as of December 31, 1988

Status	Cases
Attorney on Probation	8
Short Term Suspension	0
Pending Supreme Court	5
Pending Disciplinary Board	2
Pending Hearing Committee	4
Pending Admonition	5
Pending Fee Arbitration	1
Pending Conciliation	1
Held in Abeyance	4
Special Counsel Investigation	1
Filed/Under Review	25
Under Investigation	134
Total Open Cases	190

Note 1: The information in this Appendix was obtained from statistical summaries prepared by ABA's discipline section.

Note 2: All numbers reflect individual complaints filed and not the number of attorneys under investigation.

APPENDIX C

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION
BAR EXAMINATION AND ADMISSION STATISTICS
For Calendar Years 1986, 1987, and 1988
(Note 1)

Bar Examination

	Number Taking Exam	Number Passing Exam	Percent Passing Exam
February 1986 Exam	102	70	68%
July 1986 Exam	106	66	62%
February 1987 Exam	78	58	74%
July 1987 Exam	76	48	63%
February 1988 Exam	58	42	72%
July 1988 Exam	84	52	61%

Admission Under Motion for Reciprocity

Year	Number Admitted
1986	16
1987	8
1988	10

Note 1: The information in this Appendix was obtained from statistical summaries prepared by the Alaska Bar Association.

APPENDIX D

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION
ATTORNEY REFERRAL CALLS RECEIVED
For Calendar Years 1986, 1987, and 1988
(Note 1)

Area of Discipline	1986	1987	1988
Administrative	214	235	274
Admiralty	33	32	31
Arts	1	0	7
Bankruptcy	505	429	373
Commercial	505	345	292
Construction	29	19	14
Consumer	383	559	632
Discrimination	100	94	60
Eminent Domain	9	10	12
Environmental	6	3	3
Family	2,213	2,619	2,705
Felony/Misdemeanor	808	702	692
Foreign Language	1	2	10
Immigration	70	82	20
Insurance	122	92	89
Labor Relations	461	464	562
Landlord/Tenant	286	322	334
Malpractice	155	158	202
Mining	6	9	14
Negligence	732	729	873
Patent/Copyright	128	162	157
Public Interest	1	4	-
Real Estate	504	718	706
SSI Cases	2	40	22
Tax	89	102	103
Traffic	289	183	117
Trust/Wills/Estates	230	247	285
Workers' Compensation	189	216	273
Total	8,071	8,577	8,855

Note 1: The information in this Appendix was obtained from statistical summaries prepared by ABA.

APPENDIX E

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION
MEMBERSHIP ON ABA COMMITTEES
February 3, 1989

Committee	Attorney Members	Public Members	Total Members
Board of Governors	9	3	12
Standing Committees			
Bar Polls and Elections	8	-	8
Continuing Legal Education	12	-	12
Ethics	12	-	12
Historians	10	-	10
Law Related Education	17	4	21
Statutes, Bylaws & Rules	12	-	12
Total Standing Committees	71	4	75
Bar Rule Committees			
Law Examiners	29	-	29
Disciplinary Hearing:			
First District	10	2	12
Second & Fourth Districts	8	3	11
Third District	25	8	33
Conciliation Panels:			
First District	4	-	4
Second & Fourth Districts	4	-	4
Third District	8	-	8
Attorney Fee Review:			
First District	15	6	21
Second & Fourth District	10	2	12
Third District	36	13	49
Client Security Fund	6	-	6
Total Bar Rule Committees	155	34	189
Other Adjunct Involvement			
American Bar Assoc. Delegate	1	-	1
AK Assoc. of Legal Assistance	1	-	1
AK Bar Foundation	5	-	5
AK Code Revision Commission	1	-	1
AK Comm. on Jud. Conduct	3	-	3
AK Judicial Council	3	-	3
AK Law Review	3	-	3
AK Legal Service Corp.	17	-	17
Ninth Circuit Judicial Conf.	5	-	5
Rocky Mountain Mineral Law Foundation	1	-	1
Bar Rag	16	-	16
Tutors	11	-	11
Total Other Involvement	67		67
Total Committee Membership	302	41	343

APPENDIX F

BOARD OF GOVERNORS
ALASKA BAR ASSOCIATION
GRIEVANCES FILED BY CATEGORY
For Calendar Years 1986, 1987, and 1988

Grievance Category	1986	1987	1988
Trust violations (embezzlement, conversion, withholding client's property)	6	11	9
Conflict of Interest	13	15	9
Neglect (failure to perform, delay)	39	44	35
Relationship with client (disclosing confidential information, improper withdrawal, abandonment, failure to protect interest of client).	24	23	7
Misrepresentation/Fraud	10	13	11
Excessive Fees	1	1	3
Interference w[illegible]justice	32	35	34
Improper [illegible]ising and solici[illegible]	6	2	0
Crimina[illegible]viction	0	0	1
Perso[illegible]havior	1	0	2
Willful [illegible]lure to cooperate with d[illegible]ipline authorities	0	0	0
Medical i[illegible]capacity	0	0	0
Incompetence	0	0	0
Other	1	0	1
Total Grievances by Category	133	144	112

ALASKA BAR ASSOCIATION

March 9, 1989

Randy S. Welker
Legislative Auditor
Division of Legislative Audit
Pouch W
Juneau, AK 99811

Dear Mr. Welker:

This letter is written to respond to the recommendations contained in the Division of Legislative Audit's preliminary performance report on the Board of Governors of the Alaska Bar Association. It is my understanding that the Division's recommendations and this response will be contained in your final report to the Alaska Legislature's Budget and Audit Committee.

Let me say that I appreciate the positive comments about the Bar's lawyer referral, pro bono and CLE programs. We have worked hard to have increased member participation and public access and it is gratifying to have you acknowledge those improved aspects. We understand that it is your function to point out ways that we can improve and accept your report in that spirit. In response to your specific recommendations:

Recommendation No. 1: The Legislative Auditor has questioned the Board of Governor's action in a disciplinary matter in which the Board imposed a private reprimand following a public hearing. The Board subsequently recommended to the Alaska Supreme Court proposed changes to Alaska Bar Rules 10(c) and 16(a) which would allow a private reprimand to be imposed by the Board. The court referred the matter back to the Board for reconsideration before they discussed the proposal.

Currently the Bar Rules provide that the Board can issue a private reprimand only if discipline counsel and the attorney stipulate to that discipline and that once imposed, this infomation is not released to the public. In their decision to issue a private reprimand in the referenced matter, the Board recognized the incongruity of allowing a private reprimand following a public hearing. However, their desire was to make a distinction in the severity of discipline imposed. The Board's position was that the public would have access to the outcome of this discipline matter, but the Board would not publish a notice regarding the imposition of discipline.

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At the January 19-21, 1989 Board of Governors meeting, the Board discussed the proposed rule changes and is attempting to work out a tenable solution. The Board directed discipline counsel to review the Discipline Rules and submit proposed rule changes which would delete the terms "public" and "private" wherever the rules refer to reprimands. The result of this proposal would give the Board the authority to impose a reprimand either after hearing or by stipulation of discipline counsel and the attorney. This would give the Board the flexibility when they issue a reprimand to determine the level of severity of the discipline imposed. After a public hearing the Board could impose a reprimand that would be public, without requiring publishing a notice in the Bar Rag.

The Board does recognize that this is an area which needs to be worked out and they will most likely be recommending proposed changes to the Bar Rules following the March Board meeting.

Recommendation No. 2: The Board has recognized for several years the problems associated with a mandatory bar association taking a formal position on political issues, with which members of the Association may disagree. In 1986, this matter arose with the issue of tort reform. The Board of Governors decided that it was not appropriate for them as a Board to take a position on tort reform. Instead, the Board sponsored a public hearing and invited speakers from various sides of the issue to make presentations.

The Association has, in the past couple of years, occasionally taken positions on political issues. In 1988 the Board voted to support the continuation of the Alaska Women's Commission, and the membership voted at the annual business meeting in 1986 to cease doing business with South Africa and Libya. While the South Africa/Libya resolution was done somewhat tongue-in-cheek, the resolution supporting the Women's Commission was serious and adopted after some discussion of the appropriateness of the action.

The court cases around the country which have considered the question of lobbying by mandatory bar associations have generally stated that bars may lobby or take positions on political issues, provided they make some provisions for not spending or refunding that portion of the dues of a member who may disagree with the bar's position. Several bar associations will refund, upon request and on a pro rata basis, that portion of bar dues spent by the bar on lobbying.

The Alaska Bar Board of Governors has not gone beyond passing a resolution on political issues and has no plans to actively lobby on such issues. The Bar is aware that the Washington State Bar Association has a provision which lists appropriate lobbying areas for them (Washington is also a mandatory bar association.) The Board agrees that it is a good idea to focus on this question and determine appropriate areas on which the Board could take positions. The Board of Governors will be reviewing the provisions listed by Washington and may recommend changes to the bylaws which would cover the question of lobbying and taking positions on political issues.

Recommendation No. 3: The Board of Governors has regularly focused its attention on the discipline process and taken steps to reduce the number of backlogged discipline cases and the amount of time it takes to bring cases to a conclusion.

In the winter of 1985, the Board of Governors directed discipline counsel to review their caseload and determine the status of and probable disposition of each case and report to the Board at the mid-March meeting. The staff was specifically instructed to concentrate on those cases, especially the older cases, and resolve those cases which could be resolved. By the end of the first quarter of 1986, the discipline caseload was at its lowest point of 125 open cases.

By the end of the second quarter of 1987, the discipline caseload had edged up to 156. The Board analyzed the caseload to determine why the caseload was gradually increasing and to look for possible solutions. In August of that year, the Board contracted with a former discipline counsel to handle some of the more rountine discipline cases on a part-time basis. With the assistance of the contract discipline counsel, the caseload level through the first half of 1988 remained about the same, even though the total number of new cases initiated and total grievances went up.

In October 1988, the Board of Governors hired an additional half time assistant discipline counsel. The hiring of this staff person is an indication of the Board's commitment of the Bar's resources to reduce the caseload and processing time.

In 1988, in addition to its regular monitoring of the discipline process, the Board requested an analysis of the discipline caseload which reflected the average processing time for cases closed, cases dismissed, and cases not accepted for investigation after screening for the years 1986 and 1987. This analysis, which is reported on page 10 of the preliminary

report, reflected an average time (date filed to disposition) of 207 days for 1986 and 169 days for 1987. The analysis for 1988 shows an average of 187 days.

In reviewing the processing time, discipline counsel believes that the Bar is dealing with a greater number of more complex and more serious cases than several years ago. There have been an increased number of hearings over the past four years. The formal hearing process requires a considerable investment of time by discipline counsel and staff in preparing for hearing, conducting the hearing itself, and then preparing the necessary record and briefing for the Board and the Supreme Court. Thus, the average time to process a case is significantly increased with more cases going to hearing and on to the Board and to the Court.

Another factor which increases the processing time is the failure of attorneys to respond to grievances opened by discipline counsel for investigation. An attorney's non-response is itself a grievable offense, which must be dealt with either before or with the underlying grievance itself. There seem to be more of these non-responses as economic times get hard. Finally, once the case is filed with the Court, the case comes within exclusive control and processing guidelines of the Court.

The Board of Governors recognizes that the discipline caseload is an ongoing priority, as demonstrated by the Board's efforts over the years to take action to manage the caseload. We believe the recent hirings to be a positive step to meet this continuing problem.

Recommendation No. 4: The Board of Governors has conscientiously complied with the statutory requirement to give 30 days public notice of its regularly scheduled meetings. The Board has generally found it necessary to call one or two unscheduled conference call meetings a year. Conference call meetings are usually called to deal with matters which cannot wait until the next regularly scheduled Board meeting. For example, in 1988 the Board called conference call meetings to arrange hearings in two admission appeals and to decide on the purchase of a new computer system before the manufacturer's deadline.

The statute does grant exemptions to the notice requirement in the case of emergency meetings. In the case of the admissions appeals, the applicants were operating under tight time constraints and since the matters were confidential, the Board met in executive session.

The Board will make every effort to publish notice of conference call meetings. The Board's schedule of meetings is currently published in the Bar Rag, as well as the notice being published in the State's major newspapers.

Recommendation No. 5: The Board of Governors is now aware that several of the Board seats are "out of sync" due to the mid-term resignation of several Board members. The Board has, as required by statute, appointed attorney members to the vacant seats until the next general election. Rather than having a election for a three year term, the Board will treat these as elections for the remainder of the terms of that Board seat.

A notice recently went out to the active members of the association soliciting nominations for the vacant seats on the Board. This gave notice that one of the seats was for a two year term and one of the seats was for a one year term. With the election to these seats, the Board seats will be back in sync according to the rotation set out in the statute.

In closing, let me take this opportunity to express my appreciation for the manner in which your Division conducted the performance audit. I hope your Division found the Bar's staff cooperative. If you have any questions concerning this response, please contact me or the Bar Association staff directly.

Sincerely,

Larry R. Weeks
President

cc: Deborah Ricker
Division of Legislative Audit
Deborah O'Regan
Executive Director

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ALASKA BAR ASSOCIATION

ALASKA BAR RULES

PART II

RULES OF DISCIPLINARY ENFORCEMENT

With Amendments through April 1, 1989

ALASKA BAR RULES

Table of Contents

PART II. RULES OF DISCIPLINARY ENFORCEMENT*

*EDITOR'S NOTE: This part replaces former Part II, Grievances and Reinstatement, which was repealed by Supreme Court Order 176 dated February 26, 1974.

A. MISCONDUCT

Rule 9. General Principles and Jurisdiction.

(a) License. The license to practice law in Alaska is a continuing proclamation by the supreme court of the State of Alaska (hereinafter the "Court") that the holder is fit to be entrusted with professional and judicial matters and to aid in the administration of

justice as an attorney and counselor, and to act as an officer of the courts. As a condition of the privilege to practice law, it is the duty of every member of the Bar of this State to act at all times in conformity with the standards imposed upon members of the Alaska Bar Association (hereinafter the "Bar"). These standards include, but are not limited to, the Code of Professional Responsibility and the Code of Judicial Conduct that have been or may hereafter be adopted or recognized by the Court, and Ethics Opinions that have been or may hereafter be adopted by the Board of Governors of the Bar.

(b) **Duty to Assist.** Each member of the Bar has the duty to assist any member of the public in filing grievances against members of the Bar with the Bar Counsel of the Alaska Bar Association (hereinafter "Bar Counsel"). Each member of the Bar has the duty to assist Bar Counsel in the investigation, prosecution, and disposition of complaints filed with or by Bar Counsel. Each member has the duty to support the members of Area Bar Divisions in the performance of their duties.

(c) **Attorney Jurisdiction.** Any attorney admitted to the practice of law in Alaska, or any other attorney who appears, participates, or otherwise engages in the practice of law in this State, is subject to the jurisdiction of the Court, the Disciplinary Board of the Alaska Bar Association, and these Rules of Disciplinary Enforcement (hereinafter "Rules"). These Rules will not be interpreted to deny to any other court the powers necessary for that court to maintain control and supervision over proceedings conducted before it, such as the power of contempt.

(d) **Venue.** Disciplinary jurisdiction in this State will be divided into the following areas:

(1) Area 1 — The First Judicial District;

(2) Area 2 — The Second and Fourth Judicial Districts combined; and

(3) Area 3 — The Third Judicial District.

Venue will lie in that area in which an attorney maintains an office or any area in which the conduct under investigation occurred.

(e) **Attorney Roster.** Within 30 days of any change, each member of the Bar has the duty to inform the Bar or otherwise make available to the public his or her current mailing address and telephone number to which communications may be directed by clients and the Bar.

(Added by SCO 176 dated February 26, 1974: amended by SCO 345 §1 effective April 1, 1979: and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; and by SCO 962 effective July 15, 1989)

Annotations

Cases

Trial courts do not have authority to suspend attorneys from practice. **Weaver v. Superior Court, Third Judicial Dist.**, Op. No. 1539, 572 P2d 425 (Alaska 1977).

A two year suspension of an attorney from the practice of law based upon a felony conviction for drug distribution and the attorney's admission that he also distributed drugs to a minor is justified even though the crimes did not involve moral turpitude. **In the Matter of Preston**, Op. No. 2156, 616 P2d (Alaska 1980).

A five-year suspension of an attorney's license to practice law was warranted for falsification of an item of documentary evidence. **Matter of Stump**, Op. No. 2237, 621 P2d 263 (Alaska 1980).

When findings to fact entered by the Disciplinary Board are challenged on appeal, respondent attorney bears the burden of proof in demonstrating that such findings are erroneous. **In re of Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

The "good moral character requirement for admission to practice law is a requirement for continuing bar membership. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

The American Bar Association Standards and methodology are the appropriate model for determining sanctions for lawyer misconduct in Alaska; to the extent that previous decisions conflict with the ABA standards, the ABA standards control. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

Rule 10. The Disciplinary Board of the Alaska Bar Association.

(a) **Definition.** The Board of Governors of the Bar, when meeting to consider grievance and disability matters, will be known as the Disciplinary Board of the Alaska Bar Association (hereinafter the "Board"). The President of the Board (hereinafter "President"), or a Board member at the President's direction, may direct the submission of any matter to the Board by mail, telegraph or telephone. The votes on any matter may be taken in person at a Board meeting, or by conference telephone call.

(b) **Quorum.** A majority of the appointed and elected members of the Board will constitute a quorum. A quorum being present, the Board will act only with the agreement of a majority of the members sitting.

(c) **Powers and Duties.** The Board will have the powers and duties to

(1) appoint and supervise Bar Counsel and his or her staff;

(2) supervise the investigation of all complaints against attorneys;

(3) retain legal counsel and appoint Special Bar Counsel;

(4) hear appeals from the recommendations of Hearing Committees;

(5) review and modify the findings of fact, conclusions of law, and recommendations of Hearing

Committees regardless of whether there has been an appeal to the Board, and without regard to the discipline recommended by the Hearing Committees;

(6) recommend discipline to the Court as provided in Rule 16(a)(1), (2), (3) or (4); order discipline as provided in Rule 16(a)(5); or order the grievance dismissed;

(7) in cases where the Board has recommended discipline as provided in Rule 16(a)(1), (2), (3), or (4), forward to the Court its findings of fact, conclusions of law, recommendation, and record of proceedings;

(8) impose private reprimand as a Board upon a respondent attorney (hereinafter "Respondent") upon referral by Bar Counsel under Rule 22(d);

(9) maintain complete records of all discipline matters in which the Board or any of its members may participate, and furnish complete records to the Bar Counsel upon final disposition; these records are subject to the provisions of Rule 21 concerning public access and confidentiality;

(10) issue subpoenas requested by disciplinary authorities of other jurisdictions; and

(11) adopt regulations not inconsistent with these Rules.

(d) **Judicial Members.** The Board will have the authority to recommend to the Commission on Judicial Conduct discipline for judicial members of the Bar.

(e) **Proceedings Against Board Members.** Investigations of grievances or disability proceedings against attorney members of the Board will be conducted in the same manner as investigations and proceedings against other Respondents, except that in the event a formal petition is filed, the Court will perform the duties and have the powers of the Board, as provided in these Rules.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 2 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Rule 11. Bar Counsel of the Alaska Bar Association.

(a) **Powers and Duties.** The Board will appoint an attorney admitted to the practice of law in Alaska to be the Bar Counsel of the Alaska Bar Association (hereinafter "Bar Counsel") who will serve at the pleasure of the Board. Bar Counsel will

(1) with the approval of the Board, employ attorneys as Assistant Bar Counsel and other staff as needed for the performance of his or her duties;

(2) supervise Assistant Bar Counsel and the staff of the discipline section of the Bar;

(3) with the approval of the Board, retain and supervise investigators;

(4) supervise the maintenance of any records;

(5) aid members of the public in filing grievances;

(6) process all grievances;

(7) investigate alleged misconduct of attorneys;

(8) after finding probable cause to believe that client funds have not been properly handled, and with the approval of one Area Division member, verify the accuracy of a Respondent's bank accounts that contain, should contain, or have contained client funds; Bar Council will serve upon Respondent the results of the verification in writing; any costs associated with the examination or subsequent proceedings may be assessed against the Respondent when substantial irregularities in the accounts are found;

(9) dismiss grievances if it appears from the investigation that there is no probable cause to believe that misconduct has occurred;

(10) in his or her discretion, refer a grievance to the Attorney Fee Review Committee for proceedings under Part III of the Alaska Bar Rules, if the grievance concerns a fee dispute;

(11) in his or her discretion, refer a grievance to a Conciliator, for proceedings under Rule 13, if the grievance concerns matters other than a fee dispute or conduct referred to in Rule 15;

(12) in his or her discretion, upon a finding of misconduct and with the approval of one member of an Area Division, impose a written private admonition upon a Respondent;

(13) in his or her discretion, after seeking review in accordance with Rule 25(d), and upon a finding of probable cause to believe that misconduct has occurred, file a petition for formal hearing initiating public proceedings;

(14) in his or her discretion, appeal a recommendation of a Hearing Committee to the Board or, pursuant to Part III of the Rules of Appellate Procedure, file a petition to the Court for hearing on a recommendation or order of the Board;

(15) in the absence of a specific grievance, initiate investigation of any misconduct and prepare and file grievances in the name of the Bar;

(16) appear at reinstatement hearings requested by suspended or disbarred attorneys;

(17) report to the Commission on Judicial Conduct any grievance involving a judge, even if the

grievance arises from the judge's conduct before (s)he became a judge, or from conduct unconnected with his or herjudicial office;

(18) in his or her discretion, initiate a grievance proceeding against a Respondent who is the subject of disciplinary proceedings before the Commission on Judicial Conduct, whether or not a finding of misconduct has been made by the Commission;

(19) keep the Board fully informed about the progress of all matters in his or her charge;

(20) cooperate with individuals authorized by other jurisdictions to perform disciplinary functions for that jurisdiction; and

(21) perform other duties as set forth in these Rules or as assigned by the Board.

(b) **Grievance Forms.** Bar Counsel will furnish forms which may be used by any person to allege misconduct against an attorney. The forms will be available to the public through the office of the Bar and through the office of every clerk of court.

(c) **Dismissal of Grievance.** Any grievance dismissed by Bar Counsel will be the subject of a summary prepared by Bar Counsel and filed with the Board. The names of the parties involved will not be provided in the summary. Bar Counsel will communicate disposition of the matter promptly to the Complainant and Respondent.

(d) **Record Keeping.** This Bar Counsel will maintain records of all grievances processed and maintain statistical data reflecting

(1) the subject of the grievances received and acted upon;

(2) the status and ultimate disposition of each grievance; and

(3) the number of times each attorney is the Respondent in a grievance, including the subjects of the grievances, and the ultimate disposition of each.

(e) **Quarterly Report to Court and Board.** The Bar Counsel will provide a quarterly report to the Court and the Board providing information about the number of cases filed and closed during the quarter, the status of pending cases, the disposition of closed cases, and the subject of the grievances received. The names of the Respondents will not be provided in the report.

(f) **Delegation to Assistant Bar Counsel.** Bar Counsel may delegate such tasks as (s)he deems appropriate to Assistant Bar Counsel (hereinafter "Assistants"). Any reference in these Rules to Bar Counsel will include the Assistants.

(g) **Proceedings Against Bar Counsel.** Proceedings against Bar Counsel or any Assistant Bar Counsel will be conducted in the same manner as proceedings against any other Respondent. In these matters, the Board will appoint Special Bar Counsel who will perform the duties and have the powers of Bar Counsel as provided in these Rules.

(h) **Disposal of Files.** Bar Counsel will destroy files of disciplinary, disability, and reinstatement proceedings in accordance with Rule 32.

(Added by SCO 176 dated February 26, 1974: rescinded and repromulgated by SCO 345 § 3 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; and by SCO 962 effective July 15, 1989)

Annotations

Cases

Professional services performed by one licensed to practice law must conform to the standards of the profession, regardless of the capacity in which an attorney may be acting. **In re Cornelius**, Op. No. 1019, 520 P2d 76 (Alaska 1974).

An attorney will be held to the standards of his profession if his activities are so legal related as to be part of his practice of law. **In re Cornelius**, Op. No. 1019, 520 P2d 76 (Alaska 1974).

Public censure was warranted for attorney who neglected over a period of many years to attend to the necessary legal work connected with seven estates for which he was attorney of record. **In re Collins**, Op. No. 1694, 583 P2d 207 (Alaska 1978).

Attorney's failure to respond to the Alaska Bar Association's request for "full and fair disclosure" warranted the disciplinary sanction of public censure. **In re Minor**, Op. No. 2613, 658 P2d 718 (Alaska 1983).

Public censure was an appropriate sanction for attorney's failure to respond to a request for investigation as required by the Alaska Bar Rules. **Matter of Evans**, Op. No. 2643, 661 P2d 171 (Alaska 1983).

Suspension for 18 months was appropriate punishment for attorney who "created" a deed of trust and attached it as an exhibit to an unverified complaint. **Discipline of Walton**, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Fact that attorney's misconduct related to matters within the jurisdiction of a federal tribunal did not prevent discipline under the Alaska Bar Rules. **Discipline of Vollintine**, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Rule 12. Area Discipline Divisions and Hearing Committees.

(a) **Appointment of Area Division Members.** Members of Area Discipline Divisions (hereinafter "Area Divisions") will be appointed by the President, subject to ratification by the Board. One Area Division will be established in each area defined in Rule 9(d). Each Area Division will consist of

(1) not less than six members in good standing of the Bar, each of whom maintains an office for the practice of law within the area of disciplinary jurisdiction for which he or she is appointed; and

(2) not less than three non-attorney members of the public (hereinafter "public member"), each of whom resides in the area of disciplinary jurisdiction

for which he or she is appointed, is a United States Citizen, is at least 25 years of age, and is a resident of the State of Alaska.

Area Division members will each serve a three year term, with each term to commence on July 1 and expire on June 30th of the third year. No member will serve for more than two consecutive terms. A member whose term has expired prior to the disposition of a disciplinary or disability matter to which he or she has been assigned will continue to serve until the conclusion and disposition of that matter. This continued service will not prevent immediate appointment of his or her successor. A member who has served two consecutive terms may be reappointed after the expiration of one year.

(b) **Powers and Duties of Area Division Members.** Upon selection and assignment by the Executive Director of the Bar (hereinafter "Director"), Area Division members will have the powers and duties to

(1) sit on Hearing Committees;

(2) review requests from Bar Counsel to impose private admonitions upon Respondents pursuant to Rule 22(d);

(3) hear appeals from complainants from dismissals of grievances pursuant to Rule 25(c);

(4) review Bar Counsel's decision to file a formal petition pursuant to Rule 25(d) or (e);

(5) review challenges to Hearing Committee members pursuant to Section (h) of this Rule; and

(6) issue subpoenas and hear challenges to their validity pursuant to Rule 24(a).

(c) **Representation of Respondents Prohibited.** Members serving on Area Divisions will not represent a Respondent in disability or grievance matters during his or her term.

(d) **Failure to Perform.** The President has the power to remove an Area Division member for good cause. The President will appoint, subject to ratification by the Board, a replacement attorney or public member to serve the balance of the term of the removed member.

(e) **Assignment of Hearing Committee Members.** The Director will select and assign members of an Area Division to a Hearing Committee of not less than two attorney members and one public member. In addition, the Director will appoint an attorney member as chair of the Hearing Committee.

(f) **Hearing Committee Quorum.** Three members of a Hearing Committee will constitute a quorum, one of whom will be a public member. The Hearing Committee chair will vote except when an even number of Hearing Committee members is sitting. Each Hearing Committee will act only with the agreement of a majority of its voting members sitting for the matter before it.

(g) **Conflict of Interest.** A Hearing Committee member may not consider a matter when

(1) (s)he is a party or is directly interested;

(2) (s)he is a material witness;

(3) (s)he is related to the Respondent by blood or affinity within the third degree;

(4) the Respondent has retained the Hearing Committee member as his or her attorney or has been professionally counseled by him or her in any matter within two years preceding the filing of the formal petition before the Committee; or

(5) (s)he believes that, for any reason, (s)he cannot give a fair and impartial decision.

(h) **Challenged Member.** Any challenge for cause to an Area Division member assigned to a Hearing Committee must be made by either Respondent or Bar Counsel within 10 days following notice of the assignment, unless new evidence is discovered which establishes grounds for a challenge for cause. The challenge will be ruled upon by an Area Division member selected by the Director from the Area Division from which the Hearing Committee was chosen. If the Area Division member finds the challenge well taken, he or she will notify the Director, who will assign another member of the Area Division to the Hearing Committee. If a quorum exists in the absence of the challenged member, the Director need not assign a replacement.

Within 10 days of the notice of assignment of Hearing Committee members, a Respondent may file one peremptory challenge and the Bar Counsel may file one peremptory challenge. The Director will at once, and without requiring proof, relieve the challenged member of his or her obligation to participate, and the Director will assign another member of the Area Division to the Hearing Committee. If a quorum exists in the absence of the challenged member, the Director need not appoint a replacement.

(i) **Powers and Duties of Committees.** Hearing Committees will have the powers and duties to

(1) swear witnesses, who will be examined under oath or affirmation, and conduct hearings on formal charges of misconduct referred to them by Bar Counsel;

(2) acting as a body, or through a single member, issue subpoenas and consider challenges to their validity;

(3) direct, in their discretion, the submission of proposed findings of fact, conclusions of law, recommendations, and briefs; and

(4) submit a written report to the Board. This report will contain the Hearing Committee's findings of fact, conclusions of law, and recommendation, and will be submitted together with the record, including any briefs submitted and a transcript of the proceedings before it.

(j) **Proceedings Against Division Members.** Proceedings against attorney members of Area Divisions will be conducted in the same manner as proceedings against any other Respondent. In the event a formal petition is filed against an Area Division member, or the attorney member is placed on disability inactive status, (s)he will not be assigned to any future matters pending disposition of the proceeding. If a finding of misconduct or disability is made against an attorney Area Division member, (s)he will be removed from the Division in accordance with Section (d) of this Rule.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 4 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Annotations

Cases

Public censure was warranted for attorney who neglected over a period of many years to attend to the necessary legal work connected with seven estates for which he was attorney of record. In re Collins, Op. No. 1694, 583 P2d 207 (Alaska 1978).

A five-year suspension of an attorney's license to practice law was warranted for falsification of an item of documentary evidence. Matter of Stump, Op. No. 2237, 621 P2d 263 (Alaska 1980).

Rule 13. Conciliation Panels.

(a) **Definition.** Conciliation panels will be established for the purpose of settling disputes between attorneys and their clients not concerning fee disputes or misconduct as set out in Rule 15. At least one conciliation panel will be established in each area defined in Rule 9(d).

(b) **Terms.** Each conciliation panel will consist of at least three active members in good standing of the Bar, each of whom maintains an office for the practice of law in the area for which he or she is appointed. The members of each conciliation panel will be appointed by the President subject to ratification by the Board. The members will serve staggered terms of three years, each to commence on July 1 and expire on June 30th of the third year.

(c) **Powers and Duties.** A member of a conciliation panel will be known as a Conciliator. Only one Conciliator need act on any single matter. Conciliators will have the power and duty to mediate disputes referred to them by Bar Counsel pursuant to Rule 11(a)(11).

(d) **Informal Proceedings.** Proceedings before a Conciliator will be informal. A Conciliator will not have subpoena power or the power to swear witnesses. A Conciliator does not have the authority to impose a resolution upon any party to the dispute.

(e) **Written Agreement.** If proceedings before a Conciliator produce resolution of the dispute in whole or in part, the Conciliator will prepare a written agreement containing the resolution which will be signed by the parties to the dispute.

(f) **Report to Bar Counsel.** When the dispute has been resolved, or when in the judgment of the Conciliator further efforts at conciliation would be unwarranted, the Conciliator will submit a written report to the Bar Counsel which will include

(1) a summary of the dispute;

(2) the contentions of the parties to the dispute;

(3) any agreement which may have been reached;

(4) any matters upon which agreement was not reached;

(5) the opinion of the Conciliator on the merits of the dispute; and

(6) the opinion of the Conciliator on the good faith or lack of good faith of the efforts made by any attorney to resolve the dispute.

(g) **Failure of Attorney to Participate in Good Faith.** Any attorney involved in a dispute referred to a Conciliator has the obligation to confer expeditiously with the Conciliator and with all other parties to the dispute and to cooperate in good faith with the Conciliator in an effort to resolve the dispute. Failure by any attorney to participate in good faith in an effort to resolve a dispute submitted to a Conciliator may be grounds for disciplinary action under these Rules.

(Added by SCO 176 dated February 26, 1974; amended by SCO 233(2) effective April 1, 1976; by SCO 345 § 5 effective April 1, 1979; by SCO 403 effective May 1, 1980; by SCO 467 effective June 1, 1981; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Annotations

Cases

The Alaska Bar Rules do not allocate responsibility in disciplinary matters in such a way that there is an impermissible commingling of prosecutorial and adjudicatory functions. Discipline of Walton, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Fact that Alaska Bar Association's President, a member of the disciplinary board, considered representing the ABA before the Supreme Court regarding the board's suspension of an attorney, but did not do so, did not deny the attorney due process of law. Discipline of Walton, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

By stipulating with the ABA not to appeal the findings and recommendations of the hearing committee to the disciplinary board and to waive the submission of briefs and oral arguments, attorney waived his right to be heard, consequently his right to due

process was not violated when the disciplinary board departed from the findings and recomendations of the hearing committee without calling for briefs and oral argument. **Discipline of Walton**, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Rule 14. Executive Director of Alaska Bar Association.

The Executive Director of the Alaska Bar Association (hereinafter "Director"), or an assistant designated by the Director, has the administrative powers and duties to

(1) appoint and supervise an administrative staff for purposes of maintaining documents generated by disciplinary, disability, and reinstatement proceedings;

(2) on behalf of Hearing Committees and the Disciplinary Board

(A) accept petitions for formal hearing;

(B) accept Board and Hearing Committee reports, records, pleadings, and other documents generated in the course of disciplinary, disability, and reinstatement proceedings; and

(C) act as clerk in calendaring and scheduling hearing matters;

(3) select and assign not less than three members of Area Divisions to serve on Hearing Committees in accordance with Rule 12(e), and to appoint an attorney as chair of the Hearing Committee;

(4) replace and assign Hearing Committee members when necessary in accordance with Rule 12(h);

(5) as set forth in these Rules, select members from the Area Divisions for purposes of

(A) consultation with Bar Counsel;

(B) appeals from or review of Bar Counsel determinations; and

(C) review of challenges to Hearing Committee members; and

(6) perform other duties for and on behalf of the Board as set forth in these Rules or as assigned by the President or the Board.

(Added by SCO 176 dated February 26, 1974; and amended by SCO 233(3) and (4) effective April 1, 1976; by SCO 294 effective March 1, 1978; by SCO 345 § 6 effective April 1, 1979; by SCO 353 effective April 1, 1979; by SCO 404, effective, nunc pro tunc, January 1, 1980; by SCO 467 effective June 1, 1981; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Annotations

Cases

Attorney's failure to respond to the Alaska Bar Association's request for "full and fair disclosure" warranted the disciplinary sanction of public censure. **In re Minor**, Op. No. 2613, 658 P2d 781 (Alaska 1983).

Public censure was an appropriate sanction for attorney's failure to respond to a request for investigation as required by the Alaska Bar Rules. **Matter of Evans**, Op. No. 2643, 661 P2d 171 (Alaska 1983).

The Alaska Bar Rules do not allocate responsibility in disciplinary matters in such a way that there is an impermissible commingling of prosecutorial and adjudicatory functions. **Discipline of Walton**, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Fact that Alaska Bar Association's President, a member of the disciplinary board, considered representing the ABA before the Supreme Court regarding the board's suspension of an attorney, but did not do so, did not deny the attorney due process of law. **Discipline of Walton**, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Rule 15. Grounds For Discipline.

(a) **Grounds for Discipline.** In addition to those standards of conduct prescribed by the Alaska Code of Professional Responsibility, Ethics Opinions adopted by the Board of Governors of the Bar, and the Code of judicial Conduct, the following acts or omissions by a member of the Alaska Bar Association, or by any attorney who appears, participates, or otherwise engages in the practice of law in this State, individually or in concert with any other person or persons, will constitute misconduct and will be grounds for discipline whether or not the act or omission occurred in the course of an attoney-client relationship:

(1) conduct which results in conviction of a serious crime as defined in Rule 26(b);

(2) conduct which results in attorney or judicial discipline in any other jurisdiction, as provided in Rule 27;

(3) knowing misrepresentation of any facts or circumstances surrounding a grievance;

(4) failure to answer a grievance, failure to answer a formal petition for hearing, or failure to furnish information or respond to a request from the Board, Bar Counsel, an Area Division member, or a Hearing Committee in conforming with any of these Rules;

(5) failure to cooperate in a conciliation, as required by Rule 13(g);

(6) contempt of the Board, of a Hearing Committee, or of any duly appointed substitute:

(7) engaging in the practice of law while on inactive status, or while disbarred or suspended from the practice of law for any reason;

(8) failure to perform or comply with any condition of discipline imposed pursuant to these Rules; or

(9) failure to inform the Bar of his or her current mailing address and telephone number as provided in Rule 9(e).

(b) **Unauthorized Practice of Law.**

(1) For purposes of the practice of law prohibition for disbarred and suspended attorneys in subparagraph (a)(7) of this rule, except for attorneys suspended solely for non-payment of bar fees, "practice of law" is defined as:

(i) holding oneself out as an attorney or lawyer authorized to practice law;

(ii) representing another before a court or governmental body which is operating in its adjudicative capacity, including the submission of pleadings; or

(iii) for compensation, providing advice or preparing documents for another which effect legal rights or duties.

(2) For purposes of the practice of law prohibition for attorneys suspended solely for the non-payment of fees and for inactive attorneys, "practice of law" is defined as it is in subparagraph (b)(1) of this rule, except that these persons may represent another to the extent that a layperson would be allowed to do so.

(Added by SCO 176 dated February 26, 1974; amended by SCO 304 effective March 20, 1978; by SCO 345 § 7 effective April 1, 1979; by SCO 405 effective, nunc pro tunc, January 1, 1980; by SCO 467 effective June 1, 1981; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; by SCO 888 effective July 15, 1988; by SCO 941 effective January 15, 1989; and by SCO 962 effective July 15, 1989).

Annotations

Cases

The Bar Association's trial committee may question witnesses and call independent witnesses if it so desires. **In re Cornelius**, Op. No. 1019, 520 P2d 76 (Alaska 1974).

A combination of the state bar attorney's functions, alleged to be that of complainant, prosecutor and adjudicator, does not violate due process. **In re Cornelius**, Op. No. 1019, 520 P2d 76 (Alaska 1974).

On review of Disciplinary Board decision, court will not ordinarily disturb findings of fact made upon conflicting evidence or where such findings reflect the relative credibility of witnesses. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Where findings of fact entered by the Disciplinary Board are challenged on appeal, respondent attorney bears the burden of proof in demonstrating that such findings are erroneous. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Use of the "preponderance of evidence" rule in bar disciplinary matters does not violate due process of law. **Discipline of Walton**, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Suspension for 18 months was appropriate punishment for attorney who "created" a deed of trust and attached it as an exhibit to an unverified complaint. **Discipline of Walton**, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

By stipulating with the ABA not to appeal the findings and recommendations of the hearing committee to the disciplinary board and to waive the submission of briefs and oral arguments, attorney waived his right to be heard, and consequently his right to due process was not violated when the disciplinary board departed from the findings and recommendations of the hearing committee without calling for briefs and oral argument. **Discipline of Walton**, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Rule 16. Types of Discipline and Costs.

(a) **Discipline Imposed by the Court or Board.** A finding of misconduct by the Court or Board will be grounds for

(1) disbarment by the Court; or

(2) suspension by the Court for a period not to exceed five years; or

(3) probation imposed by the Court for a period not to exceed two years; or

(4) public censure by the Court; or

(5) public reprimand by the Disciplinary Board.

(b) **Discipline Imposed by the Board or Bar Counsel.** When Bar Counsel has made a finding that misconduct has occurred, the following discipline may be imposed:

(1) private reprimand in person by the Board, pursuant to Rule 10(c)(8); or

(2) written private admonition by Bar Counsel, pursuant to Rule 11(a)(12).

(c) **Restitution; Reimbursement; Costs.** When a finding of misconduct is made, in addition to any discipline listed above, the Court or the Board may impose the following requirements against the Respondent:

(1) restitution to aggrieved persons or organizations;

(2) reimbursement of the Client Security Fund; or

(3) payment of the costs, including attorney's fees, of the proceedings or investigation or any parts thereof.

(d) **Conditions.** Written conditions may be attached to a private or public reprimand or to a private admonition. Failure to comply with such conditions will be grounds for reconsideration of the matter by the Board or Bar Counsel.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 8 effective April 1, 1979; by SCO 438 effective November 1, 1980; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; and by SCO 962 effective July 15, 1989)

Annotations

Cases

The American Bar Association Standards and methodology are the appropriate model for determining sanctions for lawyer misconduct in Alaska; to the extent that previous decisions conflict with the ABA standards, the ABA standards control. Disciplinary Matter Involving Buckalew, Op. No. 3147, 731 P2d 48 (Alaska 1986).

Rule 17. Immunity.

(a) **General Immunity.** Members of the Board, members of Area Divisions, Bar Counsel, Special Bar Counsel, the Executive Director, Trustee Counsel, Conciliators, and all Bar staff are immune from suit for conduct in the course and scope of their official duties as set forth in these Rules.

(b) **Witness Immunity.** The Court or its designee may, in its discretion, grant immunity from criminal prosecution to witnesses in disciplinary, disability, or reinstatement proceedings upon application by the Board, Bar Counsel, or counsel for Respondent, and after receiving the consent of the appropriate prosecuting authority.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 9 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; and by SCO 962 effective July 15, 1989)

Rule 18. Statute of Limitations.

Grievances against Respondents will be filed within five years of the time that the Complainant discovers or reasonably should discover the misconduct. This Rule will, however, be interpreted to allow traditional principles of tolling, equity, and due process.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 10 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985)

Rule 19. Refusal of Complainant to Proceed.

The unwillingness of a Complainant to continue his or her grievance, the withdrawal of the grievance, a compromise between the Complainant and the Respondent, or restitution by the Respondent may, but need not in and of itself, justify abatement of a disciplinary investigation or proceeding.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 11, effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985)

Rule 20. Matters Related to Pending Civil or Criminal Litigation.

Prosecution of grievances involving material allegations which are substantially similar to the material allegations of criminal or civil litigation pending in a court will not be deferred unless the Board, in its discretion, and for good cause shown, authorizes deferment. In the event deferment of a disciplinary investigation or proceeding is authorized by the Board, the Respondent will make all reasonable efforts to obtain a prompt trial and disposition of the pending litigation. In the event the litigation is unreasonably delayed, the Board may direct, upon motion, that the investigation and any subsequent disciplinary proceedings be conducted promptly.

The acquittal of the Respondent on criminal charges or a verdict or judgment in his or her favor in civil litigation involving substantially similar material allegations will not in and of itself justify abatement of a disciplinary investigation or proceeding predicated upon the same material allegations.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 12 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985)

Rule 21. Public Access to Disciplinary Proceedings.

(a) **Discipline and Reinstatement Proceedings.** After the filing of a petition for formal hearing, hearings held before either a Hearing Committee or the Board will be open to the public. This Rule will not be interpreted to allow public access to disability proceedings described in Rule 30.

(b) **Deliberations.** The deliberations of any adjudicative body will be kept confidential.

(c) **Bar Counsel's Files.** All files maintained by Bar Counsel and staff will be confidential and are not to be reviewed by any person other than Bar Counsel or Area Division members appointed for purposes of review or appeal under these Rules. This provision will not be interpreted to:

(1) preclude Bar Counsel from introducing into evidence any documents from his or her files;

(2) preclude Bar Counsel from providing the Board, the Court, or the public with statistical information compiled pursuant to Rule 11(e), provided that the name of the Respondent is kept confidential;

(3) deny a complainant information regarding the status or disposition of his or her grievance; or

(4) deny the public facts regarding the stage of any proceeding or investigation concerning a Respondent's conviction of a crime;

(5) deny the Alaska Judicial Council confidential information about attorney applicants for judicial vacancies; or

(6) preclude a court from reviewing in camera a confidential file upon a discovery request made pursuant to Criminal Rule 16(b)(7), and from exercising discretion as to whether to release relevant information from the file to counsel pursuant to Criminal Rule 16(d)(3).

(d) Director's File. The file maintained by the Director, acting in his capacity as clerk, will be open for public review.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 13 effective April 1, 1979; rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989; and by SCO 963 effective July 15, 1989)

Rule 22. Procedure.

(a) **Grievances.** Grievances will be in writing, signed by the Complainant, and contain a clear statement of the details of each act of alleged misconduct, including the approximate time and place of each. Grievances will be filed with Bar Counsel. Bar Counsel will review the grievance filed to determine whether it is properly completed and contains allegations which, if true, would constitute grounds for discipline as set forth in Rule 15. Bar Counsel may require the Complainant to provide additional information prior to accepting a grievance. If Bar Counsel determines that the allegations contained in the grievance are inadequate or insufficient to warrant an investigation, (s)he will so notify the Complainant and Respondent.

If Bar Counsel accepts a grievance for investigation, (s)he will serve a copy of the grievance upon the Respondent for a response. Bar Counsel may require the Respondent to provide, within 20 days of service, full and fair disclosure in writing of all facts and circumstances pertaining to the alleged misconduct. Misrepresentation in a response to Bar Counsel will itself be grounds for discipline. Failure to answer within the prescribed time, or within such further time that may be granted in writing by Bar Counsel, will be deemed an admission to the allegations in the grievance.

(b) **Confidentiality.** Complainants and all persons contacted during the course of an investigation have a duty to maintain the confidentiality of discipline and disability proceedings prior to the initiation of formal proceedings subject to Bar Rule 21(c). It will be regarded as contempt of court to breach this confidentiality in any way. It will not be regarded as a breach of confidentiality for a person so contacted to consult with an attorney. A Respondent may waive confidentiality in writing and request disclosure of any information pertaining to him to any person or to the public.

(c) **Dismissal before Formal Proceedings.** If after investigation it appears that there is no probable cause to believe that misconduct has occurred, Bar Counsel may dismiss the grievance.

(d) **Imposition of Private Admonition or Reprimand.** Upon a finding of misconduct, and with the approval of one Area Division member, Bar Counsel may impose a written private admonition upon a Respondent. A Respondent will not be entitled to appeal a private admonition by Bar Counsel but may demand, within 30 days of receipt of the admonition, that a formal proceeding be instituted against him or her before a Hearing Committee. If Respondent demands a formal proceeding, the admonition will be vacated and Bar Counsel will proceed under Section (e) of this Rule.

In the discretion of Bar Counsel, (s)he may refer a matter to the Board for approval and imposition of a private reprimand by the Board, provided that the Respondent has, under Section (h) of this Rule, consented to the discipline before the Board.

(e) **Formal Proceedings.** Upon a finding of misconduct, and after seeking review in accordance with Rule 25(d), Bar Counsel may initiate discipline proceedings by filing with the Director a petition for formal hearing which specifically sets forth the charge(s) of misconduct. A copy of the petition will be served upon the Respondent.

Respondent will be required to file the original of his answer with the Director, and serve a copy upon Bar Counsel, within 20 days after the service of the petition for formal hearing. Should Respondent fail to timely answer, the charges will be deemed admitted without need of any further action by Bar Counsel.

Charges before a Hearing Committee will be presented by Bar Counsel. Bar Counsel will have the burden at any hearing of demonstrating by clear and convincing evidence that the Respondent has, by act or omission, committed misconduct as provided in Rule 15.

Bar Counsel may amend a petition for formal hearing at any time before an answer is filed. Bar Counsel may amend a petition for formal hearing after an answer is filed only by leave of the Hearing Committee or by written consent of the Respondent. Leave to amend will be freely given when justice requires. A Respondent will file an answer to an amended petition for formal hearing within the time remainingto file an answer to the original petition, or within 10 days after service of the amended petition, whichever is later.

(f) **Assignment to Hearing Committee.** In accordance with Rule 12(e), a petition for formal

hearing will be assigned by the Director to a Hearing Committee after an answer is filed or after the expiration of the time for filing an answer, unless Respondent tenders conditional consent to a specific discipline. The notice of assignment to Hearing Committee will indicate the names of the members of the Hearing Committee assigned to hear the matter and will advise Respondent that (s)he is entitled to

(1) be represented by counsel:

(2) examine and cross-examine witnesses;

(3) present evidence in his or her own behalf;

(4) have subpoenas issued in his or her behalf: and

(5) challenge peremptorily and for cause members of the Hearing Committee, as provided in Rule 12(h).

(g) **Pre-Hearing Conference.** A pre-hearing conference may be convened by the Chair of the Hearing Committee or the Director for stipulation as to matters of fact, simplification of issues, scheduling of pre-hearing motions, the establishment of a date for the formal hearing, and other similar matters which may be resolved prior to hearing.

(h) **Discipline by Consent.** Respondent may tender a conditional consent to a specific discipline contained in Rule 16. This conditional consent will be submitted to Bar Counsel for his or her approval. If accepted by Bar Counsel, (s)he will refer the conditional admission to the Board for its approval or rejection of the requested discipline.

The consenting Respondent will present to the Board an affidavit stating that (s)he desires to consent to the specific discipline and that

(1) his or her consent is freely and voluntarily given and is not the subject of any coercion or duress; and

(2) (s)he admits to the charges stated in the grievance.

Acceptance of the conditional consent by the Board will be subject to Court approval if the specific discipline to be imposed includes discipline provided in Rule 16(a) (1), (2), (3) and (4). Any conditional admission rejected by the Board or the Court will be withdrawn and Bar Counsel will proceed under Section (e) of this Rule. Any admission made by Respondent in a conditional consent rejected by the Board or the Court cannot be used against the Respondent in any subsequent proceeding.

If the Court or the Board rejects a conditional consent, the matter will be remanded to the Hearing Committee, if any, which was appointed to hear the petition. If no Hearing Committee has been appointed, the Director will appoint one in accordance with Section (f) of this Rule.

(i) **Notice of Hearing.** The Director will serve a notice of formal hearing upon Respondent, or his or her counsel, indicating the date and place of the formal hearing.

(j) **Rules of Evidence.** The rules of evidence applicable in administrative hearings will apply in all hearings before Hearing Committees. No new evidence shall be allowed by the Committee chair after the hearing without notice to the opposing party and an opportunity to respond.

(k) **Motions, Findings, Conclusions, Recommendation.** Hearing Committees may consider and rule on pre-hearing motions. On procedural motions, the Committee chair will rule; on dispositive or substantive motions, the full Hearing Committee will rule. The Hearing Committee may direct either or both parties to submit proposed findings of fact, conclusions of law, and a recommendation after the formal hearing, which will be filed within 10 days of the date of the request by the Committee.

(l) **Report of Hearing Committee and Appeal.** Within 30 days of the conclusion of a formal hearing, the Hearing Committee will submit its report to the Board in accordance with 12(i) (4), unless an extension of time is granted by the President of the Board. Within 10 days of service of the report, Bar Counsel or Respondent may appeal the Hearing Committee's findings of fact, conclusions of law, and recommendation and request oral argument before the Board, as provided in Rule 25(f). The Director will thereafter set the dates for submission of briefs and oral argument before the Board.

(m) **Oral Argument.** Oral argument before the Board will be waived unless either Bar Counsel or Respondent requests argument as provided in Section (l) of this Rule.

(n) **Board Recommendation or Order.** The Board will review the Hearing Committee report and record and enter an appropriate recommendation or order as provided in Rule 10(c) (4), (5), and (6). If the Board has recommended discipline as provided in Rule 16(a) (1), (2), (3) or (4), it will submit to the Court its findings of fact, conclusions of law, recommendation, and the record. The record will include a transcript of all proceedings before the Board as well as the Hearing Committee report.

(o) **Notification of Disposition.** The Director will promptly notify all parties of the Board's action.

(p) **Appeal from Board Order or Recommendation.** Bar Counsel or Respondent may appeal from an order or recommendation of the Board made under Section (n) of this Rule by filing a notice of appeal with the Court within 10 days of service of the Board's order or recommendation. Part II of the Rules of Appellate Procedure will govern appeals filed under this Rule.

(q) **Record of Proceedings.** A complete stenographic or electronic record of all proceedings before Hearing Committees and before the Board will be made and preserved. The Court shall furnish at its expense the necessary equipment, operator, and stenographic services for the preservation of the record of all such proceedings, and for the preparation of transcripts of all such proceedings.

(r) **Review by Supreme Court.** The Court will review findings of fact, conclusions of law, and recommendations of discipline made by the Board pursuant to Section (n) of this Rule. The Court will decide the grounds for discipline, pursuant to Rule 15; the type of discipline to be imposed, pursuant to Rule 16(a): and any requirements to be imposed, pursuant to Rule 16(c). When no appeal has been taken pursuant to Section (p) of this Rule, and if the Court determines that discipline different than that recommended by the Board may be warranted, the Court will so notify the parties and give them an opportunity to be heard.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 14 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; by SCO 962 effective July 15, 1989; and by SCO 963 effective July 15, 1989)

Rule 23. Service.

All service of petitions will be accomplished in accordance with Rule 4 of the Alaska Rules of Civil Procedure. All service of pleadings, motions, and other documents contemplated by any requirement of these Rules will be accomplished in accordance with Rule 5 of the Alaska Rules of Civil Procedure.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 15 effective April 1, 1979; by SCO 432 effective November 1, 1980; and rescinded and repromulgated by SCO 614 effective January 1, 1985)

Annotations

Cases

Conviction of felony offense of accessory after the fact to first degree murder was a serious crime within the meaning of Alaska Bar Rule 23. Matter of Webb, Op. No. 1879, 602 P2d 408 (Alaska 1979).

A two-year suspension of an attorney from the practice of law based upon a felony conviction for drug distribution and the attorney's admission that he also distributed drugs to a minor is justified even though the crimes did not involve moral turpitude. In the Matter of Preston, Op. No. 2156, 616 P2d (Alaska 1980).

Willful failure to file an income tax return is not a "serious crime" within the meaning of this rule. Matter of Vogt, Op. No. 2481, 642 P2d 819 (Alaska 1982).

Rule 24. Discovery; Subpoena Power; Witness Compensation.

(a) **Subpoenas during Investigation.** At any stage of an investigation, only the Bar Counsel will have the right to summon witnesses and require the production of records by issuance of subpoenas. Subpoenas will be issued at the request of Bar Counsel by any member of any Area Division. Subpoenas will be served in accordance with Rule 23. Any challenge to the validity of a subpoena so issued will be heard and determined by any member of any Area Division. All subpoenas issued under this Section will clearly indicate on their face that they are issued in connection with a confidential investigation and that it is regarded as contempt of court for any member of the Alaska Court System, a process server, or a person subpoenaed to in any way breach the confidentiality of the investigation. It will not be regarded as a breach of confidentiality for a person subpoenaed to consult with an attorney.

(b) **Subpoenas during Formal Proceedings.** Both Bar Counsel and Respondent have the right to summon witnesses before a Hearing Committee and to require production of records before the Committee by issuance of subpoenas. Subpoenas will be issued at the request of Bar Counsel or Respondent by any member of the Hearing Committee. Subpoenas will be served in accordance with Rule 23. Any challenge to the validity of a subpoena will be heard and determined by the chair of the Hearing Committee or any Committee member designated by the chair.

(c) **Enforcement of Subpoenas.** Subpoenas issued pursuant to this Rule will be enforceable in any superior court in this State.

(d) **Discovery.** Requests for production, requests for admissions, and the taking of deposition testimony may ensue for a period of 60 days following the filing of Respondent's answer to a petition for formal hearing. Both Bar Counsel and Respondent will be afforded reciprocal discovery under this Rule of all matters not privileged. Any disputes under this Section will be ruled upon by the chair of the Hearing Committee. Any discovery ruling is interlocutory and may only be appealed in accordance with Rule 25(a). The Alaska Rules of Civil Procedure, to the extent applicable, will govern discovery under this Rule.

Deposition testimony may be take by stenographic, electronic, or video means. The Court will furnish, at its expense, the necessary equipment, operator, and stenographic services for recording and transcription of deposition testimony taken by Bar Counsel.

(e) **Witness Compensation.** Witnesses may be compensated in accordance with the administrative rules of court. Respondents will not be paid witness fees for attendance at hearings.

(Added by SCO 176 dated February 26, 1974; repromulgated by SCO 345 § 16 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Rule 25. Appeals: Review of Bar Counsel Determinations.

(a) **Interlocutory Appeal.** Only upon the conditions and subject to the Rules of Procedure set forth in Part IV of the Alaska Rules of Appellate Procedure may parties petition the Court for review of an interlocutory order, recommendation, or decision of

(1) any member of any Area Division:

(2) a Hearing Committee or a single member thereof; or

(3) the Board or a single member thereof.

(b) **Admonition Not Appealable.** A Respondent cannot appeal the imposition of a written private admonition. In accordance with Rule 22(d), (s)he may request initiation of formal proceedings before a Hearing Committee within 30 days of receipt of the admonition.

(c) **Appeal by Complainant from Bar Counsel's Decision to Dismiss.** A Complainant may appeal the decision of the Bar Counsel to dismiss a complaint within 15 days of receipt of notice of the dismissal. The Director will appoint a member of an Area Division of the appropriate area of jurisdiction to review the Complainant's appeal. The appointed Area Division member may reverse the decision of Bar Counsel, affirm the decision, or request additional investigation. This Division member will be disqualified from any future consideration of the matter should formal proceedings be initiated.

(d) **Review of Bar Counsel's Decision to File Formal Petition.** A decision by Bar Counsel to initiate formal proceedings before a Hearing Committee will be reviewed by a member of any Area Division designated by the Director prior to the filing of a formal petition. The Area Division member will, within 20 days, approve, modify, or disapprove the filing of a petition, or order further investigation.

(e) **Appeal by Bar Counsel.** Bar Counsel may appeal the decision made under Section (d) of this Rule within 10 days following receipt of the Area Division member's decision. The Director will designate a second Area Division member to hear this appeal. The decision of the second Area Division member will be final.

(f) **Appeal of Hearing Committee Findings, Conclusions, and Recommendation.** Within 10 days of service of the Hearing Committee's report to the Board, as set forth in Rule 22(l), the Respondent or Bar Counsel may appeal the findings of fact, conclusions of law, or recommendation by filing with the Board, and serving upon opposing party, a notice of appeal. Oral argument before the Board will be waived unless either Bar Counsel or Respondent requests argument as provided in Section (l) of Rule 22.

(g) **Respondent Appeal from Board Recommendation or Order.** Respondent may appeal from a recommendation or order of the Board made under Rule 22(n) by filing a notice of appeal with the Court within 10 days of service of the Board's recommendation or order. Part II of the Rules of Appellate Procedure will govern appeals filed under this Rule.

(h) **Bar Counsel Petition for Hearing of a Board Recommendation or Order.** Bar Counsel may petition from a recommendation or order of the Board made under Rule 22(n) by filing a petition for hearing with the Court within 10 days of service of the Board's recommendation or order. Part III of the Rules of Appellate Procedure will govern petitions filed under this Rule.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 17 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; and by SCO 962 effective July 15, 1989)

Rule 26. Criminal Conviction; Interim Suspension.

(a) **Interim Suspension for Criminal Conviction.** Upon the filing with the Court of a certificate that an attorney has been convicted of a serious crime as defined in Section (b) of this Rule, the Court will enter an order of interim suspension immediately suspending the attorney. The order of interim suspension will be entered whether the conviction resulted from a plea of guilty or nolo contendere, or from a verdict after trial, or otherwise, and regardless of the pendency of an appeal. The Court will notify the Bar and the attorney of the order placing the attorney on interim suspension. The order of interim suspension shall be effective immediately upon filing and entry and will continue in effect pending final disposition of the disciplinary proceeding initiated by reason of the conviction.

(b) **Definition of Serious Crime.** The term "serious crime" shall include any crime which is or would be a felony in the State of Alaska and shall also include any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves conduct as an attorney, interference with the administration of justice, false swearing, misrepresentation, fraud, deceit, bribery, corruption, extortion, misappropriation, theft, or an attempt or a conspiracy or solicitation of another to commit a "serious crime."

(c) **Certificate of Conviction.** A certificate of conviction for any crime will be conclusive evidence of the commission of that crime in any disciplinary proceeding instituted against an attorney based upon the conviction. A certificate of conviction may be filed with the Court by any clerk of courts, Bar Counsel, the Board, or any District Attorney. Within 10 days of the judgment of conviction, the certificate of conviction will be transmitted to the Court by any clerk of courts within the state in which the attorney is convicted. Should Bar Counsel or a District Attorney learn of a criminal conviction of an attorney where there is no certificate of conviction, it will be the responsibility of Bar Counsel or the District Attorney to obtain the certificate and transmit it to the Court.

(d) **Interim Suspension for Threat of Irreparable Harm.** Interim suspension will be imposed by the Court on a showing by Bar Counsel of conduct by an attorney that constitutes a substantial threat of irreparable harm to his or her clients or prospective clients or where there is a showing that the attorney's conduct is causing great harm to the public by a continuing course of misconduct.

(e) **Reinstatement after Interim Suspension.** An attorney suspended under Section (a) of this Rule may petition for reinstatement upon the filing of a certificate demonstrating that the underlying conviction for a serious crime has been reversed. The reinstatement will not terminate any formal proceeding then pending against the attorney, the disposition of which shall be determined by the Hearing Committee and the Board on the basis of the available evidence.

(f) **Proceedings Following Interim Suspension.** Upon receipt of the certificate of conviction for a serious crime, the Court, in addition to suspending the attorney in accordance with Section (a) of this Rule, will refer the matter to Bar Counsel for the initiation of a formal proceeding before a Hearing Committee. The sole issue to be determined by the Hearing Committee will be the extent of the final discipline to be imposed; however, the matter will not be brought to hearing until all appeals from the conviction are concluded, unless the Respondent requests an earlier hearing.

(g) **Proceedings Following Conviction for Other Than Serious Crimes.** Upon receipt of a certificate of conviction for a crime other than those described in Section (b) of this Rule, the Court may, in its discretion, refer the matter to Bar Counsel for whatever action (s)he deems warranted, including the possible initiation of a formal proceeding.

(h) **Interim Suspension, General Provisions.** If interim suspension is imposed by the Court, the Court may appoint a trustee in accordance with Rule 31. In any case in which interim suspension has been ordered, the disciplinary proceedings will be diligently prosecuted. Interim suspension will terminate upon the final disposition of disciplinary proceedings, or upon the earlier entry of an order by the Court terminating interim suspension.

(i) **Notification.** An attorney placed on interim suspension must comply with Rule 28 concerning notification of parties.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 18 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective Janaury 1, 1985; amended by SCO 962 effective July 15, 1989)

Rule 27. Reciprocal Discipline.

(a) **Notice to Disciplined Attorney.** Upon receipt of a certified copy of an order demonstrating that an attorney admitted, specially admitted to practice in this State, or engaged in the practice of law in this State has been disciplined in another jurisdiction, the Court will issue a notice to him or her containing a copy of the order from the other jurisdiction and an order directing that the attorney inform the Court within 30 days from service of any reason why the imposition of the identical discipline in this State would be unwarranted, and the reasons therefor. The Court will cause this notice to be served upon the attorney and Bar Counsel.

(b) **Stay of Discipline.** In the event the discipline imposed in the original jurisdiction has been stayed by that jurisdiction, any reciprocal discipline to be imposed in this State will be deferred until the stay expires.

(c) **Imposition of Identical Discipline.** Upon the expiration of 30 days from service of the notice and order issued pursuant to Section (a) of this Rule, the Court will impose the identical discipline imposed by the original jurisdiction unless Bar Counsel or Respondent files a petition alleging that

(1) the procedure in the original jurisdiction was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process;

(2) an infirmity of proof establishing the misconduct exists which gives rise to the clear conviction that the action of the original jurisdiction should not be accepted;

(3) the imposition of the same discipline would result in grave injustice;

(4) the misconduct established has been held to warrant substantially different discipline in this State; or

(5) the conduct does not violate Rule 15.

The Court will enter an order as it deems appropriate when the Court determines that any of the above exceptions to the discipline imposed by the original jurisdiction exist.

(d) **Conclusive Evidence.** Unless the Court has made an exception under Section (c) of this Rule, the final adjudication of misconduct in another jurisdiction will be conclusive evidence of misconduct for purposes of discipline in this State.

(Added by SCO 176 dated February 26, 1974; amended by SCO 345 § 19 effective April 1, 1979; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Annotations

Cases

A condition of reinstatement as expressed in an opinion and order suspending an attorney, that the attorney must make full restitution to his victim, is not objectionable as vague. In re Cornelius, Op. No. 1019, 521 P2d 497 (Alaska 1974).

Rule 28. Action Necessary When Disbarred, Suspended, or Placed on Probation.

(a) **Notice.** An attorney who has been disbarred, suspended, placed on probation, or who is under an order of interim suspension, will promptly provide notice of the discipline imposed as required by this Section. Notice will be sent by certified or registered mail, return receipt requested. Notice to clients need only be sent to clients represented by the disciplined attorney on the entry date of the Court's order. Notice required to attorneys representing opposing parties in pending litigation or administrative proceedings need only be sent if the disciplined attorney is an attorney of record at the time of the entry date of the Court's order. Notice will be provided as follows:

(1) an attorney who has been disbarred, suspended for more than 90 days, or who is under an order of interim suspension, will promptly notify

(A) each of his or her clients who is involved in pending litigation or administrative proceedings, and each attorney representing opposing parties in the proceedings, of his or her disbarment or suspension and his or her inability to practice law in the State after the effective date of the disbarment or suspension; the notice given the client will advise the client of the necessity to promptly seek substitution of another attorney; the notice served upon the attorneys for the opposing parties will state the mailing address of the client of the disbarred or suspended attorney; and

(B) each of his or her clients who is involved in any matters other than litigation or administrative proceedings; the notice will advise the clients of his or her disbarment or suspension, his or her inability to practice law in the State after the effective date of the disbarment or suspension, and the need to seek legal advice from a different attorney;

(2) an attorney who has been suspended for 90 days or less will notify all clients in any matters, and each attorney representing opposing parties in any pending litigation or administrative proceedings, that (s)he will be unavailable for the period of time specified in the Court's order; the disciplined attorney will advise his or her clients that they may seek substitute counsel at their discretion; and

(3) an attorney who has been placed on probation will notify all clients in any matters, and each attorney representing opposing parties in any pending litigation or administrative proceedings, of the terms of his or her probation, unless the Court, in its order placing the attorney on probation, relieves the attorney of this duty.

(b) **Substitute Counsel.** An attorney suspended for 90 days or less will assist his or her clients in arranging for alternate representation where necessary or requested.

Should the client of an attorney who has been disbarred, suspended for more than 90 days, or who is under an order of interim suspension not obtain substitute counsel before the effective date of the disbarment or suspension, the disciplined attorney will move for leave to withdraw in the court or administrative agency in which the proceeding is pending.

(c) **Effective Date of Order; Limitation on Practice.** Orders imposing disbarment, suspension, or probation will be effective 30 days after the entry date, unless otherwise ordered by the Court in the order imposing discipline. After the entry date of a disbarment or suspension order, the disciplined attorney will not accept any new retainer or accept employment in any new case or legal matter of any nature. However, during the period from the entry date of the order to its effective date, (s)he may, unless otherwise ordered by the Court in the order imposing discipline, wind up and complete, on behalf of any client, all matters which were pending on the entry date of the order.

(d) **Prohibition on Practice.** An attorney who has been disbarred, suspended, or who is under an order of interim suspension will, during the period of his or her disbarment or suspension, cease all practice of law, including the acceptance of any new clients.

(e) **Probation.** Probation may be imposed in accordance with Rule 16(a) (3) only in those cases where there is little likelihood that the attorney on probation will harm his clients or the public during the period of probation and where the conditions of probation can be adequately supervised. Probation may be renewed by the Court for an additional period, not to exceed two years, if the Board so

recommends and the Court concurs in the recommendation. The Board's recommendation for renewal of probation will be submitted to the Court not more than six months, nor less than 60 days prior to the expiration of the original probation period. The attorney on probation will be advised of the recommendation and be given an opportunity to be heard by the Court. The conditions of probation will be specified in writing.

(f) **Compliance by Disciplined Attorney.** Within 10 days after the effective date of a disbarment or suspension order, the disciplined attorney will file with the Court, and serve upon Bar Counsel, an affidavit showing that

(1) (s)he has fully complied with the provisions of the order and with these Rules; and

(2) (s)he has notified all other state, federal and administrative jurisdictions to which (s)he is admitted to practice of his or her discipline.

The affidavit will also set forth the residence and mailing addresses of the disciplined attorney where communications may thereafter be directed. Pursuant to Rule 9(e), it is the ongoing responsibility of the disciplined attorney to keep the Bar apprised of his or her current address and telephone number.

(g) **Public Notice.** The Board will cause a notice of the disbarment, suspension, or interim suspension to be published in

(1) a newspaper of general circulation in the cities of Anchorage, Fairbanks, and Juneau, Alaska;

(2) an official Alaska Bar Association publication; and

(3) a newspaper of general circulation serving the community in which the disciplined attorney maintained his or her practice.

(h) **Circulation of Notice; National Discipline Data Bank.** The Board will promptly transmit a copy of the order of disbarment, suspension, interim suspension, probation, public censure or public reprimand to the presiding judges of the superior court and district court in each judical district in Alaska; to the presiding judge of the United States District Court for the District of Alaska; and to the Attorney General for the State of Alaska, together with the request that the Attorney General notify the appropriate administrative agencies. The presiding judges will make such orders as they deem necessary to fully protect the rights of the clients of the disbarred, suspended, or probationary attorney.

Bar Counsel will transmit to the National Discipline Data Bank maintained by the American Bar Association, and any jurisdiction to which Respondent has been admitted, notice of all public discipline imposed by the Court or the Board and all orders granting reinstatement.

(i) **Record Keeping.** A disbarred, suspended, or probationary attorney will keep and maintain records of the various steps taken by him or her pursuant to these Rules so that proof of compliance with these Rules and with the disbarment, suspension or probationary order is available. Proof of compliance with the Rules and Court order will be a condition precedent to any petition for reinstatement.

(j) **Surrender of Bar Membership Card.** Any attorney upon whom disbarment, suspension, or interim suspension has been imposed will, within 10 days of the effective date of the order, surrender his or her Alaska Bar Association membership card to the Director by delivery in person, or by certified or registered mail, return receipt requested.

(Added by SCO 176 dated February 26, 1974; amended by SCO 295 effective March 1, 1978; and rescinded and repromulgated by SCO 614 effective January 1,1985; amended by SCO 962 effective July 15, 1989)

Rule 29. Reinstatement.

(a) **Order of Reinstatement.** An attorney who has been disbarred or suspended may not resume practice until reinstated by order of the Court. Interm suspension will end only in accordance with Rule 26.

(b) **Petitions for Reinstatement.** An attorney who seeks reinstatement will, 60 days prior to the ending date of the suspension, or 60 days prior to the date on which (s)he seeks reinstatement, whichever comes later, file a verified petition for reinstatement with the Court, with a copy served upon the Director. In the petition, the attorney will

(1) state that (s)he has met the terms and conditions of the order imposing suspension or disbarment;

(2) state the names and addresses of all his or her employers during the period of suspension or disbarment;

(3) describe the scope and content of the work performed by the attorney for each such employer;

(4) provide the names and addresses of at least three character witnesses who had knowledge concerning the activities of the suspended or disbarred attorney during the period of his or her suspension or disbarment; and

(5) state the date upon which the suspensed or disbarred attorney seeks reinstatement. An attorney who has been disbarred by order of the Court may not be reinstated until the expiration of at least five years from the effective date of the disbarment.

(c) **Reinstatement Proceedings.** Petitioners who have been suspended for one year or less will be

automatically reinstated by the Court unless Bar Counsel files an opposition to automatic reinstatement pursuant to Section (d) of this Rule.

Proceedings for attorneys who have been disbarred or suspended for more than one year will be conducted as follows:

(1) upon receipt of the petition for reinstatement, the Director will refer the petition to a Hearing Committee in the jurisdiction in which the Petitioner maintained an office at the time of his or her misconduct; the Hearing Committee will promptly schedule a hearing to take place within 30 days of the filing of the petition; at the hearing, the Petitioner will have the burden of demonstrating that (s)he has the moral qualifications, competency, and knowledge of law required for admission to the practice of law in this State and that his or her resumption of the practice of law in within the State will not be detrimental to the integrity and standing of the Bar, or to the administration of justice, or subversive of the public interest; within 30 days of the conclusion of the hearing, the Hearing Committee will issue a report setting forth its findings of fact, conclusions of law, and recommendation; the Committee will serve a copy of the report upon Petitioner and Bar Counsel, and transmit it, together with the record of the hearing, to the Board; any appellate action will be subject to the appellate procedures set forth in Rule 25:

(2) within 45 days of its receipt of the Hearing Committee's report, the Board will review the report and the record; the Board will file its findings of fact, conclusions of law, and recommendation with the Court, together with the record and the Hearing Committee report; the petition will be placed upon the calendar of the Court for acceptance or rejection of the Board's recommendation within 60 days after receipt by the Court of the Board's recommendation:

(3) in all proceedings concerning a petition for reinstatement, Bar Counsel may cross-examine the Petitioner's witnesses and submit evidence in opposition to the petition; and

(4) the retaking and passing of Alaska's general applicant bar examination will be conclusive evidence that the Petitioner possesses the knowledge of law necessary for reinstatement to the practice of law in Alaska, as required under Section (b) (1) of this Rule.

(d) **Oppositions to Automatic Reinstatement.** Within 10 days after the Respondent files a petition for reinstatement, Bar Counsel may file an opposition to automatic reinstatement with the Court and serve a copy upon the Board and the Petitioner. The opposition to automatic reinstatement will state the basis for the original suspension, the ending date of the suspension, and the facts which Bar Counsel believes demonstrate that the petitioner should not be reinstated.

Upon receipt by the Director of a copy of the opposition to automatic reinstatement, reinstatement proceedings will be initiated in accordance with procedures outlined in Section (c)(1)—(4) of this Rule.

(e) **Expenses.** The Court may direct that the necessary expenses incurred in the investigation and processing of any petition for reinstatement be paid by the disbarred or suspended attorney.

(f) **Bar Payment of Membership Fees.** Prior to reinstatement, the disbarred or suspended attorney must pay to the Bar, in cash or by certified check, the full active membership fees due and owing the Association for the year in which reinstated.

(Added by SCO 176 dated February 26, 1974; amended by SCO 207 effective July 15, 1985; and rescinded and repromulgated by SCO 614 effective January 1, 1985: amended by SCO 665 effective March 15, 1986; and by SCO 962 effective July 15, 1989)

B. DISABILITY

Rule 30. Procedure: Disabled, Incapacitated or Incompetent Attorney.

(a) **Immediate Transfer to Interim Disability Inactive Status.** The Court will immediately transfer an attorney to interim disability inactive status upon a showing that

(1) the attorney has been declared incompetent by judicial order;

(2) the attorney has been involuntarily committed to an institution because of incapacity or disability; or

(3) the attorney has alleged during a disciplinary proceeding that he or she is incapable of assisting in his or her defense due to mental or physical incapacity.

The period of interim disability inactive status will continue until further order of the Court. A copy of the order will be served upon the attorney so transferred, his or her guardian, or the director of the institution to which (s)he has been committed or in a manner that the Court may direct. The order of transfer to interim disability inactive status will be in effect pending final disposition of a disability hearing proceeding. The hearing will be commenced upon the transfer to interim disability inactive status, and will be conducted in accordance with Section (b) of this Rule. The transfer to interim disability inactive status will terminate upon the final disposition of the disability proceedings, or

upon the earlier entry of an order by the Court terminating interim disability inactive status. An attorney transferred to interim disability inactive status may petition the Court for a return to active status upon the filing of documentation demonstrating that the attorney has been judicially declared competent. The reinstatement will not terminate any formal disability proceeding then pending against the attorney.

(b) **Transfer to Disability Inactive Status Following Hearing.** The Court may transfer an attorney to disability inactive status upon a showing that the attorney is unable to continue the practice of law by reason of mental or physical infirmity or illness, or because of addiction to controlled substances. Hearings will be initiated by Bar Counsel and conducted in the same manner as disciplinary proceedings under Rule 22, except that all proceedings will be confidential. Upon petition of Bar Counsel for good cause shown, the Court may order the Respondent to submit to a medical and/or psychological examination by a Court-appointed expert.

(c) **Stay and Appointment of Counsel.** The Court may appoint counsel to represent the attorney in a disability proceeding if it appears to the Court that the attorney is unable to obtain counsel or represent himself or herself effectively, due to incapacity. Any pending disciplinary proceedings against the attorney may, at the discretion of the Board, be stayed pending the removal or cessation of the disability.

(d) **Hearing Committee and Board Duties and Obligations.** The Hearing Committee will recommend to the Board whether the attorney is unable to continue the practice of law because of the reasons set out in Section (b) of this Rule, and whether the reasons justify the transfer of the attorney to inactive status. The Board will make recommendations to the Court as to whether the alleged incapacity justifies transfer to disability inactive status.

(e) **Notice to Public of Transfer to Disability Inactive Status.** The Board will cause a notice of transfer to disability inactive status, whether imposed after hearing or on an interim basis, to be published in

(1) a newspaper of general circulation in the cities of Anchorage, Fairbanks, and Juneau, Alaska;

(2) an official Alaska Bar Association publication; and

(3) a newspaper of general circulation primarily serving the community in which the disabled attorney maintained his or her practice.

When the disability or incapacity is removed and the attorney has been restored to active status, the Board will cause a notice of transfer to active status to be similarly published.

(f) **Circulation of Notice Transferring to Inactive Status.** The Board will promptly transmit a copy of the order of transfer to interim disability inactive status or disability inactive status to the presiding judge of the superior and district court in each judicial district in the state; to the presiding judge of the United States District Court for the District of Alaska; and to the Attorney General for the State of Alaska, together with the request that the Attorney General notify the appropriate administrative agencies. The Board will request action under Rule 31, as may be necessary, in order to protect the interests of the disabled attorney and his or her clients.

Bar Counsel will transmit to the National Discipline Data Bank maintained by the American Bar Association, and any jurisdiction to which Respondent has been admitted, notice of all transfers to inactive status due to disability and all orders granting reinstatement.

(g) **Reinstatement.** No attorney transferred to disability inactive status under the provisions of this Rule may resume active status until reinstated by order of the Court. Any attorney transferred to disability inactive status under the provisions of this Rule will be entitled to apply for reinstatement to active status once a year, but initially not before one year from the date of the Court order transferring him or her to disability inactive status, or at such shorter intervals as the Court may direct in the order transferring the Respondent to inactive status or any modification thereto.

The application will be granted by the Court upon a showing that the attorney's disability has been removed and (s)he is fit to resume the practice of law. Upon application, the Court may take or direct any action it deems necessary to determine whether the attorney's disability or incapacity has been removed, including an order for an examination of the attorney by qualified medical and/or psychological experts that the Court may designate. In its discretion, the Court may order that the expense of the examination be paid by the attorney.

Prior to reinstatement, the attorney must pay to the Bar, in cash or by certified check, the full active membership fees due and owing the Association for the year in which (s)he is reinstated.

(h) **Burden of Proof.** In a proceeding seeking transfer of an attorney to disability inactive status under this Rule, Bar Counsel will have the burden of proving, by clear and convincing evidence, that the attorney should be so transferred. In a proceeding seeking an order of reinstatement to active status under this Rule, the same burden of proof will rest with the attorney.

(i) **Waiver of Physician and Psychotherapist — Patient Privilege.** The filing of an application for

reinstatement by an attorney transferred to disability inactive status because of disability or incapacity will be deemed to constitute a waiver of any physician and psychotherapist-patient privilege with respect to any treatment of the attorney during the period of his or her disability. The disabled attorney will be required to disclose the name of every psychiatrist, psychologist, physician, and hospital or other institution by whom or in which the attorney has been examined or treated since his or her transfer to disability inactive status. (S)he will furnish to the Court written consent for each person or organization to divulge information and records as requested by court-appointed medical experts.

(Added by SCO 176 dated February 26, 1974; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Rule 31. Appointment of Trustee Counsel to Protect Client's Interests.

(a) **Appointment; Procedure.** Whenever an attorney is deceased, has disappeared or abandoned the practice of law leaving a client matter unattended, or been transferred to disability inactive status because of incapacity or disability (hereinafter "unavailable attorney") and no partner of the attorney or shareholder in the professional corporation of which the unavailable attorney was an employee is known to exist, Bar Counsel will petition the superior court in the judicial district in which the unavailable attorney maintained an office for the appointment of trustee counsel to represent the interests of the unavailable attorney and his or her clients. This petition will be made ex parte, will state the basis for its filing, and will state that the appointment of trustee counsel is necessary for the protection of the unavailable attorney and his or her clients. The petition will be heard ex parte, unless the court otherewise directs, at the earliest available time. Bar Counsel shall submit to the superior court the names of attorneys who have agreed to serve voluntarily as trustee counsel. The superior court shall make appropriate inquiries to ascertain that a volunteer attorney possesses qualifications suitable to perform the duties of trustee counsel. In the event there are no volunteer attorneys, the superior court shall appoint a suitable attorney actively practicing law in the judicial district in which the unavailable attorney maintained his or her office. Only attorneys who maintain errors and omissions insurance converage may be appointed as trustee counsel.

(b) **Powers and Duties.** The order granting the petition will grant the trustee counsel all the powers of a personal representative of a deceased under the laws of the State of Alaska insofar as the unavailable attorney's practice is concerned. It will further direct the trustee counsel to

(1) notify promptly, by certified or registered mail, return receipt requested, all clients being represented in pending matters, other than litigation or administrative proceedings, of the basis for the entry of the order and of the need to seek legal advice from another attorney;

(2) notify promptly, by certified or registered mail, return receipt requested, all clients who are involved in pending litigation or administrative proceedings of the basis for the entry of the order and that they should promptly seek the substitution of another attorney;

(3) promptly inventory all of the open files of the unavailable attorney and, with respect to each open file, prepare a brief summary of each file to include name of client(s), nature of legal matter, and status of legal matter and an accounting of the costs and fees involved; and

(4) Trustee counsel shall have the same authority to collect accounts receivables and assert the same claims as the unavailable attorney would have. The notices required in this section of the Rule will inform clients

(A) of the lien of the unavailable attorney, or of the estate of the deceased attorney, on all his or her files;

(B) of the requirement that all transfers of files require suitable arrangements regarding costs and fees;

(C) of the trustee counsel's authority to arrange the payment of the costs and fees by the clients of the unavailable attorney before any transfer of the files to substitute counsel.

(5) render an accounting of office, trust or other bank accounts.

(6) Trustee counsel will be bound by the attorney-client privilege with respect to client confidences contained in the records of the unavailable attorney, except to the extent necessary to effect the order appointing him or her trustee counsel. The superior court shall issue an order staying any pending state court proceedings which the unavailable attorney was counsel of record for a period of time not to exceed 60 days. The unavailable attorney shall remain attorney of record during the period of stay or until substitute counsel has entered an appearance, whichever occurs first.

(c) **Requirement of Bond.** The superior court may require the trustee counsel to post bond, conditioned upon the faithful performance of his or her duties.

(d) **Disposition of Assets.** Any monies or assets remaining after the completion of the client matters, and after compensation of trustee counsel, will be returned to the unavailable attorney or to his or her guardian. In the case of a deceased attorney any

monies or assets remaining after the completion of the client matters shall be returned to the personal representative and trustee counsel shall apply for compensation under section (b).

(e) **Force and Effect of Appointment.** The powers and duties of a trustee counsel are not affected by the appointment of a guardian or personal representative or by any other rule or law of the State.

(f) **Reports to Bar Counsel.** Trustee counsel appointed under this Rule will make written reports to Bar Counsel within six months of the date of the order appointing him or her as trustee, and every six months thereafter until completion of his or her duties under this Rule. The report will state the progress made under Section (b) of this Rule and the work to be accomplished within the next six month period.

(g) **Compensation.**

(1) Any attorney serving as trustee counsel shall be entitled to compensation for reasonable fees and costs incurred in the performance of duties set forth in this Rule. Trustee counsel may seek payment of fees and costs from the estate of the unavailable attorney. Such a bill for fees and costs must be approved by the court as reasonable.

(2) An attorney who serves as trustee counsel may substitute as counsel for a client of the unavailable attorney after disclosure to the client that the client is free to select any attorney to substitute as counsel for the unavailable attorney and after obtaining the client's consent to substitution.

(3) In the event that the estate of the unavailable attorney is insufficient to compensate trustee counsel, an attorney appointed to serve as trustee counsel may submit a claim to the Board of Governors of the Alaska Bar Association. Reasonable compensation shall be determined by the Board and will not exceed $5,000.

(h) **Discharge of Trustee: Destruction of Files.** After completion of his or her duties under this Rule, trustee counsel will submit a final report to the Court. The Court will review the report and will discharge the trustee. The trustee counsel will deliver to the Alaska Bar Association any files belonging to clients who cannot be located. The Alaska Bar Association will store the files for one year, after which time the Bar may exercise its discretion in maintaining or destroying the files.

(Added by SCO 176 dated February 26, 1974; amended by SCO 298 effective March 1, 1978; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 658 effective March 15, 1986; by SCO 809 effective April 1, 1987; and by SCO 962 effective July 15, 1989)

C. MISCELLANEOUS

Rule 32. Disposal of Files.

(a) **Disposal of Files Concerning Deceased Attorney.** Any time after the expiration of five years from the death of an attorney, Bar Counsel may destroy all files of any discipline, disability, or reinstatement proceedings in which the deceased attorney was a Respondent unless, prior to destruction, the Board receives a request that the files not be destroyed. If the Board receives a request, it will grant the requesting party an opportunity to be heard to show cause why the files should not be destroyed. After hearing and review, the Board will enter an order as it deems appropriate.

(b) **Disposal of Dismissals.** Any time after the expiration of five years from the date of dismissal, Bar Counsel may destroy all files of any discipline or disability proceeding terminated by dismissal.

(c) **Administrative Records.** Bar Counsel will not destroy records maintained in accordance with Rule 11(d).

(d) **Compliance with Confidentiality.** All orders entered by the Board under Section (a) of this Rule, and proceedings in connection with the disposal of files under Section (a) of this Rule, will be consistent with the provisions of Rules 21 and 30 with regard to public access.

(Added by SCO 176 dated February 26, 1974; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Rule 33. Expenses.

Except as otherwise provided herein, the salaries of Bar Counsel and staff will be paid by the Alaska Bar Association. The expenses and administrative costs incurred by Bar Counsel and staff hereunder, and the expenses and administrative costs of the Board and of Hearing Committees will be paid by the Court.

(Added by SCO 176 dated February 26, 1974; and rescinded and repromulgated by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Rule 33.1. Disciplinary and Disability Matters Take Precedence.

Disciplinary and disability matters take precedence over all other matters before any court or administrative agency in this State, unless otherwise ordered by a justice of the Court for good cause shown. Upon the filing of an affidavit stating the existence of a pending disciplinary or disability matter, any judge of any court in this State, and any

hearing officer or other person responsible for the conduct of any administrative proceeding in the State, will take action necessary to effect the requirements of this Rule. The Respondent or his or her attorney, Bar Counsel, any member of an Area Division, and any member of the Board will have authority to file such affidavit.

(Added by SCO 614 effective January 1, 1985; amended by SCO 962 effective July 15, 1989)

Rule 33.2. Effective Dates.

These Rules will take effect January 1, 1985. Rule 21 will only apply to those formal proceedings filed after the effective date of these Rules.

(Added by SCO 614 effective January 1, 1985)

STANDARDS FOR IMPOSING LAWYER SANCTIONS

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I. PREFACE

A. BACKGROUND

In 1979, the American Bar Association published the Standards for Lawyer Discipline and Disability Proceedings.[1] That book was a result of work by the Joint Committee on Professional Discipline of the American Bar Association. The Joint Committee was composed of members of the Judicial Administration Division and the Standing Committee on Professional Discipline of the American Bar Association. The task of the Joint Committee was to prepare standards for enforcement of discipline in the legal community.

The 1979 standards have been most helpful, and have been used by numerous jurisdictions as a frame of reference against which to compare their own disciplinary systems. Many jurisdictions have modified their procedures to comport with these suggested standards, and the Standing Committee on Professional Discipline of the American Bar Association has assisted state disciplinary systems in evaluating their programs in light of the approved standards.

It became evident that additional analysis was necessary in one important area—that of *appropriate sanctions* for lawyer misconduct. The American Bar Association Standards for Lawyer Discipline and Disability Proceedings (hereinafter "Standards for Lawyer Discipline") do not attempt to recommend the type of discipline to be imposed in any particular case. The Standards merely state that the discipline to be imposed "should depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances" (Standard 7.1).

For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goals of lawyer discipline: sanctions which are too lenient fail to adequately deter misconduct and thus lower public confidence in the profession; sanctions which are too onerous may impair confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency and the basic fairness of all disciplinary systems.

As an example of this problem of inconsistent sanctions, consider the range in levels of sanctions imposed for a conviction for failure to file federal income taxes. In one jurisdiction, in 1979, a lawyer who failed to file income tax returns for one year was suspended for one year,[2] while, in 1980, a lawyer who failed to file income tax returns for two years was merely censured.[3] Within a two-year period, the sanctions imposed on lawyers who converted their clients' funds included disbarment,[4] suspension,[5] and censure.[6] The inconsistency of sanctions imposed by different jurisdictions for the same misconduct is even greater.

An examination of these cases illustrates the need for a comprehensive system of sanctions. In many cases, different sanctions are imposed for the same acts of misconduct, and the courts rarely provide any explanation for the selection of sanctions. In other cases, the courts may give reasons for their decisions, but their statements are too general to be useful. In still other cases, the courts may list specific factors to support a certain result, but they do not state whether these factors *must* be considered in every discipline case, nor do they explain whether these factors are entitled to equal weight.

The Joint Committee on Professional Sanctions (hereinafter "Sanctions Committee") was formed to address these problems by formulating standards to be used in imposing sanctions for lawyer misconduct. The Sanctions Committee was composed of members from the Judicial Administration Division and the Standing Committee on Professional Discipline. The mandate given was ambitious: the Committee was to examine the current range of sanctions imposed and to formulate standards for the imposition of appropriate sanctions.

In addressing this task, the Sanctions Committee recognized that any proposed standards should serve as a *model* which sets forth a comprehensive system of sanctions, but which leaves room for flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. These standards are designed to promote thorough, rational consideration of all factors relevant to imposing a sanction in an individual case. The standards attempt to ensure that such factors are given appropriate weight in light of the stated goals of lawyer discipline, and that only relevant aggravating and mitigating circumstances are

considered at the appropriate time. Finally, the standards should help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar.

While these standards will improve the operation of lawyer discipline systems, there is an additional factor which, though not the focus of this report, cannot be overlooked. In discussing sanctions for lawyer misconduct, this report assumes that all instances of unethical conduct will be brought to the attention of the disciplinary system. Experience indicates that such is not the case. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee), was charged with the responsibility for evaluating the effectiveness of disciplinary enforcement systems. The Clark Committee concluded that one of the most significant problems in lawyer discipline was the reluctance of lawyers and judges to report misconduct.[7] That same problem exists today. It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency.[8] Failure to render such reports is a disservice to the public and the legal profession.

Judges in particular should be reminded of their obligation to report unethical conduct to the disciplinary agencies. Under the ABA Code of Judicial Conduct, a judge is obligated to "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."[9] Frequently, judges take the position that there is no such need and that errant behavior of lawyers can be remedied solely by use of contempt proceedings and other alternative means. It must be emphasized that the goals of lawyer discipline are not properly and fully served if the judge who observes unethical conduct simply deals with it on an *ad hoc* basis. It may be proper and wise for a judge to use contempt powers in order to assure that the court maintains control of the proceeding and punishes a lawyer for abusive or obstreperous conduct in the court's presence. However, the lawyer discipline system is in addition to and serves purposes different from contempt powers and other mechanisms available to the judge. Only if all lawyer misconduct is in fact reported to the appropriate disciplinary agency can the legal profession have confidence that consistent sanctions are imposed for similar misconduct.

Consistency of sanctions depends on reporting of other types as well. The American Bar Association
2 Center for Professional Responsibility has established a "National Discipline Data Bank" which collects statistics on the nature of ethical violations and sanctions imposed in lawyer discipline cases in all jurisdictions. The information available from the data bank is only as good as the reports which reach it. It is vital that the data bank promptly receive complete, accurate and detailed information with regard to all discipline cases.

Finally, the purposes of lawyer sanctions can best be served, and the consistency of those sanctions enhanced, if courts and disciplinary agencies throughout the country articulate the reasons for sanctions imposed. Courts of record that impose lawyer discipline do a valuable service to the legal profession and the public when they issue opinions in lawyer discipline cases that explain the imposition of a specific sanction. The effort of the Sanctions Committee was made easier by the well-reasoned judicial opinions that were available. At the same time, the Sanctions Committee was frustrated by the fact that many jurisdictions do not publish lawyer discipline decisions, and that even published decisions are often summary in nature, failing to articulate the justification for the sanctions imposed.

B. METHODOLOGY

The Standards for Lawyer Sanctions have been developed after an examination of all reported lawyer discipline cases from 1980 to June, 1984, where public discipline was imposed.[10] In addition, eight jurisdictions, which represent a variety of disciplinary systems as well as diversity in geography and population size, were examined in depth. In these jurisdictions—Arizona, California, the District of Columbia, Florida, Illinois, New Jersey, North Dakota, and Utah—all published disciplinary cases from January 1974 through June 1984 were analyzed. In each case, data were collected concerning the type of offense, the sanction imposed, the policy considerations identified, and aggravating or mitigating circumstances noted by the court.[11]

These data were examined to identify the patterns that currently exist among courts imposing sanctions and the policy considerations that guide the courts. In general, the courts were consistent in identify-

ing the following policy considerations: protecting the public, ensuring the administration of justice, and maintaining the integrity of the profession. In the words of the California Supreme Court: "The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the lawyer to continue in that capacity for the protection of the public, the courts, and the legal profession."[2] However, the courts failed to articulate any theoretical framework for use in imposing sanctions.

In attempting to develop such a framework, the Sanctions Committee considered a number of options. The Committee considered the obvious possibility of identifying each and every type of misconduct in which a lawyer could engage, then suggesting either a recommended sanction or a range of recommended sanctions to deal with that particular misconduct. The Sanctions Committee unanimously rejected that option as being both theoretically simplistic and administratively cumbersome.[3]

The Sanctions Committee next considered an approach that dealt with general categories of lawyer misconduct and applied recommended sanctions to those types of misconduct depending on whether or not—and to what extent—the misconduct resulted from intentional or malicious acts of the lawyer. There is some merit in that approach; certainly, the intentional or unintentional conduct of the lawyer is a relevant factor. Nonetheless, that approach was also abandoned after the Sanctions Committee carefully reviewed the purposes of lawyer sanctions. Solely focusing on the intent of the lawyer is not sufficient, and proposed standards must also consider the damage which the lawyer's misconduct causes to the client, the public, the legal system, and the profession. An approach which looked only at the extent of injury was also rejected as being too narrow.

The Committee adopted a model that looks first at the ethical duty and to whom it is owed, and then at the lawyer's mental state and the amount of injury caused by the lawyer's misconduct. (See Theoretical Framework, p. 5, for a detailed discussion of this approach.) Thus, one will look in vain for a section of this report which recommends a specific sanction for, say, improper contact with opposing parties who are represented by counsel [Rule 4.2/DR 7-104(A)(1)],[4] or for any other specific misconduct. What one will find, however, is an organizational framework that provides recommendations as to the type of sanction that should be imposed based on violations of duties owed to clients, the public, the legal system, and the profession.

To provide support for this approach, the Sanctions Committee has offered as much specific data and guidance as possible from reported cases.[5] Thus, with regard to each category of misconduct, the report provides the following:

—discussion of what types of sanctions have been imposed for similar misconduct in reported cases;
—discussion of policy reasons which are articulated in reported cases to support such sanctions; and,
—finally, a recommendation as to the level of sanction imposed for the given misconduct, absent aggravating or mitigating circumstances.

While it is recognized that any individual case may present aggravating or mitigating factors which would lead to the imposition of a sanction different from that recommended, these standards present a model which can be used initially to categorize misconduct and to identify the appropriate sanction. The decision as to the effect of any aggravating or mitigating factors should come only after this initial determination of the sanction.

The Sanctions Committee also recognized that the imposition of a sanction of suspension or disbarment does not conclude the matter. Typically, disciplined lawyers will request reinstatement or readmission. While this report does not include an in-depth study of reinstatement and readmission cases, a general recommendation concerning standards for reinstatement and readmission appears as Standard 2.10.

II. THEORETICAL FRAMEWORK

These standards are based on an analysis of the nature of the professional relationship. Historically, being a member of a profession has meant that an individual is some type of expert, possessing knowledge of high instrumental value such that the members of the community give the professional the power to make decisions for them. In the legal profession, the community has allowed the profession the right of self-regulation. As stated in the Preamble to the ABA Model Rules of Professional Conduct (hereinafter "Model Rules"), "[t]he legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."[6]

This view of the professional relationship requires lawyers to observe the ethical requirements that are set out in the Model Rules (or applicable standard in the jurisdiction where the lawyer is licensed). While the Model Rules define the ethical guidelines for lawyers, they do not provide any method for assigning sanctions for ethical violations. The Committee developed a model which requires a court imposing sanctions to answer each of the following questions:

(1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)
(2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or negligently?)
(3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and
(4) Are there any aggravating or mitigating circumstances?

In determining the nature of the ethical duty violated, the standards assume that the most important ethical duties are those obligations which a lawyer owes to *clients*. These include:

(a) the duty of *loyalty* which (in the terms of the Model Rules and Code of Professional Responsibility) includes the duties to:
  (i) preserve the property of a client [Rule 1.15/DR9-102],
  (ii) maintain client confidences [Rule 1.6/DR4-101], and
  (iii) avoid conflicts of interest [Rules 1.7 through 1.13, 2.2, 3.7, 5.4(c) and 6.3/ DR5-101 through DR 5-105, DR9-101];
(b) the duty of *diligence* [Rules 1.2, 1.3, 1.4/DR6-101(A)(3)];
(c) the duty of *competence* [Rule 1.1/DR6-101(A)(1) & (2)]; and
(d) the duty of *candor* [Rule 8.4(c)/DR 1-102(A)(4) & DR7-101(A)(3)].

In addition to duties owed to clients, the lawyer also owes duties to the *general public*. Members of the public are entitled to be able to trust lawyers to protect their property, liberty, and their lives. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice [Rules 8.2, 8.4(b)&(c)/DR 1-102(A)(3)(4)&(5), DR 8-101 through DR 8-103, DR 9-101(c)].

Lawyers also owe duties to the *legal system*. Lawyers are officers of the court, and must abide by the rules of substance and procedure which shape the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or engage in any other illegal or improper conduct [Rules 3.1 through 3.6, 3.9, 4.1 through 4.4, 8.2, 8.4(d)(e)&(f)/DR7-102 through DR7-110].

Finally, lawyers owe duties to the *legal profession*. Unlike the obligations mentioned above, these duties are not inherent in the relationship between the professional and the community. These duties do not concern the lawyer's basic responsibilities in representing clients, serving as an officer of the court, or maintaining the public trust, but include other duties relating to the profession. These ethical rules concern:

(a) *restrictions on advertising and recommending employment* [Rules 7.1 through 7.5/DR2-101 through 2-104];
(b) *fees* [Rules 1.5, 5.4 and 5.6/DR2-106, DR2-107, and DR3-102];

(c) *assisting unauthorized practice* [Rule 5.5/DR3-101 through DR3-103];
(d) *accepting, declining, or terminating representation* [Rules 1.2, 1.14, 1.16/DR2-110]; and
(e) *maintaining the integrity of the profession* [Rules 8.1&8.3/DR1-101 and DR 1-103].

The *mental states* used in this model are defined as follows. The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

The extent of the *injury* is defined by the type of duty violated and the extent of actual or potential harm. For example, in a conversion case, the injury is determined by examining the extent of the client's actual or potential loss. In a case where a lawyer tampers with a witness, the injury is measured by evaluating the level of interference or potential interference with the legal proceeding. In this model, the standards refer to various levels of injury: "serious injury," "injury," and "little or no injury." A reference to "injury" alone indicates any level of injury greater than "little or no" injury.

As an example of how this model works, consider two cases of conversion of a client's property. After concluding that the lawyers engaged in ethical misconduct, it is necessary to determine what duties were breached. In these cases, each lawyer breached the duty of loyalty owed to clients. To assign a sanction, however, it is necessary to go further, and to examine each lawyer's mental state and the extent of the injuries caused by the lawyers' actions.

In the first case, assume that the client gave the lawyer $100 as an advance against the costs of investigation. The lawyer took the money, deposited it in a personal checking account, and used it for personal expenses. In this case, where the lawyer acted intentionally and the client actually suffered an injury, the most severe sanction—disbarment—would be apropriate.

Contrast this with the case of a second lawyer, whose client delivered $100 to be held in a trust account. The lawyer, in a hurry to get to court, neglected to inform the secretary what to do with these funds and they were erroneously deposited into the lawyer's general office account. When the lawyer needed additional funds he drew against the general account. The lawyer discovered the mistake, and immediately replaced the money. In this case, where there was no actual injury and a potential for only minor injury, and where the lawyer was merely negligent, a less serious sanction should be imposed. The appropriate sanction would be either reprimand or admonition.

In each case, after making the initial determination as to the appropriate sanction, the court would then consider any relevant *aggravating or mitigating factors* (Standard 9). For example, the presence of aggravating factors, such as vulnerability of the victim or refusal to comply with an order to appear before the disciplinary agency, could increase the appropriate sanction. The presence of mitigating factors, such as absence of prior discipline or inexperience in the practice of law, could make a lesser sanction appropriate.

While there may be particular cases of lawyer misconduct that are not easily categorized, the standards are not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct. Rather, the standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in that particular situation. The standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct.

The standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors (see Standard 9.22).

III. STANDARDS FOR IMPOSING LAWYER SANCTIONS: BLACK LETTER RULES

For reference purposes, a list of the black letter rules is set out below. The entire report, with commentary on each rule, begins on p. 17.

Definitions

"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

"Intent" is the conscious objective or purpose to accomplish a particular result.

"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

A. PURPOSE AND NATURE OF SANCTIONS

1.1 *Purpose of Lawyer Discipline Proceedings*

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.

1.2 *Public Nature of Lawyer Discipline Proceedings*

Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.

1.3 *Purpose of These Standards*

These standards are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Model Rules of Professional Conduct (or applicable standard under the laws of the jurisdiction where the proceeding is brought). Descriptions in these standards of substantive disciplinary offenses are not intended to create grounds for determining culpability independent of the Model Rules. The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

B. SANCTIONS

2.1 *Scope*

A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer has engaged in professional misconduct.

2.2 *Disbarment*

Disbarment terminates the individual's status as a lawyer. Where disbarment is not permanent, procedures should be established for a lawyer who has been disbarred to apply for readmission, provided that:

(1) no application should be considered for five years from the effective date of disbarment; and
(2) the petitioner must show by clear and convincing evidence:
  (a) successful completion of the bar examination, and
  (b) rehabilitation and fitness to practice law.

2.3 *Suspension*

Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Generally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years. Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation and fitness to practice law.

2.4 *Interim Suspension*

Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:

(a) suspension upon conviction of a "serious crime" or,
(b) suspension when the lawyer's continuing conduct is or is likely to cause immediate and serious injury to a client or the public.

2.5 *Reprimand*

Reprimand, also known as censure or public censure, is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

2.6 *Admonition*

Admonition, also known as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

2.7 *Probation*

Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand or an admonition; probation can also be imposed as a condition of readmission or reinstatement.

2.8 *Other Sanctions and Remedies*

Other sanctions and remedies which may be imposed include:

(a) restitution,
(b) assessment of costs,
(c) limitation upon practice,
(d) appointment of a receiver,
(e) requirement that the lawyer take the bar examination or professional responsibility examination,
(f) requirement that the lawyer attend continuing education courses, and
(g) other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions.

2.9 *Reciprocal Discipline*

Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another jurisdiction.

2.10 *Readmission and Reinstatement*

In jurisdictions where disbarment is not permanent, procedures should be established to allow a disbarred lawyer to apply for readmission. Procedures should be established to allow a suspended lawyer to apply for reinstatement.

C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

3.0 *Generally*

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

(a) the duty violated;
(b) the lawyer's mental state;
(c) the potential or actual injury caused by the lawyer's misconduct; and
(d) the existence of aggravating or mitigating factors.

4.0 *Violations of Duties Owed to Clients*

4.1 *Failure to Preserve the Client's Property*

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

4.2 *Failure to Preserve the Client's Confidences*

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving improper revelation of information relating to representation of a client:

4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.

4.24 Admonition is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.

4.3 *Failure to Avoid Conflicts of Interest*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

4.4 *Lack of Diligence*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

4.41 Disbarment is generally appropriate when:

(a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or

(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client, or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

4.44 Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

4.5 *Lack of Competence*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:

4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.

4.53 Reprimand is generally appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.

4.6 *Lack of Candor*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

5.0 *Violations of Duties Owed to the Public*

5.1 *Failure to Maintain Personal Integrity*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct

which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

5.2 *Failure to Maintain the Public Trust*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official:

5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

5.23 Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

5.24 Admonition is generally appropriate when a lawyer in an official or governmental position engages in an isolated instance of negligence in not following proper procedures or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process.

6.0 *Violations of Duties Owed to the Legal System*

6.1 *False Statements, Fraud, and Misrepresentation*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to

disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

6.2 *Abuse of the Legal Process*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

6.3 *Improper Communications with Individuals in the Legal System*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law:

6.31 Disbarment is generally appropriate when a lawyer:

(a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

(b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

(c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.

6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

6.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little

or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.

7.0 *Violations of Duties Owed to the Profession*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system.

7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed to the profession, and causes little or no actual or potential injury to a client, the public, or the legal system.

8.0 *Prior Discipline Orders*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving prior discipline.

8.1 Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

8.3 Reprimand is generally appropriate when a lawyer:

(a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has received an admonition for the same or similar misconduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

8.4 An admonition is generally not an appropriate sanction when a lawyer violates the terms of a prior disciplinary order or when a lawyer has engaged in the same or similar misconduct in the past.

9.0 *Aggravation and Mitigation*

9.1 *Generally*

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

9.2 *Aggravation*

9.21 *Definition.* Aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed.

9.22 *Factors which may be considered in aggravation.* Aggravating factors include:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution.

9.3 *Mitigation*

9.31 *Definition.* Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32 *Factors which may be considered in mitigation.* Mitigating factors include:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;
(h) physical or mental disability or impairment;
(i) delay in disciplinary proceedings;
(j) interim rehabilitation;
(k) imposition of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.

9.4 *Factors Which Are Neither Aggravating Nor Mitigating*

The following factors should not be considered as either aggravating or mitigating:

(a) forced or compelled restitution;
(b) agreeing to the client's demand for certain improper behavior or result;
(c) withdrawal of complaint against the lawyer;
(d) resignation prior to completion of disciplinary proceedings;
(e) complainant's recommendation as to sanction;
(f) failure of injured client to complain.

IV. STANDARDS FOR IMPOSING SANCTIONS: BLACK LETTER RULES AND COMMENTARY

Definitions

"Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.

"Intent" is the conscious objective or purpose to accomplish a particular result.

"Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

"Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

"Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct.

A. PURPOSE AND NATURE OF SANCTIONS

1.1 ***Purpose of Lawyer Discipline Proceedings.*** **The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.**

Commentary

A similar statement of purpose appears as Standard 1.1 of the Standards for Lawyer Discipline. While courts express their views on the purpose of lawyer sanctions somewhat differently, an examination of reported cases reveals surprising accord as to the basic purpose of discipline. As identified by the courts, the primary purpose is to protect the public.[17] Second, the courts cite the need to protect the integrity of the legal system, and to insure the administration of justice.[18] Another purpose is to deter further unethical conduct and, where appropriate, to rehabilitate the lawyer.[19] A final purpose of imposing sanctions is to educate other lawyers and the public, thereby deterring unethical behavior among all members of the profession.[20] As the courts have noted, while sanctions imposed on a lawyer obviously have a punitive aspect, nonetheless, it is not the purpose to impose such sanctions for punishment.[21]

To achieve these purposes, sanctions for misconduct must apply to all licensed lawyers. Lawyers who are not actively practicing law, but who are serving in such roles as corporate officers, public officials, or law professors, do not lose their association with the legal profession because of their primary occupation. The public quite properly expects that anyone who is admitted to the practice of law, regardless of daily occupational activities, will conform to the minimum ethical standards of the legal profession. If the lawyer fails to meet these standards, appropriate sanctions should be imposed.

1.2 ***Public Nature of Lawyer Discipline Proceedings.*** **Upon the filing and service of formal charges, lawyer discipline proceedings should be public, and disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.**

Commentary

Standard 8.25 of the Standards for Lawyer Discipline states that "upon the filing and service of formal charges [against a lawyer] the proceeding should be public. . . ."[22] Although the majority of jurisdictions still do not follow this procedure,[23] a combination of public proceedings, after probable cause is found, and public sanctions is the better approach. Individual lawyers may prefer to avoid the embarrassment and stigma associated with a public sanction, but the profession as a whole will benefit. The more the

public knows about how effectively the disciplinary system works, the more confidence they will have in that system. If there is approval of the system, it is hoped that public confidence in the profession's ability to discipline itself will be assured. In the words of one court, ". . . the purpose of bar disciplinary proceedings is not to punish the respondent lawyer but to vindicate in the eyes of the public the overall reputation of the bar."[24] Public discipline accompanied by written opinions setting forth the court's rationale for imposing a particular sanction can enhance that reputation.

Public identification of a lawyer who has been sanctioned serves other purposes as well. Where only some of the misconduct is known and more than one lawyer appears to be involved, announcement of the names of those who are sanctioned permits others' names to be cleared. Where the lawyer sanctioned is particularly prominent, public identification demonstrates that the system does not play favorites. Where the lawyer sanctioned may have caused injury to others who did not know they could complain, identification enables other victims to make themselves known.

Public sanctions also serve other members of the legal profession. When all sanctions are public, lawyers themselves can observe whether the system is operating fairly, treating consistently lawyers who are disciplined for similar misconduct. Public sanctions also educate other lawyers, and help deter misconduct by others in the profession. The preventive aspect of discipline cannot be overlooked.

Even while recognizing these interests of the public and the profession, however, it is important to note that there are certain situations in which it may be appropriate to impose private discipline. In cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little or no likelihood of repetition, the court or disciplinary counsel should consider imposing an admonition. A private sanction in such cases informs the lawyer that his or her actions are unethical, but does not unnecessarily stigmatize a lawyer from whom the public needs no protection. To deter other lawyers, the court can still issue a public report describing the facts in cases where admonitions are imposed, but omitting the names of the disciplined lawyers.

Finally, in discussing private discipline, it is important to examine cases of discipline "by consent" in
18 cases of disbarment, suspension, and reprimand. While sanctions imposed after a consent agreement can be public, the process by which the sanction decision is reached is private. The respondent lawyer and disciplinary counsel stipulate as to the facts, and that private interpretation of the facts then becomes the basis for imposing a public sanction. While there are many practical reasons why this disciplinary "plea bargaining" occurs, it is inconsistent with the policies described above. At a minimum, where discipline by consent is imposed in cases of disbarment, suspension, or reprimand, the court should require that a statement of the facts be made public.

In cases of both public and private discipline, the court should state clearly and unambiguously what sanction or sanctions are to be imposed. The purposes of lawyer discipline are not served if the sanction is unclear or is conditioned on unnamed factors. Even when a private sanction is imposed, a disciplined lawyer is entitled to know exactly what is expected of him or her.

1.3 ***Purpose of These Standards.*** **These standards are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Model Rules of Professional Conduct (or applicable standard under the laws of the jurisdiction where the proceeding is brought). Descriptions in these standards of substantive disciplinary offenses are not intended to create grounds for determining culpability independent of the Model Rules. The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanction in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.**

Commentary

The Model Rules of Professional Conduct (or other standard under the laws of the particular jurisdiction) establish the ethical standards for lawyers, and lawyers who violate these standards are subject to

discipline. When disciplinary proceedings are brought against lawyers alleged to have engaged in ethical misconduct, disciplinary counsel have the burden of proving misconduct by clear and convincing evidence (see Standards for Lawyer Discipline, Standard 8.40). Following such a finding, the court or disciplinary agency should impose a sanction.

The Standards for Imposing Lawyer Sanctions are guidelines which are to be used by courts or disciplinary agencies in imposing sanctions *following* a finding of lawyer misconduct. These standards are not grounds for discipline, but, rather, constitute a model for the courts to follow in deciding what sanction to impose for proven lawyer misconduct. While these standards set forth a comprehensive model to be used in imposing sanctions, they also recognize that sanctions imposed must reflect the circumstances of each individual lawyer, and therefore provide for consideration of aggravating and mitigating circumstances in each case.

The Standards for Imposing Lawyer Sanctions are designed to promote consistency in the imposition of sanctions by identifying the relevant factors that courts should consider (see Standard 3.0) and then applying these factors to situations where lawyers have engaged in various types of misconduct (see Standards 4.0 through 8.0). Because the Model Rules of Professional Conduct have been adopted by the American Bar Association as the ethical standards for the legal profession, the language of the Model Rules is used herein. However, because only a minority of jurisdictions have actually adopted the Model Rules, these Standards are phrased in terms of the fundamental duties owed to clients, the public, the legal system, and the profession. This general language should make these standards applicable in all jurisdictions regardless of whether the jurisdiction chooses to adopt the Model Rules, the former Code of Professional Responsibility, or some combination of these standards.

B. SANCTIONS

2.1 *Scope*

A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgement that the lawyer has engaged in professional misconduct.

Commentary

Sanctions in disciplinary matters are neither criminal nor civil but *sui generis* and imposed under authority of the state's highest court.[25] Disciplinary sanctions are separate and apart from penalties which may be imposed solely for civil or criminal conduct, or contempt of court.[26] Disciplinary sanctions do not include restrictions upon a lawyer's practice which may be imposed solely as a result of a lawyer's disability. For example, a lawyer who has not engaged in professional misconduct, but whose ability to practice law is impaired, as by alcoholism or mental illness, should be helped to limit his practice or transferred to inactive status; disciplinary sanctions should not be imposed (see Standards for Lawyer Discipline, Standard 12). Disciplinary sanctions do not include penalties that may be imposed on lawyers who violate administrative rules or regulations applicable to members of the bar, such as by failing to pay dues or to attend mandatory continuing legal education programs.

2.2 *Disbarment*

Disbarment terminates the individual's status as a lawyer. Where disbarment is not permanent, procedures should be established for a lawyer who has been disbarred to apply for readmission, provided that:

(1) no application should be considered for five years from the effective date of disbarment; and
(2) the petitioner must show by clear and convincing evidence:
  (a) successful completion of the bar examination,
  (b) compliance with all applicable discipline or disability orders or rules; and
  (c) rehabilitation and fitness to practice law.

Commentary

Disbarment is the most severe sanction, terminating the lawyer's ability to practice law. Disbarment enforces the purpose of discipline in that the public is protected from further practice by the lawyer; the reputation of the legal profession is protected by the action of the bench and bar in taking appropriate actions against unethical lawyers. Even though disbarment is reserved for the most serious cases, the majority of jurisdictions allow application for readmission after a period of time. For the protection of the public, however, the presumption should be against readmission, and, in order to insure that disbarment is in reality a more serious sanction than suspension, in no event should a lawyer even be considered for readmission until at least five years after the effective date of disbarment. After that time, a lawyer seeking to be readmitted to practice must show by clear and convincing evidence: successful completion of the bar examination, compliance with all applicable discipline or disability orders or rules, and rehabilitation and fitness to practice law (see Standards for Lawyer Discipline, Standards 6.1 and 6.2).

Disbarment includes disbarment by consent, resignation in lieu of disbarment, and reciprocal disbarment. Although a lawyer who has been disbarred on consent or who has resigned in lieu of disbarment may not be readmitted any earlier than any other lawyer who has been disbarred, the fact that the lawyer resigned or was disbarred on consent is a factor that can be considered if the lawyer applies for readmission.

2.3 *Suspension*

Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. Generally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years. Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who

has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation, compliance with all applicable discipline or disability orders and rules, and fitness to practice law.

Commentary

Suspension includes suspension by consent, resignation in lieu of suspension and reciprocal suspension. Although jurisdictions impose suspensions for various time periods, the Standards for Lawyer Discipline recommend that suspension be for a definite period of time not to exceed three years. If the conduct is so egregious that a longer suspension seems warranted, the sanction of disbarment should be imposed.

In addition, the Standards draw a distinction between suspensions for six months or less, and suspensions for more than six months. Standard 6.4 states that a lawyer who has been suspended for six months or less should be reinstated automatically (i.e., without establishing rehabilitation). However, a lawyer who has been suspended for more than six months should *not* be reinstated without being required to show by clear and convincing evidence: rehabilitation, compliance with all applicable discipline or disability orders or rules, and fitness to practice law.

While the Standards for Lawyer Discipline currently provide for suspensions of less than six months, short-term suspensions with automatic reinstatement are not an effective means of protecting the public. If a lawyer's misconduct is serious enough to warrant a suspension from practice, the lawyer should not be reinstated until rehabilitation can be established. While it may be possible in some cases for a lawyer to show rehabilitation in less than six months, it is preferable to suspend a lawyer for at least six months in order to insure effective demonstration of rehabilitation. In order to insure that administrative procedures do not extend the period of actual suspension beyond that imposed, however, expedited procedures should be established to reinstate immediately lawyers who show rehabilitation, compliance with rules, and fitness to practice.

A six-month suspension is also necessary to protect clients. When shorter suspensions are imposed, lawyers can merely delay performing the requested services. If the lawyer eventually completes the work for the client and receives a fee, the suspension has only served to inconvenience the client. In reality, a short-term suspension functions as a fine on the lawyer, and fines are prohibited by the Lawyer Standards (see Standard 6.14).

The amount of time for which a lawyer should be suspended; then, should generally be for a minimum of six months. In no case should the time period prior to application for reinstatement be more than three years. The specific period of time for the suspension should be determined after examining any aggravating or mitigating factors in the case. At the end of this time period the lawyer may apply for reinstatement, and the lawyer must show: rehabilitation, compliance with all applicable discipline or disability orders and rules, and fitness to practice law (see Standard 6.4).

2.4 *Interim Suspension*

Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes:

(a) suspension upon conviction of a "serious crime" or,
(b) suspension when the lawyer's continuing conduct is or is likely to cause immediate and serious injury to a client or the public.

Commentary

Standard 6.5 of the Standards for Lawyer Discipline states that the court should place a lawyer on interim suspension immediately upon proof that the lawyer has been convicted of a "serious crime" or is causing great harm to the public. A "serious crime" is defined as any felony or any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, theft; or an attempt or a conspiracy or solicitation of another to commit a

"serious crime."[27] Interim suspension is necessary in such cases both to protect members of the public and to maintain public confidence in the legal profession. As explained in the commentary to Standard 6.5, it is difficult for members of the public to understand why a lawyer who has been convicted of stealing funds from a client can continue to handle client funds. Public confidence in the profession is strengthened when expedited procedures are available in such instances of lawyer misconduct.

Although due process does not require a hearing prior to imposing an interim suspension following a criminal conviction, an opportunity to show cause as to why it should not be imposed should be available. An interim suspension remains in effect until it is lifted by the court, or until the court imposes a final disciplinary sanction after compliance with relevant procedural rules.

Interim suspension is also appropriate when the lawyer's continuing conduct is causing or is likely to cause immediate and serious injury to a client or the public. The commentary to Standard 6.5 cites the example of a lawyer who has displayed a pattern of misconduct, such as ongoing conversion of trust funds, as warranting interim suspension. Interim suspension is also appropriate where a lawyer abandons the practice of law.

(As explained above in Section 2.1, cases of lawyer disability are not included in the scope of this report. See Standard 12.1 in the Standards for Lawyer Discipline for a discussion of transfer to disability inactive status.)

2.5 *Reprimand*

Reprimand, also known as censure or public censure, is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

Commentary

Publicity enhances the effect of the discipline and emphasizes the concern of the court with all lawyer misconduct, not only serious ethical violations. A reprimand is appropriate in cases where the lawyer's conduct, although violating ethical standards, is not serious enough to warrant suspension or disbarment. (See Definitions, Standards for Lawyer Discipline.) A reprimand serves the useful purpose of identifying lawyers who have violated ethical standards, and, if accompanied by a published opinion, educates members of the bar as to these standards.

A reprimand is not always sufficient to protect the public; it may also be appropriate to attach additional conditions to a reprimand. When a lawyer lacks competence in one area of practice, for example, the court could impose a reprimand and also require the lawyer to attend continuing education courses. In a case of neglect, the court could impose reprimand and probation, during which period of time the lawyer's diligence in handling client matters could be monitored.

2.6 *Admonition*

Admonition, also known as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

Commentary

Admonition is the least serious of the formal disciplinary sanctions, and is the only private sanction. (See Definitions, Standards for Lawyer Discipline.) Because imposing an admonition will not inform members of the public about the lawyer's misconduct, admonition should be used only when the lawyer is negligent, when the ethical violation results in little or no injury to a client, the public, the legal system, or the profession, and when there is little or no likelihood of repetition. Relying on these criteria should help protect the public while, at the same time, avoid damage to a lawyer's reputation when future ethical violations seem unlikely. To enhance the preventive nature of lawyer discipline, the court or disciplinary agency should publish a fact description in admonition cases without disclosing the lawyer's name.

2.7 *Probation*

Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with a reprimand or an admonition; probation can also be imposed as a condition of readmission or reinstatement.

Commentary

Probation is a sanction that should be imposed when a lawyer's right to practice law needs to be monitored or limited rather than suspended or revoked. The need for probation can arise under a variety of situations, and it can be imposed either alone or along with a sanction of reprimand or admonition. If probation is imposed with a reprimand, it would be a public sanction; if probation is imposed with an admonition, it would be a private sanction. If probation is the sole sanction imposed, it can be either public or private, but the sanction should be public in any case in which the lawyer has violated a duty owed to a client, the public, or the legal system. Probation can also be imposed as a condition of readmission following disbarment or as a condition of reinstatement following a period of suspension from practice.

By imposing probation, the court allows a lawyer to continue to practice but also requires the lawyer to meet certain conditions that will protect the public and will assist the lawyer to meet ethical obligations. Conditions of probation can include:

(a) quarterly or semi-annual reports of caseload status, especially appropriate in neglect cases, see *Florida Bar v. Neale*, 432 So.2d 50 (Fla. 1980);
(b) supervision by a local disciplinary committee member, see *In re Maragos*, 285 N.W.2d 541 (N.D. 1979) and *In re Hessberger*, 96 Ill. 2d 423, 451 N.E.2d 821 (1983);
(c) periodic audits of trust accounts, especially appropriate in cases where lawyers improperly handle client funds, see *Florida Bar v. Montgomery*, 418 So.2d 267 (Fla. 1982);
(d) attendance at continuing education programs, especially appropriate in cases of incompetence, see *Florida Bar v. Glick*, 383 So.2d 642 (Fla. 1980);
(e) participation in alcohol or drug abuse programs, especially appropriate where the lawyer's abuse of alcohol or drugs was a significant cause of his misconduct, see *Tenner v. State Bar*, 28 Cal. 3d 202, 617 P.2d 486, 168 Cal. Rptr. 333 (1980) and *In re Heath*, 296 Or. 683, 678 P.2d 736 (1984);
(f) periodic physical or mental examinations, appropriate where the lawyer's physical or mental condition was a significant cause of his misconduct, see *In re McCallum*, 289 N.W.2d 146 (Minn. 1980) and *In re Mudge*, 33 Cal. 3d 152, 654 P.2d 1307, 187 Cal. Rptr. 779 (1982);
(g) passing the bar examination or the appropriate professional responsibility examination, see *Florida Bar v. Peterson*, 418 So.2d 246 (Fla. 1982) and *In re Morales*, 35 Cal. 3d 1, 671 P.2d 857, 196 Cal. Rptr. 353 (1983);
(h) limitations on practice, see *Florida Bar v. Neely*, 417 So.2d 957 (Fla. 1983); or
(i) such other conditions as are appropriate for the misconduct.

Probation may be terminated by the court after the respondent has filed an affidavit of compliance with all conditions of probation and the court is satisfied that the need for probation no longer exists. In the event that a lawyer is charged with violating the conditions of probation, a hearing is needed to determine whether a violation has occurred. The disciplinary authority has the burden of establishing any such violation by clear and convincing evidence. Upon a finding that a lawyer has violated probation conditions, the court may extend the probation, impose a more severe sanction, or otherwise handle the matter.

2.8 *Other Sanctions and Remedies*

Other sanctions and remedies which may be imposed include:

(a) restitution,
(b) assessment of costs,
(c) limitation upon practice,
(d) appointment of a receiver,

(e) requirement that the lawyer take the bar examination or professional responsibility examination,
(f) requirement that the lawyer attend continuing education courses, and
(g) other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions.

Commentary

These other sanctions and remedies are those that the court or the board may impose when it is deemed necessary to carry out the goals of the disciplinary system. The court should be creative and flexible in approaching those cases where there is some misconduct but where a severe sanction is not required. In less serious cases of incompetence, for example, a sanction requiring the lawyer to attend continuing legal education courses or to limit the lawyer's practice to handling certain types of cases may better protect the public than a period of suspension from practice. Fines are not an appropriate sanction (see Standard 6.14, Lawyer Standards).

2.9 *Reciprocal Discipline*

Reciprocal discipline is the imposition of a disciplinary sanction for conduct for which a lawyer has been disciplined in another jurisdiction.

Commentary

Public confidence in the profession is enhanced when lawyers who are admitted in more than one jurisdiction are prevented from avoiding the effect of discipline in one jurisdiction by practicing in another. Standard 10.2 of the Standards for Lawyer Discipline provides that a certified copy of the findings of fact in the disciplinary proceeding in the other jurisdiction should constitute conclusive evidence that the respondent committed the misconduct. Reciprocal discipline can be imposed without a hearing, but the court should provide the lawyer with an opportunity to raise a due process challenge or to show that a sanction different from the sanction imposed in the other jurisdiction is warranted. In order to facilitate the imposition of reciprocal discipline, bar counsel or other appropriate authority in each state should report all cases of public discipline to the ABA National Discipline Data Bank.[28]

2.10 *Readmission and Reinstatement*

In jurisdictions where disbarment is not permanent, procedures should be established to allow a disbarred lawyer to apply for readmission. Procedures should be established to allow a suspended lawyer to apply for reinstatement.

Commentary

Readmission occurs when a disbarred lawyer is returned to practice. Since the purpose of lawyer discipline is not punishment, readmission may be appropriate; the presumption, however, should be against readmission. In no event should a lawyer even be considered for readmission until at least five years after the effective date of disbarment. After that time, a lawyer seeking to be readmitted to practice must show by clear and convincing evidence: rehabilitation, compliance with all applicable discipline or disability orders or rules, and fitness to practice law.

Reinstatement occurs when a suspended lawyer is returned to practice. Since the purpose of lawyer discipline is not punishment, reinstatement is appropriate when a lawyer can show rehabilitation. Application for reinstatement should not be permitted until expiration of the ordered period of suspension and generally not until at least six months after the effective date of suspension. A lawyer should not be reinstated unless he can show by clear and convincing evidence: rehabilitation, compliance with all applicable discipline or disability orders and rules and fitness to practice law (see Standard 6.4).

Conditional readmission and conditional reinstatement can occur when appropriate. Conditions that can be imposed include probation (see Standard 2.7) or other sanctions or remedies (see Standard 2.8).

C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

3.0 *Generally*

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

(a) the duty violated;
(b) the lawyer's mental state; and
(c) the actual or potential injury caused by the lawyer's misconduct; and
(d) the existence of aggravating or mitigating factors.

Commentary

This system for determining an initial sanction upon a finding of lawyer misconduct requires courts to examine four factors: the nature of the duty violated, the lawyer's mental state, the actual or potential injury resulting from the lawyer's misconduct, and the existence of aggravating or mitigating factors. As explained above (see Theoretical Framework, p. 5), a lawyer's misconduct may be a violation of a duty owed to a client, the public, the legal system, or the profession. The lawyer's mental state may be one of intent, knowledge, or negligence. The injury resulting from the lawyer's misconduct need not be actually realized; in order to protect the public, the court should also examine the potential for injury caused by the lawyer's misconduct. In a case where a lawyer intentionally converts client funds, for example, disbarment can be imposed even where there is no actual injury to any client (see 4.11). In other situations, the standards make distinctions between various levels of actual or potential injury; disbarment may be reserved for cases of serious or potentially serious injury, while admonition may be imposed only in cases where there is little or no actual or potential injury. In any case, however, the court may then take account of any particular aggravating or mitigating factors (see Standard 9.0 for a list of these factors).

4.0 *Violations of Duties Owed to Clients*

Introduction

This duty arises out of the nature of the basic relationship between the lawyer and the client. The lawyer is not required to accept all clients,[29] but, having agreed to perform services for a client, the lawyer has duties that arise under ethical rules, agency law, and under the terms of the contractual relationship with the individual client. The lawyer must preserve the property of a client [Rule 1.15/DR 9-102], maintain client confidences [Rule 1.6/DR 4-101] and avoid conflicts which will impair the lawyer's independent judgment [Rules 1.7 through 1.13, 2.2, 3.7, 5.4(c), and 6.3/DR 5-101 through 5-105, DR 9-102]. In addition, the lawyer must be competent to perform the services requested by the client [Rule 1.1/DR 6-101(A)(1) and (2)] and be diligent in performing those services [Rules 1.2, 1.3, 1.4/DR 6-101(A)(3)]. The lawyer must also be candid with the client during the course of the professional relationship [Rule 8.4/DR 1-102(A)(4) and DR 7-101(A)(3)].

4.1 *Failure to Preserve the Client's Property*

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.11 Disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.

Commentary

Some courts have held that disbarment is always the appropriate discipline when a lawyer knowingly converts client funds. For example, in the case of *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979), the Supreme Court of New Jersey discussed the rationale for imposing disbarment as a sanction on lawyers who misappropriate client funds:

> Like many rules governing the behavior of lawyers, this one has its roots in the confidence and trust which clients place in their attorneys. Having sought his advice and relying on his expertise, the client entrusts the lawyer with the transaction—including the handling of the client's funds. Whether it be a real estate closing, the establishment of a trust, the purchase of a business, the investment of funds, the receipt of proceeds of litigation, or any one of a multitude of other situations, it is common-place that the work of lawyers involves possession of their client's funds. . . . Whatever the need may be for the lawyer's handling of client's money, the client permits it because he trusts the lawyer. . . . [T]here are few more egregious acts of professional misconduct of which an attorney can be guilty than the misappropriation of a client's funds held in trust. [citing *In re Beckman*, 79 N.J. 402, 404-05, 400 A.2d 792, 793 (1979)]. . . . Recognition of the nature and gravity of the offense suggests only one result—disbarment (81 N.J. at 454-55, 409 A.2d at 1154-55).

California has held that disbarment is appropriate even absent knowing conversion when a lawyer is grossly negligent in dealing with client property. As the California Supreme Court observed, "[e]ven if [the attorney's] conduct were not wilful and dishonest, gross carelessness and negligence constitute a violation of an attorney's oath faithfully to discharge his duties and involve moral turpitude." (*Chefsky v. State Bar*, 36 Cal.3d 116, at 123, 680 P.2d 82 (1984).)

Most courts, however, reserve disbarment for cases in which the lawyer uses the client's funds for the lawyer's own benefit. In *Carter v. Ross*, 461 A.2d 675 (R.I. 1983), for example, the lawyer took money from an estate and used it to pay office and personal expenses. The Rhode Island Supreme Court cited the *Wilson* case and imposed disbarment: "We, like our New Jersey colleagues, are convinced that continuing public confidence in the judicial system and the bar as a whole requires that the strictest discipline be imposed in misappropriation cases" (461 A.2d at 676). Similarly, in *In re Freeman*, 647 P.2d 820 (Kan. App. 1982), a lawyer was disbarred who caused checks from an insurance company to be issued to fictitious payees, and then converted that money for his own use. In these types of cases, where the law-

yer's lack of integrity is clear, only the most compelling mitigating circumstances should justify a lesser sanction than disbarment.

In such cases, it may not even seem necessary to consider whether there is any injury to a client. Even though there will always be a potential injury to a client in such cases, the injury factor should still be considered. First, consideration of the extent of actual or potential injury can be important when it is especially serious: injury should be proved up at the disciplinary proceeding in order to make a record in the event that a lawyer applies for readmission. Second, even in jurisdictions where disbarment is permanent, consideration of injury reinforces the concept that a basic purpose of lawyer discipline is protection of the public. As the New York Supreme Court explained in a case where it imposed disbarment on a lawyer who misappropriated more than $31,000 from a client-descendent's estate by forging the administratrix's signature on checks: "This result is called for by the duty to protect the public and to vindicate the public's trust in lawyers as custodians of clients' funds" (*In re Marks*, 72 A.D.2d 399, 401, 424 N.Y.S.2d 229, 230 (1980)). (Note: Lawyers who convert the property of persons other than their clients are covered by Standard 5.11.)

4.12 Suspension is generally appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Commentary

Suspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common cases involve lawyers who commingle client funds with their own, or fail to remit client funds promptly. While the court in *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979), defined misappropriation to include "any unauthorized use by the lawyer of clients' funds entrusted to him, . . . whether or not he derives any personal gain or benefit therefrom" (81 N.J. at 455, n.1, 409 A.2d at 1155, n.1), most courts do not impose disbarment on lawyers who merely commingle funds. As the Washington Supreme Court recently concluded, "We do not now nor have we ever held that trust account violations per se result in disbarment" (*In re Salvesen*, 94 Wash.2d 73, 79, 614 P.2d 1264, 1266 (1980)). 27

For example, in *State v. Chartier*, 234 Kan. 834, 676 P.2d 740 (1984), the lawyer commingled a client's funds, and failed to notify a client of receipt of garnishment proceeds. The court imposed an indefinite suspension, stating that the lawyer "knew, or should have known through the exercise of reasonable diligence" that the garnishment funds collected exceeded the amounts actually due (234 Kan. at 836, 676 P.2d at 742). Similarly, in *Disciplinary Board of the Supreme Court v. Banks*, 641 S.W.2d 501 (Tenn. 1982), the court imposed a one-year suspension where the lawyer took the client's money to invest but did not pay her interest on a regular basis or pay over the client's money upon her demand. The court noted that the lawyer did not intend to convert the client's funds to his own use: "At all times he acknowledged his responsibility for them and his indebtedness to her" (641 S.W.2d at 504). Because lawyers who commingle client's funds with their own subject the client's funds to the claims of creditors, commingling is a serious violation for which a period of suspension is appropriate even in cases when the client does not suffer a loss. As explained by the Illinois Supreme Court: "It is the risk of the loss of the funds while they are in the attorney's possession, and not only their actual loss, which the rule is designed to eliminate. . . ." *In re Bizar*, 97 Ill. 2d 127, 454 N.E.2d 271 (1983).

4.13 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Commentary

Reprimand should be reserved for lawyers who are merely negligent in dealing with client property, and who cause injury or potential injury to a client. Suspension or disbarment as applicable under Standards 4.11 and 4.12 and the commentary thereto is appropriate for lawyers who are grossly negligent. For example, lawyers who are grossly negligent in failing to establish proper accounting procedures should be suspended; reprimand is appropriate for lawyers who simply fail to follow their established pro-

cedures. Reprimand is also appropriate when a lawyer is negligent in training or supervising his or her office staff concerning proper procedures in handling client funds.

The courts have typically imposed reprimands in cases when lawyers fail to maintain adequate trust accounting procedures, or neglect to return the client's property promptly. In *The Florida Bar v. Golden*, 401 So. 2d 1340 (Fla. 1981), a public reprimand was imposed on a lawyer who failed to repay a loan made to him by a client for two years and who failed to keep adequate records of his trust accounting procedures. Similarly, in *Carter v. Gallucci*, 457 A.2d 269 (R.I. 1983), because of inadequate records, a lawyer failed to pay real estate taxes out of funds disbursed to him. He did subsequently pay the taxes, and the court imposed a reprimand.

4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.

Commentary

Admonition should be reserved for cases where the lawyer's negligence poses little or no risk of injury to a client. An admonition would be appropriate, for example, when a lawyer's sloppy bookkeeping practices make it difficult to determine the state of a client trust account, but where all client funds are actually properly maintained. Imposing an admonition in such a case should serve as a warning to the lawyer to improve his or her accounting procedures, thus preventing any actual injury to any client.

4.2 *Failure to Preserve the Client's Confidences*

Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

Commentary

Disbarment is warranted in situations when a lawyer intentionally abuses the client's trust by using the professional relationship to gain information which benefits the lawyer or another, and which causes injury or potential injury to a client. Because the violation of a client's confidence poses such a serious threat to the lawyer-client relationship, disbarment should be imposed whenever the lawyer acts with the intent to benefit the lawyer or another. Neither a "serious" injury nor a "potentially serious" injury to a client need be proved; any injury to a client will be sufficient to impose disbarment. An example of a case where disbarment is appropriate occurred in *In re Pool*, No. 83-37 BD, Sup. J. Ct., Suff. Cty., Mass. (1984), where a defendant's lawyer gave a federal prosecutor information about the location of a safety deposit box containing incriminating evidence in order to gain access to obtain funds to cover the costs of investigation. In the words of the court, "[t]he disclosure of confidential information by a defense attorney to a prosecutor, without the client's consent, is a serious violation of the defense attorney's obligations" (*Id.* at 4). (Note: This situation should be distinguished from the situation where a lawyer is acting under a good faith belief that there is no choice but to reveal a client's confidence, as in a case where a lawyer is called to testify as to the whereabouts of the client in a divorce proceeding and the lawyer's answer involves facts learned in the lawyer-client relationship. Here, the lawyer's good faith belief that the law requires disclosure of the information would be a mitigating factor, see Standard 9.32(b).)

4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

Commentary

Suspension is appropriate when the lawyer is not intentionally using the professional relationship to benefit himself or another, but nevertheless knowingly breaches a client's confidence such that the client

suffers injury or potential injury. An appropriate case for a suspension would involve a lawyer who knowingly revealed confidential information to the opposing party in litigation, with the result that the client's position was weakened.

4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.

Commentary

Reprimand should be imposed when a lawyer negligently breaches a client's confidence. Even when the client is not actually harmed, the potential for harm to the client and damage to the professional relationship is so significant that a public sanction should be imposed. In the words of one court: "This element of trust is the very essence of the attorney-client relationship" [*Matter of Roache*, 446 N.E.2d 1302, 1303 (Ind. 1983)]. An appropriate case for a reprimand would involve a lawyer who negligently leaves a client's documents in a conference room following a meeting, or who discusses a client matter in a public place.

4.24 Admonition is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.

Commentary

Maintaining a client's confidence is so fundamental to the professional relationship that generally it is inappropriate to impose a private sanction. At a minimum, a reprimand should be imposed (see Standard 4.23).

4.3 *Failure to Avoid Conflicts of Interest*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest: 29

4.31 Disbarment is generally appropriate when a lawyer, without the informed consent of client(s):

(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

Commentary

The courts generally disbar lawyers who intentionally exploit the lawyer-client relationship by acquiring an ownership, possessory, security or other pecuniary interest adverse to a client without the client's understanding or consent. For example, in *Matter of Easler*, 269 S.E.2d 765 (S.C. 1980), a lawyer who engaged in a fraudulent scheme to obtain the client's property at a price well below market value was disbarred. The court noted that "in his attempt to acquire their property for his personal gain," the lawyer falsely notarized one of the clients' signature, and took advantage of the "domestic and financial difficulties the McFarlins [the clients] were undergoing" (269 S.E.2d at 766). In *In re Wolf*, 82 N.J. 326, 413 A.2d 317 (1980), a widow retained the lawyer who had represented her husband during his lifetime to handle her husband's estate. When she asked the lawyer to suggest an investment for a portion of her inheritance, he suggested that she invest in property which was owned by a company in which he was a stock-

holder and officer. Knowing that his client was naive and inexperienced in business matters, he directed her to invest her money in property worth only half of what he represented to her, and did not inform her as to the status of the mortgage, the title, or unpaid real estate taxes. Later on, he failed to notify her of a foreclosure action on the property or to defend the action on her behalf. In the words of the court, "It is clear that he exploited his client for his own financial benefit. It was unthinkable in the first place for respondent to have suggested such an investment, but, having done so, it was unconscionable for him to have continued to represent the widow. He should have insisted that she retain independent counsel or refused to consummate the transaction. Undoubtedly, independent counsel would never have allowed the widow to make this investment" (413 A.2d at 321). (Note: the lawyer, who was disbarred, also attempted to commit fraud on the court in order to secure a larger fee.) Similarly, in *In re Hills*, 296 Or. 526, 678 P.2d 262 (1984), the lawyer entered into a loan transaction with clients in which he intentionally misrepresented that funds were available to pay the note. He also entered into a partnership agreement with another client in which he misrepresented that the client would be a limited partner but, in fact, made the client a general partner. In neither of these cases did the lawyer advise the clients to seek independent legal counsel.

Disbarment is also appropriate in cases of multiple representation when a lawyer knowingly engages in conduct with the intent to benefit the lawyer or another. As one court has explained, "Although many ingredients go into the recipe for a successful lawyer-client relationship, one ingredient is indispensable: individual loyalty. The relationship cannot properly exist absent the lawyer's uncompromised commitment to the client's cause. DR5-105 aims to insure undivided loyalty; in its absence, the lawyer cannot serve. The rule also seeks to maintain or increase public confidence in public institutions, for the appearance of impropriety that sometimes exists when a lawyer represents multiple clients . . . erodes public confidence in the legal profession." *In re Jans*, 295 Or. 289, 666 P.2d 830, 832 (1983). In *In re Keast*, 497 P.2d 103 (Mont. 1972), a lawyer represented a client charged with procuring girls for immoral purposes. Although the lawyer was named as one of the individuals for whom the girls were procured, he served as defense counsel in his client's criminal case. While this case was pending, the lawyer also filed an action for divorce against the client on behalf of the client's wife.
30 The court imposed disbarment. In *Stanley v. Board of Professional Responsibility*, 640 S.W.2d 210 (Tenn. 1982), a lawyer was disbarred who represented both the victim and the defendant in a criminal matter. After learning about the crime from the victim, the lawyer misled the defendant into employing him when the lawyer knew that the victim no longer wished to prosecute. In the words of the court, "Stanley [the lawyer] deceived an immature youth and his naive parents. He compounded the deception with his lack of understanding of the proper role of a lawyer—which does not include a self-appointed role as a paraclete, comforter, helper, or hand-holder, under the guise of legal services and at a lawyer's compensation rate" (640 S.W.2d at 213). (Note: the lawyer also was involved in another conflict of interest by entering into usurious loan transactions with two other clients.)

Finally, disbarment is appropriate when a lawyer knowingly uses information relating to representation of a former client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client. Although such cases are rare, disbarment is warranted when there is such an intentional abuse of the lawyer-client relationship.

4.32 Suspension is generally appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Commentary

Conflicts can take the form of a conflict between the lawyer and his or her client, between current clients, or between a former client and a present client. In the case of conflicts between a lawyer and a present client, suspension is appropriate when the lawyer knows that his or her interests may be or are likely to be adverse to that of the client, but does not fully disclose the conflict, and causes injury or potential injury to a client. For example, in *In re Boyer*, 295 Or. 624, 669 P.2d 326 (1983), the lawyer represented a client for a number of years, rendering both financial and legal advice. When another of his clients wanted to borrow money, the lawyer arranged for the first client to make a loan, and he prepared the note and a mortgage to secure the note, but the lawyer did not tell the first client either that such a loan might be

usurious, and thus unenforceable, or that he had received a finder's fee from the second client for his efforts. The Oregon Supreme Court found that the lawyer violated DR5-101(A) in his representation of the first client, and suspended him for seven months. [Note: the court also found a violation of DR5-105(B).] Similarly, in *Joseph E. Chabat*, DP-161/80, DP 74/81 (Michigan Attorney Discipline Board, 1980), a lawyer in a divorce action was suspended for nine months when he lent himself money from the sale of a client's house and failed to advise the client to seek independent representation in regard to the loan.

Suspension is also appropriate when a lawyer knows of a conflict among several clients, but does not fully disclose the possible effect of the multiple representation, and causes injury or potential injury to one or more of the clients. For example, in *State v. Callahan*, 232 Kan. 136, 652 P.2d 708 (1982), the lawyer represented both the vendors and the purchaser in a land sale transaction. The lawyer failed to warn the vendors that they did not have a perfected security interest and failed to make full disclosure to the vendors of his close business and professional associations with the purchaser. The Supreme Court of Kansas imposed an indefinite suspension. Similarly, in *Matter of Krakauer*, 81 N.J. 32, 404 A.2d 1137 (1979), the New Jersey Supreme Court imposed a one-year suspension on a lawyer who represented both sides in a real estate transaction (and who also attempted to retain an unearned commission and called for a title search which was not ordered by the client).

Finally, suspension is appropriate when a lawyer knows or should know that the interests of a client are materially adverse to the interests of a former client in a substantially related matter, and causes injury or potential injury to the former or the subsequent client. For example, in *In re LaPinska*, 72 Ill. 2d 461, 381 N.E.2d 700 (1978), the lawyer represented a contractor to secure title papers for a residence being sold. The lawyer, a city attorney, then represented the city in a suit brought by the purchasers of the residence against the contractor regarding a zoning violation of the property. When the purchasers complained about the leniency of the fine imposed on the contractor, the lawyer agreed to represent them in a civil suit against the contractor. Despite the fact that the lawyer had acted openly, and all the affected parties were aware of the dual representation, the Illinois Supreme Court suspended the lawyer for one year. Similarly, *In re Odendahl*, M.R. 2787 (Ill. 1982), the Illinois Supreme Court suspended a lawyer for one year when, while a state's attorney, he represented individuals in nine divorce proceedings in which support payments were due. In one case, he represented the wife to obtain the divorce, and then the husband, in a petition to reduce the support payments. In another case, he prosecuted a defendant for disorderly conduct and then filed an answer for him in a divorce suit by his wife. The court noted that four of these cases occurred after motions to disqualify had been filed against the lawyer and that he knew or should have known of the impropriety of his conduct. 31

4.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Commentary

The courts generally impose a reprimand when a lawyer engages in a single instance of misconduct involving a conflict of interest when the lawyer has merely been negligent and there is no overreaching or serious injury to a client. For example, in *State v. Swoyer*, 228 Kan. 799, 619 P.2d 1166 (1980), a public censure was imposed on a lawyer who was representing a client who owned his own business, and who also advised the client's former employee to sue the client for back wages. Although the lawyer stated that he was simply carrying out his client's wishes by attempting to secure payment for the employee, and that he merely advised her to file suit herself, the court found an ethical violation worthy of censure (reprimand) since her petition was actually typed in the lawyer's office and filed by the lawyer. In a multiple representation situation, the court in *Gendron v. State Bar of California*, 35 Cal. 3d 409, 673 P.2d 260, 197 Cal. Rptr. 590 (1983), imposed a public reprimand on a public defender who neglected to obtain written waiver of conflict forms from three defendants who were jointly charged with robbery. In *Matter of Palmieri*, 76 N.J. 51, 385 A.2d 856 (1978), a public reprimand was imposed on a lawyer who represented the seller of a supermarket when, with the buyers unable to hire a lawyer and upon the insistence of the seller, he also

represented the buyers. Although the lawyer made full disclosure of the relevant facts and pitfalls of multiple representation, he later filed suit against the buyers and eventually had to withdraw when he was required to be a witness concerning the nature of the agreement between the parties.

Courts also impose reprimands in cases of subsequent representation. For example, in *In re Drendel*, M.R. 1708 (Ill. 1975), a lawyer represented a client in a divorce suit against his wife, but the parties reconciled before the hearing and the case was dismissed. About 18 months later, he represented the wife in a divorce action against the husband, but this suit was also dismissed. Similarly, in *In re Lewis*, M.R. 2766 (Ill. 1982), the lawyer represented the executor of a will and later, while employed in another office, represented a client who was the devisee of the residence property who filed a petition alleging misconduct by the executor. The court ordered the lawyer censured [reprimanded], noting no evidence of secrecy, fraud, or financial benefit to the lawyer.

4.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no actual or potential injury to a client.

4.4 *Lack of Diligence*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

4.41 Disbarment is generally appropriate when:

(a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or

(b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or

(c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

Commentary

Lack of diligence can take a variety of forms. Some lawyers simply abandon their practices, leaving clients completely unaware that they have no legal representation and often leaving clients without any legal remedy. Other lawyers knowingly fail to perform services for a client, or engage in a pattern of misconduct, demonstrating by their behavior that they either cannot or will not conform to the required ethical standards.

Disbarment is appropriate in each of these situations. For example, in *The Florida Bar v. Lehman*, 417 So.2d 648 (Fla. 1982), a lawyer abandoned his practice and kept approximately 450 pending client matters. The clients suffered serious injuries; one client's statute of limitations ran, and many of the clients never recovered money paid to the lawyer as fees. See also: *In re Cullinam*, M.R. 2963 (Ill. 1983) (with other charges). In a case demonstrating a pattern of neglect, *State v. Dixon*, 233 Kan. 465, 664 P.2d 286, (1983), a lawyer was disbarred after having been disciplined for 13 counts of neglect of probate cases, with each case involving a long period of neglect (16 years, 28 years, etc.). The court noted that, although there was no evidence of dishonesty on the part of the lawyer, disbarment was appropriate because "the extent of the neglect is extreme and had reached proportions never before considered by this court" (233 Kan. at 470, 644 P.2d at 289). See also: *The Florida Bar v. Mitchell*, 285 So.2d 96 (Fla. 1980).

4.42 Suspension is generally appropriate when:

(a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

(b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Commentary

Suspension should be imposed when a lawyer knows that he is not performing the services requested by the client, but does nothing to remedy the situation, or when a lawyer engages in a pattern of

neglect, with the result that the lawyer causes injury or potential injury to a client. Most cases involve lawyers who do not communicate with their clients. For example, in *In re Earl J. Taylor*, 666 Ill. 2d 567, 363 N.E.2d 845 (1977), a lawyer was suspended for one year when he failed to appear at a criminal hearing, failed to file a divorce action, and failed to prosecute a civil case. In the third case, the lawyer told the client that "he'd take care of everything," yet did not contact her or return her telephone calls. This last client suffered a default judgment, which forced her to settle and pay a second lawyer; the first two clients suffered the loss of the fee. See also: *Hunt v. Disciplinary Board of the Alabama State Bar*, 381 So. 2d 52 (Ala. 1980); *People v. Dixon*, 616 P.2d 103 (Colo. 1980).

4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client.

Commentary

Most courts impose a reprimand when the lawyer is negligent. For example, in *In re Logan*, 70 N.J. 222, 358 A.2d 787 (1976), a lawyer who neglected a client matter was reprimanded when, knowing that a motion for reduction of alimony was dependent on the court's examination of his client's tax return, he failed to file a copy of the tax return with the court. See also: *In re Donohue*, 77 A.D.2d 112, 432 N.Y.S.2d 498 (1980), where a lawyer neglected an estate matter, but where the estate was eventually closed to the satisfaction of all parties and with no financial loss, and *Louis Lan*, DP-194180 (Mich. Atty. Dis. Board 1980), where the lawyer attempted to transfer cases to other lawyers without adequately communicating with his clients.

4.44 Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

4.5 *Lack of Competence*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:

4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

Commentary

Disbarment should be imposed on lawyers who are found to have engaged in multiple instances of incompetent behavior. Since disbarment is such a serious sanction, it should rarely be imposed on a lawyer who has demonstrated only a single instance of incompetence; rather, disbarment should be imposed on lawyers whose course of conduct demonstrates that they cannot or will not master the knowledge and skills necessary for minimally competent practice. For example, in *The Florida Bar v. Blaha*, 366 So.2d 443 (Fla. 1978), the court disbarred a lawyer who totally mishandled a guardianship and real estate transaction, and also filed a complaint for another client in the wrong court, such that relief was denied. In representing a third client, the lawyer mishandled a replevin action, filing replevin under old rules at a time when his client had not yet perfected a security interest necessary to support the action. As a result of this incompetence, the lawyer was eventually held in contempt and fined $3,000.

4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.

Commentary

In order to protect the public, a suspension should be imposed in cases when a lawyer engages in practice in areas in which a lawyer knows that he or she is not competent. In such cases, it may also be

appropriate to attach certain conditions to the suspension, such as a requirement that the lawyer pass the bar examination or limit his or her practice to certain areas.

Such a situation arose in the case of *Office of Disciplinary Counsel v. Henry*, 664 S.W.2d 62 (Tenn. 1983), where the lawyer mishandled four cases in a relatively short period of time. In one case, the lawyer attempted to represent a client charged with murder. The lawyer had never handled any felony case before, and yet did not associate any lawyer with him. He made little investigation of the crime, and filed motions based on statutes which had been superceded. Further, he severely damaged his client's case by filing an "amended answer" to the indictment, following the form which would be filed in a civil action, which set forth his client's version of the homicide. The court imposed a two-year suspension with reinstatement conditioned "upon a showing that he has obtained a level of competence adequate to justify the issuance of a license" (664 S.W.2d at 64).

4.53 Reprimand is generally appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

Commentary

Most courts impose reprimands on lawyers who are incompetent. For example, in *The Florida Bar v. Gray*, 380 So.2d 1292 (Fla. 1980), the lawyer agreed to represent a client in a claim of violation of the truth in lending laws, but, although the evidence showed that he expected to become qualified in this area, he did not engage in sufficient study and investigation to become competent (only securing a number of laymen's publications). The court imposed a public reprimand. Similarly, in *State ex rel. Nebraska State Bar Association v. Holscher*, 193 Neb. 729, 230 N.W.2d 75 (1975), a county lawyer who filed a claim for services he rendered in foreclosing tax sale certificates without familiarizing himself with the statute prescribing the fee for such services received a reprimand.

While reprimand alone can be appropriate, a combination of reprimand and probation is often a more productive approach. Probation can be very effective in assisting lawyers to improve their legal skills. The court can use probation creatively, imposing whatever conditions are necessary to assist that particular lawyer. It may be appropriate, for example, to require an inexperienced lawyer to associate with co-counsel. In *Florida Bar v. Glick*, 383 So. 2d 642 (Fla. 1980), the court imposed a reprimand and one-year probation on a lawyer who mishandled a quiet title action. The court imposed the following conditions of probation: that the lawyer refrain from representing clients in real estate matters and that he complete 30 hours of approved continuing education courses in real property.

4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.

4.6 *Lack of Candor*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client.

Commentary

Disbarment is appropriate when a lawyer intentionally abuses the fiduciary relationship, making misrepresentations to a client in order to benefit himself or another and causing serious injury or potentially serious injury to a client. (For a discussion of lack of candor before a court, see Standard 6.1). For exam-

ple. In *Matter of Wolfson*, 313 N.W.2d 596 (Minn. 1981), the court disbarred a lawyer who asked a client to help him arrange for a loan, and who misrepresented that the loan was for medical treatment for his daughter, when the loan was actually used in his wife's business. The client personally guaranteed payment of the loan and, when the lawyer failed to repay it, the client had to institute legal action against the lawyer to obtain an $832.61 judgment. In imposing disbarment, the court stated that the lawyer had not "hesitated to use his knowledge and skill as a lawyer for improper purposes" (313 N.W.2d at 602). (Note: The lawyer had also engaged in acts of neglect and abuse of the legal process.) Similarly, in (anonymous) 49 Cal. State Bar J. 73 (1974), a lawyer was disbarred after he borrowed money from two clients, falsely leading them to believe that he was solvent, with the result that the clients received an unsecured promissory note. In *Virginia State Bar ex rel. Eighth District Committee v. Fred W. Bender, Jr.*, No. 50228 (Va. App. Ct. 1981), the court revoked the license of a lawyer who intentionally overstated the number of hours he worked on a client's estate to make it appear that he was entitled to $9,500.

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

Commentary

Suspension is appropriate when a lawyer knowingly deceives a client, although not necessarily for his own direct benefit, and the client is injured. The most common cases are those in which a lawyer misrepresents the nature or the extent of services performed. For example, in *Kentucky Bar Association v. Reed*, 623 S.W.2d 228 (Ky. 1981), the court suspended a lawyer for one year when he misrepresented the status of three different cases and all three clients suffered injury (two clients suffered a summary judgment against them and another client was denied a settlement payment for an extensive period of time).

4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

Commentary

Reprimand is justified when the lawyer is merely negligent and there is injury or potential injury to a client. In *Hawkins v. State Bar*, 23 Cal.3d 622, 591 P.2d 524, 153 Cal. Rptr. 234 (1979), a lawyer received a public reproval (reprimand) when he failed to fully explain to his clients the nature of a contingency interest which he possessed in insurance proceeds used to satisfy an adverse judgment against the clients in a personal injury action.

4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

5.0 *Violations of Duties Owed to the Public*

Introduction

The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct [Rules 8.4(b) and (c)/DR 1-102(A)(3)(4)) and (5)]. In addition, a lawyer who serves as a public official has the duty to avoid using his public position to obtain any special advantage for himself or a client, or to influence a tribunal to act in favor of himself or a client [Rules 3.5(a), 8.4(e) and (f)/DR 8-101 through DR 8-103, DR 9-101(c)]. Finally, prosecutors have a special obligation to protect the public interest by insuring that charges are brought only after a finding of probable cause, and that exculpatory evidence is turned over to the accused (Rule 3.8(a)/DR 7-103).

It is important to note that the ABA Standards for Lawyer Discipline provide that the court should place a lawyer on interim suspension immediately and without reference to the pendency of an appeal upon proof that the lawyer has been convicted of a "serious crime" or is causing great harm to the public (Standard 6.5). A "serious crime" is defined as any felony and any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, theft, or an attempt or a conspiracy to commit a "serious crime." The sanctions which are set out below are those which should be imposed as final discipline, at which time the interim suspension should be terminated (Standard 6.6).

5.1 *Failure to Maintain Personal Integrity*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Commentary

A lawyer who engages in any of the illegal acts listed above has violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity. This duty to the public is breached regardless of whether a criminal charge has been brought against the lawyer. In fact, this type of misconduct is so closely related to practice and poses such an immediate threat to the public that the lawyer should be suspended from the practice of law immediately pending a final determination of the ultimate discipline to be imposed (see Standards for Lawyer Discipline, Standard 6.5).

In imposing final discipline in such cases, most courts impose disbarment on lawyers who are convicted of serious felonies. As the court noted in a case where a lawyer was convicted of two counts of federal income tax evasion and one count of subornation of perjury, "we cannot ask the public to voluntarily comply with the legal system if we, as lawyers, reject its fairness and application to ourselves." *In the Matter of Grimes*, 414 Mich. 483, 326 N.W.2d 380 (1982). See also: *In re Fry*, 251 Ga. 247, 305 S.E.2d 590 (Ga. 1983), conviction of murder; *Sixth District Committee of the Virginia State Bar v. Albert C. Hodgson*, No. 80-18 (Va. Disciplinary Board, 1981), where a lawyer advised a client that he could make arrangements to have her husband killed in lieu of bringing a child custody suit.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct

which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

Commentary

Lawyers who engage in criminal conduct other than that described above in Standard 5.11 should be suspended in cases where their conduct seriously adversely reflects on their fitness to practice. As in the case of disbarment, a suspension can be imposed even where no criminal charges have been filed against the lawyer. Not every lawyer who commits a criminal act should be suspended, however. As pointed out in the Model Rules of Professional Conduct:

> Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.[30]

The most common cases involved lawyers who commit felonies other than those listed above, such as the possession of narcotics or sexual assault. See: *In re Robideau*, 102 Wis. 2d 16, 306 N.W. 2d 1 (1981), suspension for three years for contributing to the delinquency of a minor and possession of a controlled substance; *In re Lanier*, 309 S.E.2d 754 (S.C. 1983), indefinite suspension for possession of marijuana; *In re Safran*, 18 Cal.3d 134, 554 P.2d 329, 133 Cal. Rptr. 9 (1976), suspension for three years for conviction of two counts of child molesting.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

Commentary

There are few situations not involving fraud or dishonesty which are sufficiently related to the practice of law to subject a lawyer to discipline. The Arizona Supreme court applied this standard in *In re Johnson*, 106 Ariz. 73, 471 P.2d 269 (1970), a case where a lawyer was charged with assault, stating that "isolated, trivial incidents of this kind not involving a fixed pattern of misbehavior find ample redress in the criminal and civil laws. They have none of the elements of moral turpitude, arising more out of the infirmities of human nature. They are not the appropriate subject matter of a solemn reprimand by this court" (471 P.2d at 271). However, a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate such indifference to legal obligation as to justify a reprimand.

There can be situations, however, in which the lawyer's conduct is not even criminal, but, because it is directly related to his or her professional role, discipline is required. For example, in *In re Lamberis*, 93 Ill.2d 222, 443 N.E.2d 549 (1982), the court imposed a censure [reprimand] on a lawyer who knowingly plagiarized two published works in a thesis submitted in satisfaction of the requirements for a master's degree. The court noted that although the lawyer's conduct might appear to be "fairly distant from the practice of law," discipline was "appropriate and required because both the extent of the appropriated material and the purpose for which it was used evidence the respondent's complete disregard for values that are most fundamental in the legal profession" (443 N.E.2d at 551). Specifically, the lawyer's plagiarism displayed "an extreme cynicism toward the property rights of others," and a "lack of honesty which cannot go undisciplined, especially because honesty is so fundamental to the functioning of the legal profession" (443 N.E.2d at 551-52).

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

5.2 *Failure to Maintain the Public Trust*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who en-

gage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official:

5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

Commentary

The public officials who are subject to disbarment generally engage in conduct involving fraud and deceit, and are generally subject to criminal sanctions as well. For example, in *In re Rosenthal*, 73 Ill.2d 46, 382 N.E.2d 257 (1978), two lawyers were disbarred who participated in an extortion scheme to benefit their client as part of a zoning request. One of the lawyers was an assistant Attorney General, a fact which the court emphasized as significant in imposing disbarment: "Despite his obligations as a law officer, he knowingly participated and furthered conduct which he knew to be illegal, and then, further, deliberately misled federal agents" (382 N.E.2d at 262). The court concluded, "corruption within government could not, in most instances, thrive but for those few attorneys, who, like respondents, are willing to tolerate such illegal activity if it will benefit their client. The practice of law is a privilege and demands a greater acceptance of responsibility and adherence to ethical standards than respondents have demonstrated" (382 N.E.2d at 261).

5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

Commentary

Suspension is an appropriate sanction when lawyers who are public officials knowingly act improp-
38 erly, but not necessarily for their own benefit. For example, in *In re DeLucia*, 76 N.J. 329, 387 A.2d 362 (1978), a judge fixed a traffic ticket by entering a not guilty judgment when no hearing had been held. He later attempted to cover up his wrongdoing by preparing an affidavit with a backdated acknowledgment. Disciplinary proceedings were instituted after the lawyer had resigned from his part-time judgeship. The court imposed a one-year suspension, noting that he did not personally benefit. Similarly, in *In re Weishoff*, 75 N.J. 326, 382 A.2d 632 (1978), the court held that a municipal prosecutor's knowing participation in an improper disposition of a traffic ticket warranted a one-year suspension. In *In re Vasser*, 75 N.J. 357, 382 A.2d 1114 (1978), the court imposed a six-month suspension on a lawyer/part-time judge who improperly practiced law and also interceded in another court to obtain a postponement of a trial to give his client an advantage in an unrelated civil matter. The lawyer also used official court stationery with respect to a transaction relating solely to his private law practice. The court noted that "the instances of proved misconduct did not assume egregious proportions. His improper intercession in the neighboring municipal court apparently did not result in any tangible or lasting distortion of justice" (382 A.2d at 1117).

5.23 Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

Commentary

In *In re Shafir*, 92 N.J. 138, 455 A.2d 1114 (1983), the court imposed a public reprimand on a county prosecutor who improperly placed his supervisor's signature on forms filed in plea bargaining cases. The lawyer stated that he believed he had explicit or implicit authority to sign what he thought were internal records and the disciplinary committee found that the lawyer "was not motivated by personal gain but only by a desire to move cases on his trial list" (455 A. 2d at 1116). Similarly, in *State v. Socclofsky*, 233 Kan. 1020, 666 P.2d 725 (1983), the court imposed a public censure [reprimand] on a county attorney who anonymously mailed to discharged members of a jury a copy of a newspaper article describing that the acquitted defendant had subsequently pled guilty to a misdemeanor charge of delivery of L.S.D. in an

unrelated case. Some of the jurors who received the mailing were called for service only a month later. The lawyer testified that he would not have mailed the article had he realized that the jurors were to be called for further service, and, that in his experience as a prosecutor, "he had never seen jurors called back for further duty so soon" (666 P.2d at 726).

5.24 Admonition is generally appropriate when a lawyer in an official or governmental position engages in an isolated instance of negligence in not following proper procedures or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process.

6.0 *Violations of Duties Owed to the Legal System*

Introduction

Lawyers are officers of the court, and the public expects lawyers to abide by the legal rules of substance and procedure which affect the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or make false statement of material fact [Rules 3.3, 3.4, and 4.1/DR 7-102(A)]. Ethical standards require that a lawyer refrain from filing frivolous suits (Rule 3.1/DR 7-102), delaying a trial (Rule 3.2/DR 7-102), improperly communicating with a party, juror, witness, or judge (Rules 3.5, 4.2, 4.3/DR 7-104, DR 7-108 through DR 7-110), threatening criminal prosecution (DR 7-105), or otherwise interfering with a legal process (Rules 3.4, 3.6, 4.1, 4.4/DR 7-106 and DR 7-107).

6.1 *False Statements, Fraud, and Misrepresentation*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

Commentary

The lawyers who engage in these practices violate the most fundamental duty of an officer of the
40 court. As the court noted in a case in which a criminal defense lawyer was disbarred for putting a client on the stand to testify falsely, "A lawyer's participation in the presentation of knowing false evidence is the clearest kind of ethical breach" [*Board of Overseers of the Bar v. James Dineen*, No. 83-46 (Maine 1983) at 4]. In *Office of Disciplinary Counsel v. Grigsby*, 493 Pa. 194, 425 A.2d 730 (1981), a lawyer was disbarred where he filed a false sworn pleading in connection with a pending garnishment proceeding. The pleading stated that the funds in the lawyer's checking account belonged to clients and could not be reached. The lawyer's action to save his money from garnishment was both intentional and damaging to his creditors. Similarly, in *Matter of Discipline of Agnew*, 311 N.W.2d 869 (Minn. 1981), the court disbarred a lawyer who refused to return a client's documents after an initial consultation and, without the client's knowledge or consent, then instituted a suit on his behalf in which he made false allegations that the client had been harmed by the defendant. Because of the lawyer's actions, the client incurred legal bills of $8,000 and lost time appearing in court to obtain his own documents.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Commentary

Suspension is appropriate when a lawyer has not acted with intent to deceive the court, but when he knows that material information is being withheld and does not inform the court, with the result that there is injury or potential injury to a party, or an adverse or potentially adverse effect on the legal proceeding. For example, in *In re Nigohosian*, 88 N.J. 308, 442 A.2d 1007 (1982), the court suspended a lawyer for six months when he failed to disclose to the court or to opposing counsel the fact that he had previously conveyed property that was the subject of a settlement to someone else. The court noted that, while a lawyer does not have a continuing obligation to inform the court of the state of a client's assets, he "has a

duty of disclosure of any significant fact" touching upon the status of an asset which is the subject matter of a stipulation before the court (442 A.2d at 1009).

6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Commentary

Reprimand is appropriate when a lawyer is merely negligent. For example, in *Gilbert E. Meitry*, D.P. 144/81 (Mich. Atty. Dis. Brd. 1981), the lawyer was publicly reprimanded where he accidentally filed a motion for a bond which contained inaccurate statements. Similarly, in *In re Coughlin*, 91 N.J. 374, 450 A.2d 1326 (1982), the court held that a public reprimand should be imposed on a lawyer who did not follow proper procedures in acknowledging a deed (neglecting to secure the grantor's acknowledgement in his presence). The court noted that "his actions were not grounded on any intent of self-benefit, nor was any one harmed as a result of his actions" (450 A. 2d at 1327). In *Davidson v. State Bar*, 17 Cal. 3d 570, 551 P.2d 1211, 131 Cal. Rptr. 379 (1976), the court imposed a public reprimand on a lawyer who failed to disclose to the court the location of his client in a child custody case when his conduct occurred in confused circumstances caused by contradictory *ex parte* custody orders.

6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

6.2 *Abuse of the Legal Process*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

Commentary

Lawyers should be disbarred for intentionally misusing the judicial process to benefit the lawyer or another when the lawyer's conduct causes injury or potentially serious injury to a party, or serious or potentially serious interference with a legal proceeding. For example, in *In the Matter of Daniel Friedland*, 416 N.E.2d 433 (Ind. 1981), the lawyer filed charges against members of the Disciplinary Committee and witnesses in the lawyer disciplinary hearing. The lawyer attempted to use the lawsuit to intimidate and discredit those who administered and prosecuted grievances against him. In holding that the lawyer was not protected by the First Amendment, the court recognized the harm to judicial integrity. "It is the Constitutional duty of this Court, on behalf of sovereign interest, to preserve, manage, and safeguard the adjudicatory system of this State. The adjudicatory process cannot function when its officers misconstrue the purpose of litigation. The respondent attempted to influence the process through the use of threats and intimidation against the participants involved. This type of conduct must be enjoined to preserve the integrity of the system. The adjudicatory process, including disciplinary proceedings, must permit the orderly resolution of issues; Respondent's conduct impeded the order of this process" (416 N.E. 2d at 438). See also: *In re Crumpacker*, 269 Ind. 630, 383 N.E.2d 36 (1978), where the court disbarred a lawyer who had engaged in nineteen acts of misconduct, including shouting at and verbally abusing witnesses and op-

posing counsel, taking an action merely to harass another, and generally using offensive tactics. In the words of the court, his misconduct showed that he was "a vicious, sinister person, tunnel-visioned by personal pique, willing to forego all professional responsibilities which conflict with acts of preconceived vengeance on personal enemies" (383 N.E.2d at 52).

6.22 Suspension is appropriate when a lawyer knows that he is violating a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

Commentary

In many cases, lawyers are suspended when they knowingly violate court orders. Such knowing violations can occur when a lawyer fails to comply with a court order that applies directly to him or her, as in the case of lawyers who do not comply with a divorce decree ordering spousal maintenance or child support. Suspension is also appropriate where the lawyer interferes directly with the legal process. For example, in *In re Vincenti*, 92 N.J. 591, 458 A.2d 1268 (1983), the court imposed a suspension for one year and until further order of court where the lawyer made repeated discourteous, insulting and degrading verbal attacks on the judge and his rulings which substantially interfered with the orderly trial process. The court noted that it was not confronted with "an isolated example of loss of composure brought on by the emotion of the moment; rather, the numerous instances of impropriety pervaded the proceedings over a period of three months" (458 A. 2d at 1274).

6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

Commentary

Most courts impose a reprimand on lawyers who engage in misconduct at trial or who violate a court order or rule that causes injury or potential injury to a client or other party, or who cause interference or potential interference with a legal proceeding. For example, in *McDaniel v. State of Arkansas*, 640 S.W. 2d 442 (Ark. 1982), a lawyer who failed to file briefs in a timely manner after having been given extensions received a reprimand. In *Florida Bar v. Rosenberg*, 387 So. 2d 935 (Fla. 1980), the court imposed a reprimand on a lawyer who used harassing delay tactics at trial and who also refused to send copies of documents to opposing counsel. Courts also impose reprimands when lawyers neglect to respond to orders of the disciplinary agency. For example, in *In re Minor*, 658 P.2d 781 (Alaska 1983), the court imposed a public censure [reprimand] on a lawyer who, because of poor office procedures, neglected to respond to a letter from the Alaska Bar Association.

6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

6.3 *Improper Communications with Individuals in the Legal System*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law:

6.31 Disbarment is generally appropriate when a lawyer:

(a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

(b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

(c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.

Commentary

Disbarment is warranted in cases where the lawyer uses fraud or undue influence to injure a party or to affect the outcome of a legal proceeding. For example, in *In the Matter of Stroh*, 97 Wash. 2d 289, 644 P.2d 1161 (1982), a lawyer was disbarred when he was convicted of tampering with a witness. The court justified imposing disbarment on the following basis: "First, the crime of tampering with a witness strikes at the very core of the judicial system and therefore necessarily involves moral turpitude. . . . An attorney presents his case almost entirely through the testimony of witnesses. Although an occasional witness may perjure him/herself, the presentation of the opponent's other witnesses and effective cross-examination frequently reveals the falsehood before a fraud has been perpetrated upon the court. A witness, tampered by an attorney, however, becomes much more destructive to the search for truth. That witness, privy to the testimony of other witnesses, can avoid the pitfalls of contradiction and refutation by judicious fabrication. Vigorous cross-examination may become ineffective as the coached witness would know both the questions and the proper answers. In sum, the legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness" (644 P.2d at 1165). Similarly, in *Matter of Holman*, 286 S.E.2d 148 (S.C. 1982), a lawyer was disbarred who was convicted of contempt of court based on a communication with a member of a jury selected for trial.

6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

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Commentary

In the case of *John Arnold Fitzgerald* (Tenn. 1980) (unpublished decision), a lawyer was suspended for one year for threats to an opposing party. Similarly, in *The Florida Bar v. Lopez*, 406 So.2d 1100 (Fla. 1982), a lawyer was suspended for one year where he urged two parties he was suing on behalf of his client to change their testimony in exchange for general releases from prosecution. In imposing this sanction, the court rejected a referee's recommendation of a three-month suspension with automatic reinstatement, stating, "we feel that a three-month suspension is insufficient to impress upon respondent, the bar, and the public our dissatisfaction with and distress over his conduct. If Mr. Lopez had been convicted in a court of this state of tampering with a witness, he would have been subject to a one-year term of imprisonment. Using the witness-tampering statute as a guideline, we find a one-year suspension appropriate in this case" (406 So. 2d at 1102). In *The Florida Bar v. Mason*, 334 So. 2d 1 (Fla. 1976), the court imposed a reprimand and suspension for one year and until proof of rehabilitation when a lawyer engaged in ex parte communications with justices of the Florida Supreme Court concerning the merits of a pending case and subsequently concealed his actions from opposing counsel.

6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

Commentary

Most courts impose reprimands on lawyers who engage in improper communications. For example, in *In re McCaffrey*, 549 P.2d 666 (Or. 1976), the court imposed a reprimand on a lawyer who unknowingly improperly communicated with a party represented by a lawyer. Even though the lawyer claimed that he thought the party, the husband in a dispute of visitation, was representing himself, the court stated that

discipline could be imposed in cases of misconduct that the rule is designed to prevent, and it is "immaterial whether the communication is an intentional or a negligent violation of the rule" (549 P.2d at 668).

6.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.

7.0 *Violations of Duties Owed to the Profession*

Introduction

The Model Rules include many ethical standards that are not fundamental to the professional relationship but which define certain standards of conduct. These standards concern restrictions on advertising (Rules 7.1, 7.2, 7.4, 7.5/DR 2-101, DR 2-102, DR 2-105), recommending employment (Rule 7.3/DR 2-103, DR 2-104), fees (Rules 1.5, 5.4 and 5.6/DR 2-106, DR 2-107 and DR 3-102), and assisting unauthorized practice (Rule 5.5/DR 3-101 and DR 3-103). Other such standards include the duty to comply with proper procedures for admission to the bar (Rule 8.1/DR 1-101), to report other lawyers who engage in unethical behavior (Rule 8.3/DR 1-103) and to properly withdraw from representation [Rule 1.16/DR 2-110].

While these standards have been developed out of a desire to protect the public, such as by restricting practice to those persons who have met appropriate educational requirements, a violation of these standards generally is less likely to cause injury to a client, the public, or the administration of justice than the other standards discussed above. In fact, in the area of advertising, the United States Supreme Court has ruled that lawyer advertising is protected by the First Amendment and has struck down certain ethical prohibitions on advertising [see *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. E. 2d 810 (1977), *In re R.M.J.*, 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 53 U.S.L.W. 4587, decided May 28, 1985].

In general, then, a sanction of disbarment or suspension will rarely be required, and a sanction of reprimand, admonition or probation will be sufficient to insure that the public is protected and the bar is educated. While it will as a rule be inappropriate to impose a sanction of disbarment or suspension for six months or more, there are situations when a more severe sanction should be imposed. The standards set out below identify those exceptional situations.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Commentary

Disbarment should be imposed in cases when the lawyer knowingly engages in conduct that violates a duty owed to the profession with the intent to benefit the lawyer or another, and which causes serious injury or potentially serious injury to a client, the public or the legal system. For example, disbarment is appropriate when a lawyer intentionally makes false material statements in his application for admission to the bar. For example, in *In re W. Jason Mitan*, 75 Ill. 2d 118, 387 N.E.2d 278 (1979), *cert. denied*, 444 U.S. 916 (1979), the respondent made false statements and deliberately failed to disclose certain information on his application for admission to the bar. These false statements and omissions included his failure to disclose at least four of his previous addresses, the wrong birth date, his change of name, a previous marriage, a subsequent divorce, other law schools attended, application for admission to another state's bar, previous employers and occupations, prior civil suits and arrests, and conviction of a felony. The court felt that these falsehoods and omissions had a direct effect on the ability to practice law and be a competent member of the profession, and imposed disbarment.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

Commentary

Suspension is appropriate when the lawyer knowingly violates a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system, even when a lawyer does not intentionally abuse the professional relationship by engaging in deceptive conduct. Suspension is appropriate, for example, when the lawyer did not mislead a client but engages in a pattern of charging excessive or improper fees. A suspension is also appropriate when a lawyer solicits employment knowing that the individual is in a vulnerable state. For example, in *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265 (1979), the court suspended a lawyer for two years who was invited by a minister to speak to victims of a railway disaster, but who then contacted victims whom he knew were still in a vulnerable state as a result of the tragedy.

7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

Commentary

Reprimand is the appropriate sanction in most cases of a violation of a duty owed to the profession. Usually there is little or no injury to a client, the public, or the legal system and the purposes of lawyer discipline will be best served by imposing a public sanction that helps educate the respondent lawyer and deter future violations. A public sanction also informs both the public and other members of the profession that this behavior is improper. For example, in *Carter v. Falcarelli*, 402 A.2d 1175 (RI 1979), the court imposed public censure (reprimand) on a lawyer who failed to divulge the identity of another lawyer when matters had been forwarded and subsequently neglected.

Courts typically impose reprimands when lawyers engage in a single instance of charging an excessive or improper fee. See *In the Matter of Donald L. Fasig*, 444 N.E.2d 849 (Ind. 1983), where the court imposed a public reprimand when the lawyer entered into an agreement for a contingent fee in a criminal case; *Russell J. Perry*, DP 63 (Mich. Atty. Dis. board 1983), where a lawyer charged an excessive fee by improperly adding investigation costs; and *The Florida Bar v. Sagrans*, 388 So.2d 1040 (Fla. 1980), where the lawyer improperly split fees with a chiropractor.

Courts also impose reprimands on lawyers who are negligent in supervising their employees. For example, in the case of *Donald Franklin Kotter*, 52 Calif. State Bar J. 552-3 (Cal. 1977), the court imposed a public reproval (reprimand) on a lawyer who neglected properly to instruct his employees regarding what acts constitute solicitation.

7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed to the profession, and causes little or no actual or potential injury to a client, the public, or the legal system.

8.0 *Prior Discipline Orders*

Introduction

Severe sanctions should be imposed on lawyers who violate the terms of prior disciplinary orders. While such lawyers may also demonstrate a pattern of misconduct that will serve as an aggravating factor (see Standard 9.22), these violations are so serious as to warrant special discussion.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving prior discipline.

8.1 Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Commentary

Disbarment is warranted when a lawyer who has previously been disciplined intentionally or knowingly violates the terms of that order and, as a result, causes injury or potential injury to a client, the public, the legal system, or the profession. The most common case is one where a lawyer has been suspended but, nevertheless, practices law. The courts are generally in agreement in imposing disbarment in such cases. As the court explained in *Matter of McInerney*, 389 Mass. 528, 451 N.E.2d 401, 405 (1983), when the record establishes a lawyer's willingness to violate the terms of his suspension order, disbarment is appropriate "as a prophylactic measure to prevent further misconduct by the offending individual." See also: *In re Reiser*, M.R. 2269 (Ill. 1980), where a lawyer was disbarred when he continued to practice law in violation of an order of suspension and caused serious injury to a client by neglecting her legal matter.

Disbarment is also appropriate when a lawyer intentionally or knowingly engages in the same or similar misconduct. For example, in *Benson v. State Bar*, 13 Cal. 3d 581, 531 P.2d 1001, 119 Cal. Rptr. 297 (1975), the court disbarred a lawyer who induced a client to loan him money by making false representations and who then failed to repay the loan. The lawyer in that case had previously been suspended for one year (with a four-year probationary period) for misappropriation of client funds. See also: *Matter of Friedland*, 416 N.E.2d 433 (Ind. 1981).

8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Commentary

Lawyers should be suspended when they engage in the same or similar misconduct for which they were previously disciplined when that misconduct causes injury or potential injury to a client, the public, the legal system, or the profession. As the court noted in *The Florida Bar v. Glick*, 397 So.2d 1140, 1141 (Fla. 1981), "[W]e must deal more severely with an attorney who exhibits cumulative misconduct."

8.3 Reprimand is generally appropriate when a lawyer:

(a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has received an admonition for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Commentary

Reprimands are most commonly imposed on lawyers who have been disciplined and engage in the same or similar acts of misconduct. For example, in *Shalant v. State Bar of California*, 33 Cal. 3d 485, 658 P.2d 737, 189 Cal. Rptr. 374 (1983), the court imposed a public reproval [reprimand] on a lawyer who

failed to communicate with a client and who had received a private reproval for the same misconduct. See also *Matter of Davis*, 280 S.E.2d 644 (S.C. 1981), where the court explained that a reprimand for neglect was necessary because prior warnings for similar behavior were "ignored" (280 S.E.2d at 647).

8.4 **An admonition is generally not an appropriate sanction when a lawyer violates the terms of a prior disciplinary order or when a lawyer has engaged in the same or similar misconduct in the past.**

Commentary

An admonition is a sanction which should only be imposed in cases of minor misconduct, where the lawyer's acts cause little or no injury to a client, the public, the legal system, or the profession, and where the lawyer is unlikely to engage in further misconduct. Lawyers who do engage in additional similar acts of misconduct, or who violate the terms of a prior disciplinary order, have obviously not been deterred, and a more severe sanction should be imposed.

9.0 *Aggravation and Mitigation*

9.1 *Generally*

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

Commentary

Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary sanctions, consideration must necessarily be given to the facts pertaining to the professional misconduct and to any aggravating or mitigating factors (see Standards for Lawyer Discipline, Standard 7.1). Aggravating and mitigating circumstances generally relate to the offense at issue, matters independent of the specific offense but relevant to fitness to practice, or matters arising incident to the disciplinary proceeding.

9.2 *Aggravation*

9.21 *Definition.* Aggravation or aggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.

9.22 *Factors which may be considered in aggravation.* Aggravating factors include:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution.

Commentary

Cases citing each of the factors listed above include: (a) prior disciplinary offenses: *Matter of Walton*, 251 N.W.2d 762 (N.D. 1977), *People v. Vernon*, 660 P.2d 879 (Colo. 1982); (b) dishonest or selfish motive: *In re: James H. Dineen*, SJC-535 (Maine 1980); (c) pattern of misconduct: *The Florida Bar v. Mavrides*, 442 So. 2d 220 (Fla. 1983); *State v. Dixon*, 233 Kan. 465, 664 P.2d 286 (1983); (d) multiple offenses: *State ex rel. Oklahoma Bar Association v. Warzya*, 624 P.2d 1068 (Okla. 1981), *Ballard v. State Bar of California*, 35 Cal. 3d 274, 673 P.2d 226, 197 Cal. Rptr. 556 (1983); (e) bad faith obstruction of disciplinary proceedings: *In re Brody*, 65 Ill. 2d 152, 357 N.E.2d 498 (1976), *Committee on Prof. Ethics v. Brodsky*, 318 N.W.2d 180 (Iowa 1982); (f) lack of candor during the disciplinary process: *In re Stillo*, 68 Ill. 2d 49, 368 N.E.2d 897 (1977), *Weir v. State Bar*, 23 Cal. 3d 564, 591 P.2d 19, 152 Cal. Rptr. 921 (1979); (g) refusal to acknowledge wrongful nature of conduct: *Greenbaum v. State Bar*, 18 Cal. 3d 893, 544 P.2d 921, 126 Cal. Rptr. 785 (1976), *H. Parker Stanley v. Bd. of Professional Responsibility*, 640 S.W.2d 210 (Tenn. 1982); (h) vulnerability of victim: *People v. Lanza*, 613 P.2d 337 (Colo. 1980); (i) substantial experience in the practice of law: *John F. Buckley*, 2 Mass. Atty. Dis. Rpt. 24 (1980); (j) indifference to making restitution: *The Florida Bar v. Zinzell*, 387 So. 2d 346 (Fla. 1980); *Bate v. State Bar of California*, 34 Cal. 3d 920, 671 P.2d 360, 196 Cal. Rptr. 209 (1983).

9.3 *Mitigation*

9.31 *Definition.* Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32 *Factors which may be considered in mitigation.* Mitigating factors include:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;
(h) physical or mental disability or impairment;
(i) delay in disciplinary proceedings;
(j) interim rehabilitation;
(k) imposition of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.

Commentary

While the courts generally agree that each of these factors can be considered in mitigation, the courts differ on whether restitution is a mitigating factor. Some courts hold that restitution should not be considered. See *Ambrose v. State Bar*, 31 Cal. 3d 184, 643 P.2d 486, 481 Cal. Rptr. 903 (1982); *Oklahoma Bar Association v. Lowe*, 640 P.2d 1361 (Okla. 1982), *In re Galloway*; 300 S.E.2d 479 (S.C. 1983). Other courts do consider restitution. See *People v. Luxford*, 626 P.2d 675 (Colo. 1981); *The Florida Bar v. Pincket*, 398 So.2d 802 (Fla. 1980); *In re Suernick*, 100 Wis. 2d 427, 321 N.W.2d 298 (1982). While restitution should not be a complete defense to a charge of misconduct, the better policy is to allow a good faith effort to make restitution to be considered as a factor in mitigation. Such a policy will encourage lawyers to make restitution, reducing the degree of injury to the client and helping insure that the lawyer has recognized the wrongfulness of his conduct. Restitution which is made upon the lawyer's own initiative should be considered as mitigating; lawyers who make restitution prior to the initiation of disciplinary proceedings present the best case for mitigation, while lawyers who make restitution later in the proceedings present a weaker case.

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Cases citing personal and emotional problems as mitigating factors include a wide range of difficulties, most often involving marital or financial problems. The factor which has been treated most inconsistently by the courts is (h): physical/mental disability or impairment. The cases include the following types of behaviors or conditions: alcoholism, *The Florida Bar v. Ullensvang*, 400 So. 2d 969 (Fla. 1981); mental disorders, *In re Weyrich*, 339 N.W.2d 274 (Minn. 1983); drug abuse, *In re Maragos*, 285 N.E.2d 541 (N.D. 1979); and senility, *In re Hansen*, 318 N.W.2d 856 (Minn. 1982). While most courts treat such disabilities or impairments as mitigating factors, it is important to note that the consideration of these factors does not completely excuse the lawyer's misconduct. In the words of the Illinois Supreme Court, "alcoholism is at most an extenuating circumstance, a mitigating fact, not an excuse." *In re Driscoll*, 85 Ill. 2d 312, 423 N.E.2d 873, 874 (1981).

Cases citing each of the factors listed above include: (a) absence of a prior disciplinary record: *In re Battin*, 617 P.2d 1109, 168 Cal. Rptr. 477 (1980), *The Florida Bar v. Shannon*, 398 So.2d 453 (Fla. 1981); (b) absence of selfish or dishonest motive: *People ex rel. Goldberg v. Gordon*, 607 P.2d 995 (Colo. 1980); (c) personal/emotional problems: *In re Stout*, 75 N.J. 321, 382 A.2d 630 (1981), *Matter of Barron*, 246 Ga. 327, 271 S.E.2d 474 (1980); (d) timely good faith effort to make restitution or to rectify consequences of misconduct: *Matter of Byars*, 268 S.E.2d 155 (Ga. 1980), *Matter of Rubi*, 133 Ariz. 491, 652 P.2d 1014 (1982); (e) full and free disclosure to disciplinary board/cooperative attitude toward proceedings: *Matter of Shaw*, 298 N.W.2d 133 (Minn. 1980), *In the Matter of Rhame*, 416 N.E.2d 823 (Ind. 1981); (f) inexperience in the practice of law: *In re: James M. Pool*, No. 83-37 BD (Sup. Jud. Ct. Suffolk Cty., Mass. 1984); *Matter of Price*, 429 N.E.2d 961 (Ind. 1982); (g) character/reputation: *Matter of Shaw*, 298 N.W.2d 133 (Minn. 1980), *In re Bizar*, 97 Ill. 2d 127, 454 N.E.2d 271 (1983); (h) physical/mental disability or impair-

ment: *The Florida Bar v. Routh*, 414 So. 2d 1023 (1982), *In re Hopper*, 85 Ill. 2d 318, 423 N.E.2d 900 (1981); (i) delay in disciplinary proceedings: *Yokozeki v. State Bar*, 11 Cal. 3d 436, 521 P.2d 858, 113 Cal. Rptr. 602 (1974), *The Florida Bar v. Thomson*, 429 So. 2d 2 (Fla. 1983); (j) interim rehabilitation: *In re Barry*, 90 N.J. 286, 447 A.2d 923 (1982), *Tenner v. State Bar of California*, 617 P.2d 486, 168 Cal. Rptr. 333 (1980); (k) imposition of other penalties or sanctions: *In re Lamberis*, 93 Ill. 2d 222, 443 N.E.2d 549 (1982), *In re: John E. Walsh*, SJC—53.9 (Maine 1980); *Matter of Garrett*, 399 N.E.2d 369 (Ind. 1980); (l) remorse: *In re Power*, 91 N.J. 408, 451 A.2d 666 (1982), *In re Nadler*, 91 Ill. 2d 326, 438 N.E.2d 198 (1982); (m) remoteness of prior offenses: (no cases found).

9.4 *Factors which are neither aggravating nor mitigating.*

The following factors should not be considered as either aggravating or mitigating:

(a) forced or compelled restitution;
(b) agreeing to the client's demand for certain improper behavior or result;
(c) withdrawal of complaint against the lawyer;
(d) resignation prior to completion of disciplinary proceedings;
(e) complainant's recommendation as to sanction;
(f) failure of injured client to complain.

Commentary

While courts have considered each of these factors, the purposes of lawyer discipline are best served by viewing them as irrelevant to the imposition of a sanction. Lawyers who make restitution voluntarily and on their own initiative demonstrate both a recognition of their ethical violation and their responsibility to the injured client or other party. Such conduct should be considered as mitigation (see Standard 8.32), even if the restitution is made in response to a complaint filed with the disciplinary agency. Lawyers who make restitution only after a disciplinary proceeding has been instituted against them, however, cannot be regarded as acting out of a sense of responsibility for their misconduct, but, instead, as attempting to circumvent the operation of the disciplinary system. Such conduct should not be considered in mitigation. See *Fitzpatrick v. State Bar of California*, 20 Cal. 3d 73, 141 Cal. Rptr. 169, 569 P.2d 763 (1977); *In re O'Bryant*, 425 A.2d 1313 (D.C. 1981).

Similarly, mitigation should not include a lawyer's claim that "the client made me do it". Each lawyer is responsible for adhering to the ethical standards of the profession. Unethical conduct is much less likely to be deterred if lawyers can lessen or avoid the imposition of sanctions merely by blaming the client (see *In re Price*, 429 N.E.2d 961 (Ind. 1982); *People v. Kennelly*, 648 P.2d 1065 (Colo. 1982). In addition, neither the withdrawal of the complaint against the lawyer nor the lawyer's resignation prior to completion of disciplinary proceedings should mitigate the sanction imposed. In order for the public to be protected, sanctions must be imposed on lawyers who engage in unethical conduct. The mere fact that a complainant may have decided to withdraw a complaint should not result in a lesser sanction being imposed on a lawyer who has behaved unethically and from whom other members of the public need protection (see *In re McWhorter*, 405 Mich. 563, 275 N.W.2d 259 (1979), *on reh'g*, 407 Mich. 278, 284 N.W.2d 472 (1979)). Similarly, the lawyer's resignation is irrelevant; the purposes of deterrence and education can only be served if sanctions are imposed on all lawyers who violate ethical standards (see *In re Johnson*, 290 N.W.2d 604 (Minn. 1980) and *In re Phillips*, 452 A.2d 345 (D.C. 1982)).

The complainant's recommendation as to a sanction is a factor which should be neither aggravating nor mitigating. The consistency of sanctions cannot be assured if any individual's personal views concerning an appropriate sanction can either increase or decrease the severity of the sanction to be imposed by the court. Although the court should not consider the complainant's recommendation as to sanction, the complainant's feelings about the lawyer's misconduct need not be completely ignored. The complainant's views will be relevant and important in determining the amount of injury caused by the lawyer's misconduct, a factor which can be either aggravating [Standard 8.22(j)] or mitigating [Standard 8.32(i)].

Finally, the fact that an injured client has not complained should not serve as mitigation. The disciplinary system is designed to protect all members of the public. The fact that one injured person is willing to forgive and forget should not relieve or excuse the lawyer, who then has the capability of injuring others (see *In re Krakauer*, 81 N.J. 32, 404 A.2d 1137 (1979); *State ex rel. Oklahoma Bar Association v. Braswell*, 663 P.2d 1228 (Okla. 1983)).

FOOTNOTES

1. Standards for Lawyer Discipline and Disability Proceedings (Chicago: Joint Committee of Professional Discipline of the Appellate Judges' Conference and the American Bar Association Standing Committee on Professional Discipline, 1979).
2. *In re* Gold, 77 Ill. 2d 224, 396 N.E.2d 25 (1979).
3. *In re* Oliver, M.R. 2454, 79-CH-6 (1980).
4. *In re* Smith, 63 Ill. 2d 250, 347 N.E.2d 133 (1976).
5. *In re* DiBella, 58 Ill. 2d 5, 316 N.E.2d 771 (1974).
6. *In re* Sherman, 60 Ill. 2d 590, 328 N.E.2d 553 (1975).
7. Problems and Recommendations in Disciplinary Enforcement (Chicago: American Bar Association, Special Committee on Evaluation of Disciplinary Enforcement, 1970), at 167.
8. Lawyers have a duty to report ethical misconduct of other lawyers under Rule 8.3 of the Model Rules of Professional Conduct (American Bar Association, 1983) and under DR1-103 of the Code of Professional Responsibility (American Bar Association, 1981). Judges have a similar duty under the Code of Judicial Conduct, Canon 3(B)(3) (American Bar Association, 1972).
9. *Id.*, Code of Judicial Conduct.
10. See Appendix 3 for a listing of the actual number of reported cases from each jurisdiction. The differences in the number of reported cases among the jurisdictions is a function not only of the differences in lawyer populations, but in the operation of the state discipline systems. States differ dramatically in the sophistication of their disciplinary systems: most importantly for this study, states vary in the extent to which disciplinary orders are published. In those jurisdictions where disciplinary decisions are not published in the regional reporters, summaries in state bar publications or unreported cases (supplied by bar counsel) were examined. (To obtain copies of unreported decisions, contact the ABA Center for Professional Responsibility.) The states in which only reported cases were examined were: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, South Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wisconsin. In the following jurisdictions both reported and unreported cases were examined: Arizona, California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, New York, Pennsylvania, Tennessee, Virginia, and Wyoming. In the following jurisdictions, all data were collected from unreported decisions (supplied by bar counsel or taken from case summaries in bar publications): Maine, Michigan, New Hampshire, and Texas.
11. Because of the difficulty in getting complete factual statements, the report does not include cases which were the result of consent orders, or cases in which reciprocal discipline was imposed.
12. Ballard v. State Bar of California, 35 Cal. 3d 274, 673 P.2d 226, 197 Cal. Rptr. 556 (1983).
13. An example of the problems which would be encountered in such an approach will suffice to demonstrate why that approach was rejected. It is improper for a lawyer to neglect a legal matter entrusted to him (Rule 1.3/DR 6-101(A)(3)). Sanctions which are imposed for violations of this ethical rule vary dramatically. Such conduct may be an intentional violation of the rule (as where a lawyer takes a client's money never intending to perform the services requested), or it may result from negligence (as where an overworked or inexperienced lawyer does not meet a deadline relating to some aspect of the representation). The Sanctions Committee felt that a listing of sanctions based merely on the type of lawyer misconduct would not adequately differentiate between conduct which has an extremely deleterious effect on the client, the public, the legal system, and the profession, and conduct which has only a minimal effect. In short, the Sanctions Committee concluded that an approach that reviewed each type of misconduct would result in nothing more than a general statement that the individual circumstances of a case dictate the type of sanction which ought to be imposed.
14. Although the House of Delegates of the American Bar Association adopted the Model Rules of Professional Conduct on August 2, 1983, as the ethical standards for the legal profession, references to the Code of Professional Responsibility are included here because most states' ethical standards still follow the Code in both form and substance.
15. While it is not possible to discuss in detail each of the 2,991 cases which have been examined in preparing this report, statistical summaries are available from the American Bar Association Center for Professional Responsibility.
16. Preamble to Model Rules, paragraph 11, *supra* note 8.
17. *In re* Stout, 75 N.J. 321, 382 A.2d 630 (1978); Matter of Rubi, 133 Ariz. 491, 652 P.2d 1014 (1982).

18. *In re* Zderic, 92 Wash. 2d 777, 600 P.2d 1297 (1979); *In re* Nadler, 91 Ill. 2d 326, 438 N.E.2d 198 (1982).
19. Matter of McInerney, 389 Mass. 528, 451 N.E.2d 401 (1983).
20. Matter of Carroll, 124 Ariz. 80, 602 P.2d 461 (1979); Committee on Professional Ethics v. Gross, 326 N.W.2d 272 (Iowa 1982); The Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983).
21. Matter of Maragos, 285 N.W.2d 541 (N.D. 1979); Matter of Grimes, 414 Mich. 483, 326 N.W.2d 380 (1982).
22. Lawyer Standards, *supra* note 1.
23. Only 19 jurisdictions currently follow the provision of Standard 8.25 (1983 Survey of Lawyer Disciplinary Procedures in the United States, American Bar Association Center for Professional Responsibility): Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, Oregon, Texas, Utah, Washington, and Wisconsin.
24. Levi and Denham v. Mississippi State Bar, 436 So. 2d 781, 786 (Miss. 1983).
25. Some states, for example, delegate this power to other agencies. See Standards for Lawyer Discipline, Standards 1.2, 2.1.
26. Attorney Grievance Commission v. Velasquez, 301 Md. 450, 483 A.2d 354 (1984); *In re* McDaniel, 470 N.E.2d 1327 (Ind. 1984).
27. See Definitions, Standards for Lawyer Discipline.
28. The National Discipline Data Bank is operated by the American Bar Association Center for Professional Responsibility. For further information on how to report or to receive current statistical data, contact the Center for Professional Responsibility at the American Bar Association, 750 N. Lake Shore Drive, Chicago, Illinois, 60611, or call (312) 988-5000.
29. Comment to Rule 6.2, paragraph 1, Model Rules, *supra* note 8; EC 2-26, Code of Professional Responsibility, *supra* note 8.
30. Comment to Rule 8.4, Model Rules, *Id.*

APPENDICES

APPENDIX 1

Cross-Reference Table: ABA Model Rules of Professional Conduct and Standards for Imposing Sanctions

ABA Model Rules of Professional Conduct	*Standards for Imposing Sanctions*
Competence	
Rule 1.1	Standard 4.5
Scope of Representation	
Rule 1.2(a), (b), (c), (e)	Standard 4.4
Rule 1.2(d)	Standard 6.1
Diligence	
Rule 1.3	Standard 4.4
Communication	
Rule 1.4	Standard 4.4
Fees	
Rule 1.5	Standards 4.6 & 7.0
Confidentiality of Information	
Rule 1.6	Standard 4.2
Conflict of Interest	
Rule 1.7	Standard 4.3
Prohibited Transactions	
Rule 1.8	Standard 4.3
Former Client	
Rule 1.9	Standard 4.3
Imputed Disqualification	
Rule 1.10	Standard 4.3
Successive Government and Private Employment	
Rule 1.11	Standard 4.3
Former Judge or Arbitrator	
Rule 1.12	Standard 4.3
Organization as Client	
Rule 1.13	Standard 4.3
Disabled Client	
Rule 1.14	Standard 7.0
Safekeeping Property	
Rule 1.15	Standard 4.1
Declining or Terminating Representation	
Rule 1.16	Standard 7.0
Advisor	
Rule 2.1	Standard 7.0
Intermediary	
Rule 2.2	Standard 4.3

ABA Model Rules of Professional Conduct	*Standards for Imposing Sanctions*
Evaluation for Use by Third Persons Rule 2.3	Standard 7.0
Meritorius Claims and Contentions Rule 3.1	Standard 6.2
Expediting Litigation Rule 3.2	Standard 6.2
Candor Toward the Tribunal Rule 3.3	Standard 6.1
Fairness to Opposing Party and Counsel Rule 3.4	Standard 6.2
Impartiality and Decorum Rule 3.5	Standard 6.3
Trial Publicity Rule 3.6	Standard 6.2
Lawyer as Witness Rule 3.7	Standard 4.3
Special Responsibilities of a Prosecutor Rule 3.8	Standard 5.2
Advocate in Nonadjudicative Proceedings Rule 3.9	Standard 6.2
Truthfulness to Others Rule 4.1	Standard 6.1
Communication with Represented Persons Rule 4.2	Standard 6.3
Dealing with Unrepresented Persons Rule 4.3	Standard 6.3
Respect for Rights of Third Persons Rule 4.4	Standard 6.2
Responsibilities of a Partner or Supervisory Lawyer Rule 5.1	Standard 7.0
Responsibilities of a Subordinate Lawyer Rule 5.2	Standard 7.0
Responsibilities Regarding Nonlawyer Assistants Rule 5.3	Standard 7.0
Professional Independence of Lawyer Rule 5.4(a)&(b) Rule 5.4(c) Rule 5.4(d)	 Standard 7.0 Standard 4.3 Standard 7.0
Unauthorized Practice of Law Rule 5.5	Standard 7.0
Restrictions on Right to Practice Rule 5.6	Standard 7.0

ABA Model Rules of Professional Conduct	*Standards for Imposing Sanctions*
Pro Bono Publico Service	
Rule 6.1	No Applicable Standard
Accepting Appointments	
Rule 6.2	Standard 7.0
Membership in Legal Services Organization	
Rule 6.3	Standard 4.3
Law Reform Activities Affecting Client Interests	
Rule 6.4	Standard 5.2
Communication Concerning Lawyer's Services	
Rule 7.1	Standard 7.0
Advertising	
Rule 7.2	Standard 7.0
Direct Contact with Prospective Clients	
Rule 7.3	Standard 7.0
Communication of Fields of Practice	
Rule 7.4	Standard 7.0
Firm Names and Letterheads	
Rule 7.5	Standard 7.0
Bar Admission and Disciplinary Matters	
Rule 8.1	Standards 5.1 & 7.0
Judges and Legal Officials	
Rule 8.2	Standard 6.1
Reporting Professional Misconduct	
Rule 8.3	Standard 7.0
Misconduct	
Rule 8.4(a)	Standards 4.0, 5.0, 6.0, & 7.0
Rule 8.4(b)	Standard 5.1
Rule 8.4(c)	Standards 4.6 & 5.1
Rule 8.4(d)	Standard 6.0
Rule 8.4(e)&(f)	Standard 6.2
Jurisdiction	
Rule 8.5	None

APPENDIX 2

Cross-Reference Table: ABA Code of Professional Responsibility and Standards for Imposing Sanctions

ABA Code of Professional Responsibility	*Standards for Imposing Sanctions*
Canon 1: Integrity of Profession	
DR 1-101	Standard 7.0
DR 1-102	Standards 4.6, 5.1, 6.2
DR 1-103	Standard 7.0
Canon 2: Making Counsel Available	
DR 2-101	Standard 7.0
DR 2-102	Standard 7.0
DR 2-103	Standard 7.0
DR 2-104	Standard 7.0
DR 2-105	Standard 7.0
DR 2-106	Standard 7.0
DR 2-107	Standard 7.0
DR 2-108	Standard 7.0
DR 2-109	Standard 7.0
DR 2-110	Standard 7.0
Canon 3: Unauthorized Practice	
DR 3-101(A)	Standard 7.0
DR 3-101(B)	Standard 8.0
DR 3-102	Standard 7.0
DR 3-103	Standard 7.0
Canon 4: Confidences and Secrets	
DR 4-101	Standard 4.2
Canon 5: Independent Judgment	
DR 5-101	Standard 4.3
DR 5-102	Standard 4.3
DR 5-103	Standard 4.3
DR 5-104	Standard 4.3
DR 5-105	Standard 4.3
DR 5-106	Standard 4.3
DR 5-107	Standard 4.3
Canon 6: Competence	
DR 6-101(A)(1) & (2)	Standard 4.5
DR 6-101(A)(3)	Standard 4.4
DR 6-102	Standard 4.3
Canon 7: Zealous Representation	
DR 7-101(A)(1) & (2)	Standard 4.4
DR 7-101(A)(3)	Standard 4.6
DR 7-101(B)	Standard 7.0
DR 7-102	Standards 6.1 & 6.2
DR 7-103	Standard 5.2

ABA Code of Professional Responsibility	*Standards for Imposing Sanctions*
DR 7-104	Standard 6.3
DR 7-105	Standard 6.2
DR 7-106	Standard 6.2
DR 7-107	Standard 6.2
DR 7-108	Standard 6.3
DR 7-109	Standard 6.3
DR 7-110	Standard 6.3
Canon 8: Improving the Legal System	
DR 8-101	Standard 5.2
DR 8-102	Standard 5.2
DR 8-103	Standard 5.2
Canon 9: Appearance of Impropriety	
DR 9-101(A) & (B)	Standard 4.3
DR 9-101(C)	Standard 5.2
DR 9-102	Standard 4.1

APPENDIX 3

Frequency Statistics

Jurisdiction	*Total Number of Cases*	*Percentage of Total*	*Years*
Alabama	13	.4%	1980-84
Alaska	8	.3%	1980-84
Arkansas	5	.2%	1980-84
Arizona	96	3.2%	1974-84
California	681	22.8%	1974-84
Colorado	56	1.9%	1980-84
Delaware	3	.1%	1980-84
D. of Columbia	126	4.2%	1974-84
Florida	347	11.6%	1974-84
Georgia	12	.4%	1980-84
Hawaii	4	.1%	1980-84
Idaho	10	.3%	1980-84
Illinois	198	6.6%	1974-84
Indiana	44	1.5%	1980-84
Iowa	39	1.3%	1980-84
Kansas	53	1.8%	1980-84
Kentucky	32	1.1%	1980-84
Louisiana	20	.7%	1980-84
Maine	17	.6%	1980-84
Maryland	3	.1%	1980-84
Massachusetts	92	3.1%	1980-84
Michigan	228	7.6%	1980-83
Minnesota	18	.6%	1980-84
Mississippi	4	.1%	1980-84
Missouri	1	0%	1980-84
Montana	3	.1%	1980-84
Nebraska	3	.1%	1980-84
Nevada	1	0%	1980-84
New Hampshire	0	0%	1980-84
New Jersey	69	2.3%	1974-84
New Mexico	4	.1%	1980-84
New York	243	8.1%	1979-82
North Carolina	1	0%	1980-84
North Dakota	16	.5%	1974-84
Ohio	16	.5%	1980-84
Oklahoma	15	.5%	1980-84
Oregon	47	1.6%	1980-84
Pennsylvania	4	.1%	1980-84
Rhode Island	6	.2%	1980-84
South Carolina	30	1.0%	1980-84
South Dakota	1	0%	1980-84
Tennessee	69	2.3%	1980-84
Texas	225	7.5%	1974-84
Utah	28	.9%	1980-84

Jurisdiction	Total Number of Cases	Percentage of Total	Years
Vermont	0	0%	1980-84
Virginia	56	1.9%	1980-84
Washington	24	.8%	1980-84
West Virginia	2	.1%	1980-84
Wisconsin	12	.4%	1980-84
Wyoming	1	0%	1980-84
(Missing cases)	(5)	(.2%)	
	2991	100%	

CODE OF PROFESSIONAL RESPONSIBILITY

CODE OF PROFESSIONAL RESPONSIBILITY

Table of Contents

PREAMBLE

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this rule requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the everchanging relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

PRELIMINARY STATEMENT

In furtherance of the principles stated in the Preamble this Code of Professional Responsibility has been promulgated consisting of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their nonprofessional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

CANON 1. A LAWYER SHOULD ASSIST IN MAINTAINING THE INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION

DR 1-101. Maintaining Integrity and Competence of the Legal Profession.

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102. Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Annotations

Cases

Prosecutor's failure to reveal possible taint of identification procedure was apparently violative of DR 1-102(a)(4) and (5) and DR 7-102(a)(6). **Buchanan v. State**, Op. No. 2553, 544 P2d 1153 (Alaska 1976).

Conduct leading to conviction as accessory after the fact to first degree murder was "illegal conduct involving moral turpitude." **Matter of Webb**, Op. No. 1879, 602 P2d 408 (Alaska 1979).

Conduct leading to conviction for offense of accessory after the fact to murder was conduct prejudicial to the administration of justice. **Matter of Webb**, Op. No. 1879, 602 P2d 408 (Alaska 1979).

A five-year suspension of an attorney's license to practice law was warranted for falsification of an item of documentary evidence. **Matter of Stump**, Op. No. 2237, 621 P2d 263 (Alaska 1980).

Public censure was appropriate sanction for gross negligence in responding to an interrogatory and for failing to heed an admonition against commingling of funds. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Grossly negligent misconduct is not within the ambit of the rule prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, but does violate the rule on failing to act competently as well as other disciplinary rules. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Suspension for 18 months was appropriate punishment for attorney who "created" a deed of trust and attached it as an exhibit to an unverified complaint. **Discipline of Walton**, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Disciplinary rules under which attorney was cited were not overboard or void for vagueness. **Discipline of Vollintine**, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Statements by attorney in letters to two federal officials during the attorney's representation of clients in a federal quiet title and ejectment action, which accused certain official of perjury and cheating and warned that they might find themselves criminally or personally liable in tort, were improper and required public censure. **Discipline of Vollintine**, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Discipline of attorney for writing letters to two federal officials accusing certain officials of perjury and cheating and warning that they might find themselves criminally or personally liable in tort did not violate the attorney's right of free speech. **Discipline of Vollintine**, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Attorney, representing plaintiff in a personal injury action, who agreed to assert a military claim for reimbursement of the cost of providing medical care to the plaintiff, breached her fiduciary obligation to the military when she negotiated a settlement and distributed all of the proceeds to the plaintiff and to herself as attorney's fees; accordingly, since her conduct as a matter of law involved dishonesty and misrepresentation, suspension was the appropriate sanction. **In re Miner**, Op. No. 2726, 681 P2d 1347 (Alaska 1983).

Any possible violation of the disciplinary rules of the Code of Professional Responsibility by police officers, who knew that defendant had an attorney but nevertheless conducted a non-custodial interview with defendant without first informing his attorney, was so attenuated that the substantial interest in admitting reliable evidence resulting from the interview substantially outweighed the marginal purpose that would be served by suppressing the evidence. **Depp v. State**, Op. No. 390, 686 P2d 712 (Alaska App. 1984).

The American Bar Association Standards and methodology are the appropriate model for determining sanctions for lawyer misconduct in Alaska; to the extent that previous decisions conflict with the ABA standards, the ABA standards control. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

Under the ABA standards, sanctioning courts must: (1) determine what ethical duty the lawyer violated, the lawyer's mental state, and the extent of the actual or potential injury caused by the lawyer's misconduct; (2) look to the ABA standards to discern what sanction is recommended for the "type" of misconduct in question; and (3) ascertain whether any aggravating or mitigating circumstances exist which warrant increasing or decreasing the otherwise appropriate sanction. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

Lawyer misconduct, which included defrauding a client by fabricating a "settlement agreement" and intentionally representing the same as genuine, abuse of the legal process by forging a judge's signature, and the embezzlement of client funds, warranted disbarment rather than suspension. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

The "good moral character" requirement for admission to practice law is a requirement for continuing bar membership. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

DR 1-103. Disclosure of Information to Authorities.

(A) A lawyer possessing unprivileged knowledge or evidence of a violation of DR 1-102 concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

ETHICAL CONSIDERATIONS

EC 1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC 1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law. To assure the maintenance of high moral and educational standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar. In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC 1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed

investigator or judge of applicants for admission, he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.

EC 1-4 The integrity of the profession can be mantained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

EC 1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC 1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

(Added by SCO 158 effective May 6, 1971)

CANON 2. A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE

DR 2-101. Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers.

(2) One or more fields of law in which the lawyer or law firm practices or a statement that the practice is limited to one or more fields of law, to the extent authorized under DR 2-105.

(3) Date and place of birth.

(4) Date and place of admission to the bar of state and federal courts.

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions.

(6) Public or quasi-public offices.

(7) Military service.

(8) Legal authorships.

(9) Legal teaching position.

(10) Memberships, offices, and committee assignments, in bar associations.

(11) Membership and offices in legal fraternities and legal societies.

(12) Technical and professional licenses.

(13) Memberships in scientific, technical and professional associations and societies.

(14) Foreign language ability.

(15) Names and addresses of bank references.

(16) With their written consent, names of clients regularly represented.

(17) Prepaid or group legal services programs in which the lawyer participates.

(18) Whether credit cards or other credit arrangements are accepted.

(19) Office and telephone answering service hours.

(20) Fee for an initial consultation.

(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services.

(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs.

(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information.

(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information.

(25) Fixed fees for specific routine legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information.

(C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forms may apply to the Alaska Bar Association. Any such application shall be served upon the agencies having jurisdiction under state law over the regulation of the legal profession and consumer matters who shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers.

(D) If the advertisement is communicated to the public over television or radio, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

(E) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(F) Unless otherwise specified in the advertisement if a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(G) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101 (B), the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(H) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(I) A lawyer shall not compensate or give any thing of value to representatives of press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

(Amended by SCO 263 effective December 31, 1976; by SCO 356 effective April 1, 1979; and by SCO 377 Effective July 1, 1979)

DR 2-102. Professional Notices, Letterheads and Offices.

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form.

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the name of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more lawyers unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged in both the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

(Amended by SCO 356 § 2 effective April 1, 1979)

DR 2-103. Recommendation of Professional Employment.

(A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, or himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that:

(1) He may request referral from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its members or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

(Amended by SCO 263 effective December 31, 1976; and by SCO 356 § 3, effective April 1, 1978)

DR 2-104. Suggestion of Need of Legal Services.

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that service, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

(Amended by SCO 263 effective December 31, 1976; and by SCO 356 § 4 effective April 1, 1979)

DR 2-105. Limitation of Practice.

A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR 2-101(B), except that

(1) A lawyer permitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.

(2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by the Board of Governors. Such disclosures and statements shall include the following statement: "The Alaska Bar Association does not certify that any attorney possesses specified training or skill in a particular field of law."

(Amended by SCO 356 § 5 effective April 1, 1979)

DR 2-106. Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR 2-107. Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

DR 2-108. Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR 2-109. Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harrassing or maliciously injuring any person.

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reveaal of existing law.

DR 2-110. Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client,

allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insist that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

ETHICAL CONSIDERATIONS

EC 2-1 The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Recognition of Legal Problems

EC 2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for any publications and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers. The problems of advertising on television require special consideration, due to the style, cost, and transitory nature of such media. If the interests of laypersons in receiving relevant lawyer advertising are not adequately served by print media and radio advertising, and if adequate safeguards to protect the public can reasonably be formulated, television advertising may serve a public interest.

(Amended by SCO 356 § 6 effective April 1, 1979)

EC 2-3 Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

(Amended by SCO 356 § 7 effective April 1, 1979)

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

(Amended by SCO 356 § 8 effective April 1, 1979)

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

(Amended by SCO 356 § 9 effective April 1, 1979)

Selection of a Lawyer

EC 2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.

(Amended by SCO 356 § 11 effective April 1, 1979)

EC 2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties — relatives, friends, acquaintances, business associates, or other lawyers — and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, other forms of print media, television or radio, should be formulated to convey only information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including name of law firm and names of professional associates, addresses; telephone numbers, credit card acceptability; fluency in foreign languages, and office hours; (2) relevant biographical information; (3) description of the practice, but only by using designations and definitions authorized by the Board of Governors; for example, one or more fields of law in which the lawyer or law firm practices, and/or a statement that practice is limited to one or more fields of law; (4) permitted fee information. Laudation of the lawyer, or law firm, by himself or by others, testimonials, statements of quality of service to be rendered, comparative statement about the lawyer's or law firm's services in relation to those of others, and statements of performance records are considered undignified, are primarily solicitative rather than informative, and are apt to be misleading to the public. They should be avoided.

(Amended by SCO 356 § 12 effective April 1, 1979; and by SCO 377 effective July 1, 1979)

Selection of a Lawyer: Lawyer Advertising

EC 2-9 The importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in law advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service. Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

(Amended by SCO 356 § 13 effective April 1, 1979)

EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to compare the qualifications of the lawyers available to represent him. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers for prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal is necessary in light of existing Code provisions, whether the proposal accords with standards of accuracy, reliability and truthfulness, and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services. Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. Any change which is approved should be promulgated in the form of an amendment to the Code so that all lawyers practicing in the jurisdiction may avail themselves of its provisions.

(Amended by SCO 356 § 14 effective April 1, 1979)

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners, and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

(Amended by SCO 356 § 15 effective April 1, 1979)

EC 2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC 2-13 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of a professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC 2-14 In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been

permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation on his practice or one or more particular areas or fields of law in which he practices using designations and definitions authorized for that purpose by the Board of Governors.

(Amended by SCO 356 § 16 effective April 1, 1979)

EC 2-15 The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

EC 2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel: Persons Able to Pay Reasonable Fees

EC 2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC 2-19 As soon as feasible after a lawyer has been employed it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee.

EC 2-21 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.

EC 2-22 Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable.

EC 2-23 A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees

EC 2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Acceptance and Retention of Employment

EC 2-26 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.

EC 2-27 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

EC 2-28 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.

EC 2-29 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should

not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

EC 2-30 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

EC 2-31 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC 2-32 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the posibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

(Added by SCO 128 effective May 6, 1971)

Annotations

Cases

This provision is designed to apply when a lawyer withdraws, not when a client secures new counsel; accordingly, it does not mandate return of a client's files when the client terminates the relationship. Miller v. Paul, Op. No. 2152, 615 P2d 615 (Alaska 1980).

EC 2-33 As a part of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients. An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independence, professional representation of the interests of the individual client. An attorney should avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the attorneys employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

(Added by SCO 263 effective December 31, 1976)

CANON 3. A LAWYER SHOULD ASSIST IN PREVENTING THE UNAUTHORZED PRACTICE OF LAW

DR 3-101. Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR 3-102. Dividing Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money; over a reasonable period of time after his death, to his estate or to one or more specified persons.

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR 3-103. Forming a Partnership with a Non-Lawyer.

(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

ETHICAL CONSIDERATIONS

EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC 3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC 3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC 3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

EC 3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC 3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

EC 3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

(Added by SCO 128 effective May 6, 1971)

Annotations

Cases

Engaging in a law-related business with nonlawyers violates the Canons of Professional Ethics. In re Cornelius, Op. No. 1019, 520 P2d 76 (Alaska 1974).

CANON 4. A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT

DR 4-101. Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C) and (D), a lawyer shall not knowingly during or after termination of the professional relationship to his client:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

Annotations

Cases

Attorney was involved in a conflict of interest when he represented his wife in a personal injury action against former client arising out of the same automobile accident for which he defended the former client on a drunk driving charge. Burrell v. Disciplinary Bd. of Alaska Bar, Op. No. 2948, 702 P2d 240 (Alaska 1985).

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

Annotations

Cases

An attorney may not represent a third party against a former client where there exists a substantial possibility that knowledge gained by him in the earlier professional relationship can be used against the former client, or where the subject matter of his present undertaking has a substantial relationship to that of his prior representation. Alcut Corp. v. McGarvey, Op. No. 1544, 573 P2d 473 (Alaska 1978).

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus an attorney, as successor to another practice, must preserve inviolate the secrets and confidences reflected in the files in the same respect as required by his predecessor. A lawyer should take all reasonable steps, providing safeguards from disclosing the confidences and secrets reflected in the files of his client, following the termination of his practice of the law whether termination is due from disability or retirement.

(Added by SCO 128 effective May 6, 1971)

Annotations

Cases

An attorney may not represent a third party against a former client where there exists a substantial possibility that knowledge gained by him in the earlier professional relationship can be used against the former client, or where the subject matter of his present undertaking has a substantial relationship to that of his prior representation. Alcut Corp. v. McGarvey, Op. No. 1544, 573 P2d 473 (Alaska 1978).

CANON 5. A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT

DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Annotations

Cases

Where the issue of whether lessees of store had consented to repossession of store by lessors had been decided in a previous case, making it highly probable that the lessors would be collaterally estopped from relitigating the issue in the present case, attorney who witnessed the repossession could represent the lessees against the lessors in the present case since it was unlikely that the attorney would be called as a witness on the consent issue. Murry v. Feight, Op. No. 3210, 741 P2d 1148 (Alaska 1987).

DR 5-102. Withdrawal as Counsel When the Lawyer becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 5-103. Avoiding Acquisition of Interest in Litigation

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

DR 5-104. Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Annotations

Cases

Attorney was involved in a conflict of interest when he represented his wife in a personal injury action against a former client arising out of the same automobile accident for which he defended the former client on a drunk driving charge. Burrell v. Disciplinary Bd. of Alaska Bar, Op. No. 2948, 702 P2d 240 (Alaska 1985).

DR 5-106. Settling Similar Claims of Clients.

(A) A lawyer who represents two or more clients shall not make or participate in the making of an

aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR 5-107. Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A non-lawyer is a corporate director or officer thereof; or

(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Annotations

Cases

Guardian ad litem appointed under AS 09.65.130 is child's attorney with power and responsibility to represent child zealously and to the best of his ability. **Veazey v. Veazey**, Op. No. 1381, 560 P2d 382 (Alaska 1977).

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC 5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC 5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

EC 5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by a lawyer to his client. Although this assistance is generally not encouraged, there are instances when it is not improper to advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and the cost of obtaining and presenting evidence, provided that the client remains ultimately liable for such expenses.

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as a advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility.

The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

EC 5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC 5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.

EC 5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

Interests of Multiple Clients

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chances of adverse effect upon his judgment is not unlikely.

EC 5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent in in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC 5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC 5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC 5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC 5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong

pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

EC 5-24 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

(Added by SCO 128 effective May 6, 1971)

CANON 6. A LAWYER SHOULD REPRESENT A CLIENT COMPETENTLY

DR 6-101. Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

Annotations

Cases

Public censure was warranted for attorney who neglected over a period of many years to attend to the necessary legal work connected with seven estates for which he was attorney of record. **In re Collins**, Op. No. 1964, 583 P2d 207 (Alaska 1978).

Public censure was appropriate sanction for gross negligence in responding to an interrogatory and for failing to heed an admonition against commingling of funds. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Grossly negligent misconduct is not within the ambit of the rule prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, but does violate the rule on failing to act competently as well as other disciplinary rules. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Lack of experience in criminal cases will not always justify a court-appointed attorney's refusal to represent an indigent criminal defendant. **Wood v. Superior Court**, Op. No. 2884, 690 P2d 1225 (Alaska 1984).

DR 6-102. Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

ETHICAL CONSIDERATIONS

EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

(Added by SCO 128 effective May 6, 1971)

Annotations

Cases

Professional services performed by one licensed to practice law must conform to the standards of the profession, regardless of the capacity in which an attorney may be acting. In re Cornelius, Op. No. 1019, 520 P2d 76 (Alaska 1974).

An attorney will be held to the standards of his profession if his activities are so legally related as to be part of his practice of law. In re Cornelius, Op. No. 1019, 520 P2d 76 (Alaska 1974).

CANON 7. A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW

DR 7-101. Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102. Representing a Client within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client, when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowlingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected tribunal and may reveal the fraud to the affected person.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Annotations

Cases

Prosecutor's failure to reveal possible taint of identification procedure was apparently violative of DR 1-102(A)(4) and (5) and DR 7-102(A)(6). Buchanan v. State, Op. No. 1316, 544 P2d 1153 (Alaska 1976).

Where defense counsel informed the judge of his belief that defendant's proposed testimony would be false, the judge's solution as an alternative to withdrawal by the attorney that defendant take the stand and give his testimony in narrative form without assistance from his attorney, did not violate defendant's rights. Coleman v. State, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Failure of trial court to allow defendant's counsel to withdraw was reversible error where there was sufficient evidence to suggest that the attorney client relationship had broken down and where, in trying to extricate himself from the case, the attorney essentially told the judge that his client was going to perjure himself. Newcomb v. State, Op. No. 130, 651 P2d 1176 (Alaska App. 1982).

Suspension for 18 months was appropriate punishment for attorney who "created" a deed of trust and attached it as an exhibit to an unverified complaint. Discipline of Walton, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Unverified complaint attached to pleadings constituted "evidence" within the meaning of this rule even though the complaint would not have been admissible at trial under the technical requirements of the Rules of Evidence. Discipline of Walton, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Discipline of attorney for writing letter to two federal officials accusing certain officials of perjury and cheating and warning that they might find themselves personally and criminally liable in tort did not violate the attorney's right of free speech. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Disciplinary rules under which attorney was cited were not overbroad or void for vagueness. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Statement by attorney in letters to two federal officials during the attorney's representation of clients in a federal quiet title and ejectment action, which accused certain officials of perjury and cheating and warned that they might find themselves criminally or personally liable in tort, were improper and required public censure. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

DR 7-103. Performing the Duties of Public Prosecutor or Other Government Lawyer.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

Annotations

Cases

Prosecutor has an obligation to disclose evidence which tends to negate guilt, mitigate the degree of the offense or reduce punishment. Des Jardins v. State, Op. No. 1245, 551 P2d 181 (Alaska 1976).

Failure to refuse to accept or continue employment when interests of another client impaired independent professional judgement, combined with other offenses, justified public censure. Matter of Croddick, Op. No. 1877, 602 P2d 406 (Alaska 1979).

DR 7-104. Communicating with One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

Annotations

Cases

Any possible violation of the disciplinary rules of the Code of Professional Responsibility by police officers, who knew that defendant had an attorney but nevertheless conducted a noncustodial interview with defendant without first informing his attorney, was so attenuated that the substantial interest in admitting reliable evidence resulting from the interview substantially outweighed the marginal purpose that would be served by suppressing the evidence. Depp v. State, Op. No. 390, 686 P2d 712 (Alaska App. 1984).

DR 7-105. Threatening Criminal Prosecution.

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Annotations

Cases

Disciplinary rules under which attorney was cited were not overbroad or void for vagueness. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Discipline of attorney for writing letters to two federal officials accusing certain officials of perjury and cheating and warning that they might find themselves criminally or personally liable in tort did not violate the attorney's right of free speech. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

The fact that an attorney believes the truth of his allegations does not insulate him from discipline under the rule prohibiting lawyers from threatening to present criminal charges solely to obtain an advantage in a civil matter. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Statements by attorney in letters to two federal officials during the attorney's representation of clients in a federal quiet title and ejectment action, which accused certain officials of perjury and cheating and warned that they might find themselves criminally or personally liable in tort, were improper and required public censure. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983)

Dismissal of a case pursuant to the civil compromise statute does not imply that the case was prosecuted "solely to obtain an advantage in a civil matter." State v. Nelles, Op. No. 578, 713 P2d 806 (Alaska App. 1986).

DR 7-106. Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

Annotations

Cases

Suspension for 18 months was appropriate punishment for attorney who "created" a deed of trust and attached it as an exhibit to an unverified complaint. Discipline of Walton, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

DR 7-107. Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) Physical evidence or the performance or results of any examination or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees, associates and clients from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

DR 7-108. Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR 7-108(A) and (B) do not prohibit a lawyer from necessary communication with veniremen or jurors solely in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

DR 7-109. Contact with Witnesses.

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.

(B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

DR 7-110. Contact with Officials.

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal which might be reasonably construed as being for the purpose of influencing his official acts.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) As required in the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

ETHICAL CONSIDERATIONS

EC 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

Annotations

Cases

Guardian ad litem appointed under AS 09.65.130 is child's attorney with power and responsibility to represent child zealously and to the best of his ability. Veazey v. Veazey, Op. No. 1381, 560 P2d 382 (Alaska 1977).

EC 7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC 7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client

EC 7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC 7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC 7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC 7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise, the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC 7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.

He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC 7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

EC 7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

EC 7-12 Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC 7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be ex parte in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law. Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

EC 7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should comply with applicable laws and legislative rules.

EC 7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC 7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice

EC 7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

EC 7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a

tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the basis for standards of professional conduct set forth in the Disciplinary Rules.

EC 7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC 7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

EC 7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

EC 7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissable evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC 7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC 7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

EC 7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

EC 7-28 Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

EC 7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extra-judicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

EC 7-30 Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen jurors should act with circumspection and restraint.

EC 7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC 7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a veniremen, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

EC 7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC 7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal which might reasonably be construed as being for the purpose of influencing his official actions.

EC 7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing

counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and aboveboard in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC 7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC 7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

(Added by SCO 128 effective May 6, 1971)

CANON 8. A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM

DR 8-101. Action as a Public Official.

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR 8-102. Statements Concerning Judges and Other Adjudicatory Officers.

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

ETHICAL CONSIDERATIONS

EC 8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC 8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

EC 8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend

themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC 8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC 8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

(Added by SCO 128 effective May 6, 1971)

CANON 9. A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY

DR 9-101. Avoiding Even the Appearance of Impropriety.

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

DR 9-102. Presenting Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable insured depository accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay services charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

For purposes of this rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(B) A lawyer shall

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(C) Unless an election not to participate is submitted in accordance with the procedure set forth in paragraph (D), a lawyer or law firm shall establish and maintain an interest bearing insured depository account into which must be deposited funds of clients which are nominal in amount or are expected to be held for a short period of time, but only in compliance with the following provisions:

(1) No earnings from such account shall be made available to the lawyer or law firm and the lawyer or law firm shall have no right or claim to such earnings.

(2) Only funds of clients which are nominal in amount or are expected to be held for a short period of time may be deposited in such account. Funds which reasonably may be expected to generate in excess of one hundred dollars interest may not be deposited in such account.

(3) The depository institution shall be directed by the lawyer or law firm establishing such account:

(a) To remit earnings from such account, net of any service charges or fees, as computed in accordance with the institution's standard accounting practice to the Alaska Bar Foundation, Inc., at least quarter-annually; and

(b) To transmit with each remittance of earnings a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied, with a copy of such statement to such lawyer or law firm.

(4) The lawyer or law firm shall review the account at reasonable intervals to determine if changed circumstances required further action with respect to the funds of any client.

(D) A lawyer or law firm who elects not to maintain the account described in paragraph (C) shall make such election on or before September 1, 1989 on a Notice of Election form provided by the Alaska Bar Association. If a Notice of Election is not submitted, the lawyer or law firm shall maintain the account described in paragraph (C). A lawyer or law firm who wishes to change a previous election may do so at any time by notifying the Alaska Bar Association.

Annotations

Cases

Public censure was appropriate sanction for gross negligence in responding to an interrogatory and for failing to heed an admonition against commingling of funds. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Under the ABA standards, sanctioning courts must: (1) determine what ethical duty the lawyer violated, the lawyer's mental state, and the extent of the actual or potential injury caused by the lawyer's misconduct; (2) look to the ABA standards to discern what sanction is recommended for the "type" of misconduct in question; and (3) ascertain whether any aggravating or mitigating circumstances exist which warrant increasing or decreasing the otherwise appropriate sanction. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

Lawyer misconduct, which included defrauding a client by fabricating a "settlement agreement" and intentionally representing the same as genuine, abuse of the legal process by forging a judge's signature, and the embezzlement of client funds, warranted disbarment rather than suspension. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

ETHICAL CONSIDERATIONS

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

EC 9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC 9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Annotations

Cases

An attorney may not represent a third party against a former client where there exists a substantial possibility that knowledge gained by him in the earlier professional relationship can be used against the former client, or where the subject matter of his present undertaking has a substantial relationship to that of his prior representation. **Alent Corp. v. McGarvey**, Op. No. 1544, 573 P2d 473 (Alaska 1978).

EC 9-7 A lawyer should exercise good faith judgment in determining initially whether funds of a client are of such a nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest bearing insured depository account for the benefit of the client. In this determination, the lawyer should consider all relevant factors, including without limitation, the cost of establishing and maintaining the account, service charges, accounting fees and tax reporting procedures, the nature of the transaction involved and the likelihood of delay. A determination not to place funds in an account for the benefit of the client should be reviewed at reasonable intervals if the funds remain on hand to determine if changed circumstances require further action with respect to such funds.

(Added by SCO 128 effective May 6, 1971; amended by SCO 782 effective March 15, 1987)

DEFINITIONS*

As used in the Disciplinary Rules of the Code of Professional Responsibility:

(1) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(2) "Law firm" includes a professional legal corporation.

(3) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(4) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(5) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(6) "Tribunal" includes all courts and all other adjudicatory bodies.

(7) "A bar association" includes a bar association of specialists as referred to in DR 2-105(A)(1) or (4).

(8) "Qualified legal assistance organization" means an office or organization of one of the four types listed in DR 2-103(D)(1) through (4), inclusive that meets all the requirements thereof.

(Added by SCO 128 effective May 6, 1971 and amended by SCO 263 effective December 31, 1976)

*"Confidence" and "secret" are defined in DR 4-101(A).

client security fund

The Client Security Fund was established by the Alaska Bar Association to provide a remedy for clients who have lost money or other property as a result of the dishonest conduct of attorneys. The Fund is a remedy of last resort for clients who cannot get reimbursement from other sources, such as insurance or the attorney involved.

purpose of fund

The legal profession depends upon the trust of clients. Very few attorneys breach that trust. Nonetheless, it is important that the profession's reputation for honesty be maintained and protected. The Client Security Fund serves this function by providing reimbursement to clients whose money or property has been wrongfully taken by attorneys admitted to practice law in Alaska.

financing the fund

No tax dollars are used. The Client Security Fund is financed by judges and attorneys licensed to practice law in Alaska.

losses covered by the client security fund

The Client Security Fund Committee, under rules established by the Supreme Court, administers the Fund and it may recommend reimbursement of losses caused by the dishonest conduct of attorneys admitted to the practice of law in Alaska, up to a maximum of $10,000.00 for each claim and $50,000.00 per attorney. Dishonest conduct means the wrongful taking of a client's money or other property. A situation in which an attorney did not complete work for which the client has paid or did not perform to the client's satisfaction does not, alone, constitute a claim. A claim for reimbursement must be filed with the Committee within three years after the client discovers the loss.

The Client Security Fund Committee does not have authority to discipline attorneys for misconduct, resolve fee disputes or determine legal malpractice claims. Fee disputes, complaints of misconduct or malpractice should be pursued by notifying the Alaska Bar Association or by civil lawsuit. In addition to filing a claim with the Client Security Fund Committee, a claimant should report the attorney's conduct to the Alaska Bar Association. A claimant should also report illegal acts, such as theft or embezzlement, to the local District Attorney.

how to file a claim

A claim form and other information and assistance is available by writing the Client Security Fund Committee or calling the Alaska Bar Association. A claimant is not required to be represented by an attorney in order to process a claim with the Fund.

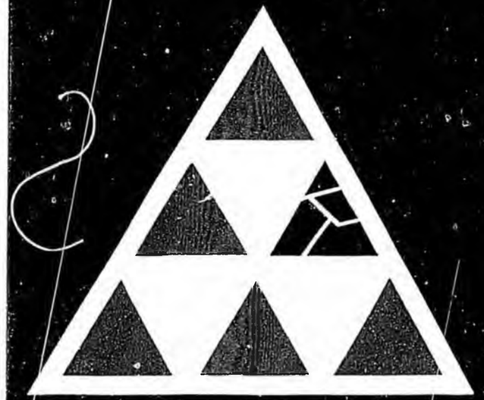
what to expect after a claim is filed

Each application for reimbursement will be reviewed and investigated. Applications which fail to make a case for reimbursement will be rejected. The reasons for the rejection will be set forth in a written report. Applications which are not rejected will be considered by the Client Security Fund Committee. Based upon its consideration, the Committee will make recommendation to the Board of Governors of the Alaska Bar Association. The Board will determine, in its discretion, whether and to what extent to reimburse the applicant. The decision to reimburse the applicant will depend on the amount of money available to the Fund, the number of claimants seeking reimbursement, and the degree of hardship suffered by each claimant.

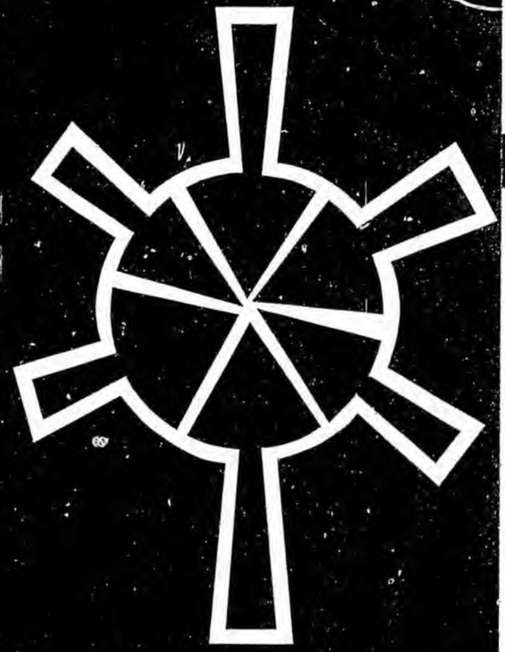
Claims will generally not be awarded until the completion of the disciplinary action against the attorney. It is important, therefore, that a claimant report dishonest conduct to Discipline Counsel immediately and cooperate with any investigation by the Alaska Bar Association.

Direct inquiries to:
Discipline Counsel
Alaska Bar Association
P.O. Box 100279
Anchorage, AK 99510
907-272-7469

client security fund



fee arbitration



what is a fee arbitration?

Fee arbitration is a process which may be used to resolve a dispute over fees with an attorney. The dispute is decided by an impartial panel which renders a final and binding decision based on the facts and evidence presented by the parties.

a public service

The fee arbitration process is a service provided by the Alaska Bar Association without charge to the person or attorney.

disputes subject to fee arbitration

A person may have a fee dispute with an attorney arbitrated. The attorney must be licensed to practice in the State of Alaska or the services must have involved a legal matter conducted in Alaska. The person must make efforts to resolve the dispute directly with the attorney before the arbitration process is commenced. The fee arbitration process cannot be used if the fee was determined by a court decision, by a statute, or by court rule.

requesting a fee arbitration

A person may request a fee arbitration by filling out a form available through the Bar Association. The person must state on the petition form the efforts that he or she has made to resolve the dispute directly with the attorney, describe the dispute as specifically as possible, and state the remedy sought from the attorney.

putting court proceeding "on hold"

A party in a civil court proceeding involving the collection of attorney fees may seek a "stay," which puts the court proceeding on "hold" while a fee arbitration is pending with the Bar Association. In order to obtain a stay, a petition for fee arbitration must be filed with the Bar Association within thirty (30) days of receiving a "Notice of Client's Right to Arbitrate" from the attorney.

assignment of arbitration to hearing panel

If a dispute involves an amount less than $2,000.00, the matter will be heard by a single member of the fee arbitration committee. Otherwise, a panel of three members, one of whom is a non-attorney, is convened from a local standing committee in the community where the legal services were provided. There are local standing committees in Anchorage, Fairbanks, Juneau, and Ketchikan. Special arrangements are made in communities which are not close to one of these.

hearing

Twenty days advance notice of the hearing will be given to the parties. The chairperson of the hearing panel conducts the hearing and decides what testimony and documents may be used as evidence. Relevant and reliable evidence will be admitted. If the client or the attorney fails to appear at the hearing, the hearing panel may proceed in that person's absence. Special procedures may be used by a client or the attorney to submit a written statement in addition to, or instead of, testimony at the hearing; to submit witness affidavits instead of presenting their testimony in person, and to participate by conference call. The cost of the call will generally be paid by the party requesting it.

confidentiality

Fee arbitration proceedings are confidential. Hearings and records relating to the arbitration are only open to the parties to the dispute and not to the public.

decision

The hearing panel will make its decision within thirty days after the close of the hearing. The decision must be agreed to by a majority of the hearing panel members. The panel may decide that an attorney should refund fees already collected; should collect only a reduced fee; or that the fees are reasonable under the circumstances.

fee arbitration binding

All parties are bound by the decision of the fee arbitration panel, unless the decision is set aside by the superior court on appeal, as discussed below. A party may apply to the courts for an order "confirming" the arbitration decision. The decision is confirmed by the court without any further evidenciary proceeding, and may be enforced in the same manner as a court judgment.

appeal

Either party may appeal a decision of the fee arbitration committee within thirty days of the date that the decision is mailed or delivered. There are limited grounds for appeal, which are set out in Alaska Statutes 09.43.120-180. Procedures for appeal are set out in the Rules of Appellate Procedure 601-609.

assistance in filing

The Bar Association is here to provide assistance to persons seeking an opportunity to have their fee dispute arbitrated and is more than happy to provide clients with information and assistance in the processing and handling of their fee dispute.

Contact the:

Alaska Bar Association
P.O. Box 100279
Anchorage, Alaska 99510
907-272-7469

appeal of dismissals

If a complainant disagrees with the dismissal of a grievance, (s)he may appeal the decision by writing a letter to the Bar Association specifically stating the reasons for appeal. The appeal and the file will be reviewed by a member of an Area Discipline Division.

hearings

Discipline hearings are public and are much like a courtroom trial, with witnesses testifying under oath. Complainants are generally called to testify at the hearing. A Hearing Committee of at least one non-attorney and two attorneys considers the evidence and makes a recommendation to the Disciplinary Board.

Three non-attorneys and nine attorneys sit on the Disciplinary Board. The Board reviews the record and considers the Hearing Committee's recommendation. The Board can 1) dismiss the matter if it finds insufficient evidence; 2) issue a public reprimand to the attorney; or 3) recommend that the attorney be disciplined by the Alaska Supreme Court. The Court can impose public censure, probation, suspension from practice for up to five years, or disbarment.

some things a complainant should not expect

You should not expect the Bar Association to provide you with legal advice or services. The Bar Association can only act to enforce the Code of Professional Responsibility and cannot represent you in civil or criminal matters.

You should not expect that your complaint will be decided solely on the basis of your statement of the facts, just as the attorney cannot expect that the matter will be decided solely on the basis of his or her version. The decision will be based on all the relevant evidence.

You should not expect, as a result of your complaint, that you will receive any money or reimbursement for loss.

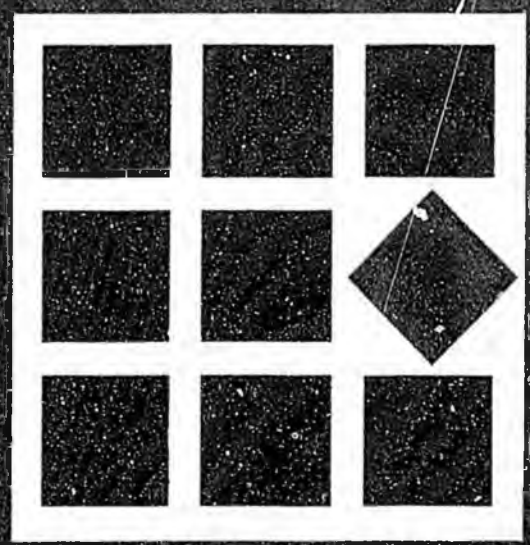
what a complainant can expect

You can expect that every attempt will be made to review your grievance in a manner which is timely and fair both to you and to the attorney.

You can expect to receive written notice of the final decision concerning your grievance, and the reasons for that decision.

Direct inquiries to:
Discipline Counsel
Alaska Bar Association
P.O. Box 100279
Anchorage, AK 99510
907-272-7469

ethical grievances against attorneys



supervision of attorney conduct

All attorneys are governed by rules of ethics known as the Code of Professional Responsibility. An attorney who violates the Code of Professional Responsibility is subject to discipline. The Alaska Supreme Court exercises final authority over attorney conduct in Alaska.

The Disciplinary Board of the Alaska Bar Association has been given the responsibility by the Alaska Supreme Court and the legislature to process ethical grievances against attorneys and to recommend discipline when appropriate. The Disciplinary Board employs Discipline Counsel and staff to investigate and prosecute ethical grievances.

examples of misconduct

The Code of Professional Responsibility covers a wide range of attorney conduct. Examples of misconduct are:

- conduct involving dishonesty, fraud, deceit, or misrepresentation
- revealing client confidences or secrets except under special circumstances
- charging a clearly excessive fee (generally a fee dispute is referred to the Attorney Fee Review Committee)
- withdrawing money from his/her office trust account for personal use unless it is undisputed that the attorney has earned the funds

If you have questions about an attorney's conduct you may call the Alaska Bar Association. The Code of Professional Responsibility is available at any court law library in the State of Alaska.

filing a complaint

Grievances must be written, signed statements, containing a clear explanation of the details of each act of alleged misconduct, including the approximate time and place of each. Copies of letters or other documents relating to the grievance should be included. A grievance must be sent to the Alaska Bar Association, where Discipline Counsel will review it and determine whether it contains sufficient factual allegations which, if true, would constitute ethical misconduct. Attorney Grievance forms, which may be used in filing a grievance, are available from the Alaska Bar Association.

investigation

If review of a grievance indicates that ethical misconduct may have occurred, a copy of the grievance will be sent to the attorney for a response. If the response raises additional questions, the complainant may be asked to submit further comments.

The investigation of a complaint is confidential. All persons involved in the investigation of a complaint, including the complainant, must maintain confidentiality, but they may consult with an attorney. It is contempt of court to violate this confidentiality.

After investigation, Discipline Counsel will make one of the following decisions:

- dismiss the grievance if the evidence does not show unethical conduct
- issue a written private admonition to the attorney
- file a petition for formal hearing

ATTORNEY DISCIPLINE NATIONAL SURVEY AND REPORT

By HALT

1988

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Introduction

More than 70,000 complaints were filed with state attorney discipline agencies in 1986. Less than 2 percent resulted in public discipline.[1] Despite these alarming statistics, officials claim that attorney discipline agencies are effective and that lawyers guilty of violating the states' code of professional responsibility are appropriately disciplined. HALT contends that because the legal profession is self-policing, it is more concerned with protecting the image and economic status of lawyers than with protecting consumers from incompetent or unethical practitioners.

This conclusion is based on data HALT gathered in a state-by-state survey of disciplinary agencies completed by 34 agencies (see Appendix I) and data gathered by others, including the American Bar Association's (ABA) Center for Professional Responsibility.

This report on the status of attorney discipline identifies several national problems consumers encounter with discipline procedures. It is the first report on attorney discipline prepared by an organization of legal consumer advocates.[2] We hope it will answer many questions consumers have about lawyer discipline and be useful to consumer advocates, bar regulators, legislators and state courts as they consider reform of lawyer-discipline systems.

Summary of Findings

HALT found the state of attorney discipline across the country inexcusably irresponsible toward consumers. State agencies serve neither consumers nor the legal profession because of:

Invisibility — Disciplinary agencies do almost nothing to publicize consumers' right to file a complaint about a lawyer. The most common form of such publicity is reactive, an informational brochure sent to those who call the agency and request it.

Secrecy — Every state except Oregon and Washington conducts investigations, dismisses complaints and imposes private reprimands behind closed doors. In all but eight states, disciplinary hearings on complaints are closed to the public.

Leniency — Less than 2 percent of all complaints filed result in any form of public discipline. In some states, sanctions are decreased for lawyers who have stolen client money or been convicted of a felony, using such justifications as financial hardship, personal and emotional problems, inexperience or remorse.

Delay — Seventeen agencies (50 percent of 34 agencies responding) have no deadlines for processing complaints.[3] Some states report delays of eight to ten years in processing complaints.

Unfair and Unresponsive Process — Clients often don't complain about misconduct because they are discouraged by agency brochures' praise of lawyers and because the process is controlled by lawyers, takes place in secret, limits the client's right to present their own case or to appeal decisions, and does not provide compensation for injury.

Lack of Public Participation — The governing boards of agencies are dominated by lawyers usually chosen by or in consultation with state bar officials. Seventeen agencies (45 percent of 38 agencies responding) reported they have no requirement that hearing panel members include nonlawyers. Nonlawyers that do serve on panels are typically recruited through the "grapevine" of lawyers who work with the agency.

I. How the Process Works

Although each state's grievance system operates independently, almost all follow the model described below, with but slight variations. (See Appendix II for details on specific state procedures.)

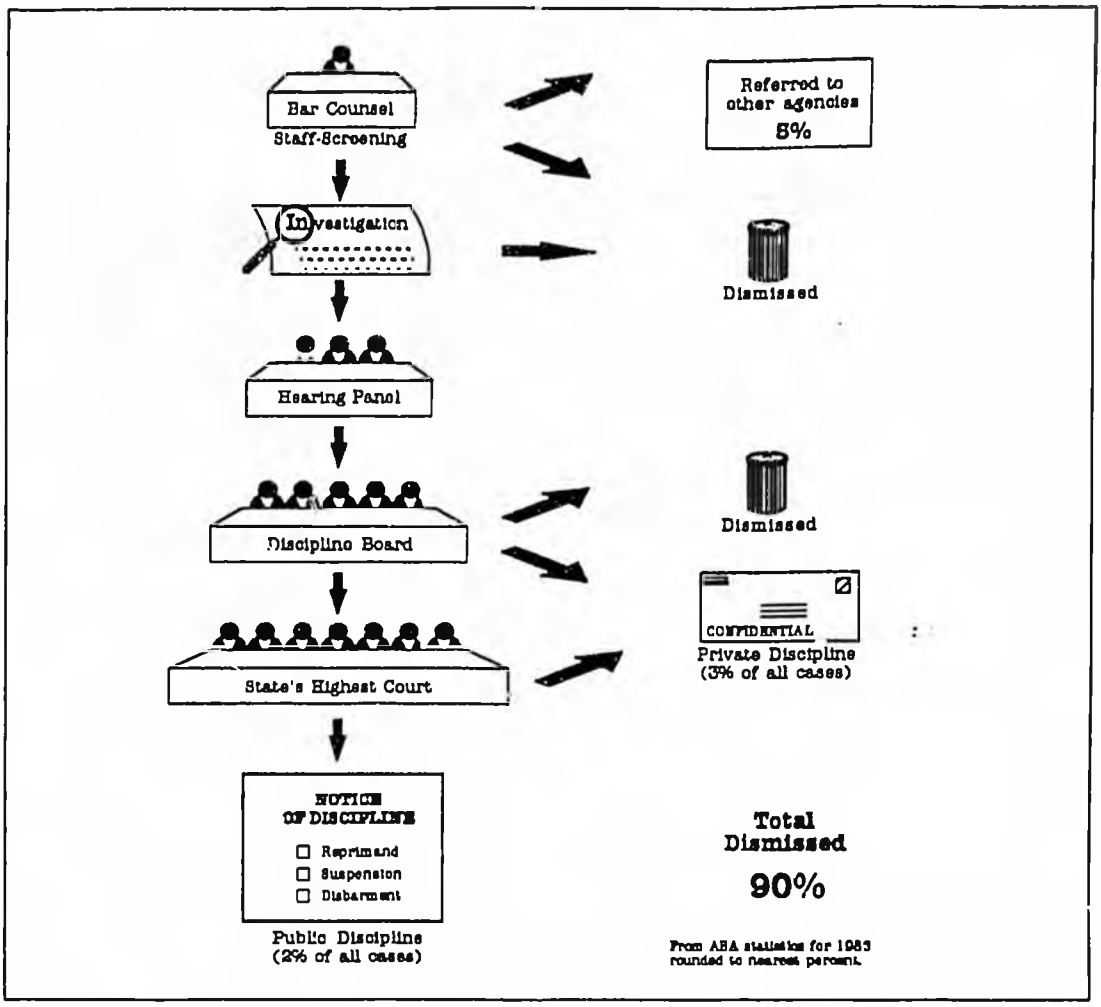
In almost every state, the highest court has oversight of attorney discipline. Actual court control, however, is nominal in most states and usually involves little more than rubber-stamping agency decisions.[4]

The ABA reports that in 33 states the agencies are run by state bar associations.[5] The bar also acts as a trade association charged with protecting the status and economic interests of the legal profession. In the remaining states, although the disciplinary agency is technically independent of the state bar, the state bar has considerable influence over who sits on the disciplinary governing board, who is hired as bar counsel (the agency director, traditionally a lawyer), how complaints are processed and what is considered unethical conduct under the state's code of professional responsibility.[6]

The discipline process begins when someone files a complaint with the bar counsel. Complaints can be initiated by clients, judges, other lawyers or the discipline agency itself. Lawyers and judges are required by their codes of ethics to report unethical or incompetent conduct by lawyers. Nevertheless, almost all complaints are filed by clients.[7]

Complaints are screened by lawyers or the bar counsel's staff to determine whether they allege misconduct under the state's code. Many complaints do not survive this initial screening, but information about dismissals at the screening stage is scant because only Oregon and Washington make such records public.

After a Complaint is Filed



Only complaints that survive initial screening are investigated. The investigation always includes asking the lawyer named in the complaint to respond to the client's claims. Investigations can — but often do not — include gathering documents and conducting interviews. If the bar counsel determines it is more likely than not that the lawyer has violated the ethical code (finds "probable cause"), a panel is appointed to hear the complaint. Only about one of every 10 complaints reach this stage.[8]

The hearing panel usually has three members, most often three lawyers or two lawyers and one nonlawyer. Rules of procedure are applied loosely during hearings,

which are informal, although the lawyer is given many of the due process rights of a criminal defendant. In order for discipline to be imposed, misconduct must be proven, in most states, by evidence that meets the tough "clear and convincing" standard. The lawyer is under no obligation to defend questionable conduct. After the hearing, the panel reports its findings and recommendation to the agency's governing board.

The disciplinary board reviews the recommendation and decides whether to uphold it. The board can dismiss the complaint, issue a private reprimand or recommend public discipline to the court. If a formal charge recommending public discipline is filed with the court, the court appoints a referee to review the recommendation. In some states, the referee holds a hearing during which the bar counsel presents evidence supporting the agency's recommendation and the lawyer has an opportunity to present a defense.

Based on the referee's findings, the court can dismiss the complaint or impose discipline. The typical options for discipline include a public reprimand, a suspension of the lawyer's license to practice for a specified period of time or disbarment, in which case the lawyer loses their license to practice law, although after five years they may usually reapply for their license. In most states the lawyer has the right to appeal the court's decision, in some states the agency may appeal, and in some states the client may appeal.

II. Invisibility

In 1970, the Clark Commission reported that "[m]ost disciplinary agencies deliberately discourage any publication of information concerning their activities, believing that the public image of the profession is damaged by a disclosure that attorney misconduct exists."[9] Little evidence exists to suggest that this attitude has changed.

HALT's survey reveals that the most common way of "informing" the public about the right to file a complaint against a lawyer is through a brochure sent out to people who call or write the agency requesting information. This is done by 25 agencies (65 percent of 38 agencies responding). Agencies also publish notices of public discipline in their state bar's magazine or newspaper, the readership of which is almost exclusively lawyers. Only two agencies (5 percent of 38 agencies responding) list the agency in the Yellow Pages of a telephone directory.

Four states (California, Maryland, Mississippi and West Virginia) have toll-free consumer information numbers.[10] However, Robert Fellmeth, who was appointed to the legislatively-mandated position to watchdog California's discipline system, reported in 1987 that the California number was not published in any of 16 major California telephone directories and the California Bar had made "no proactive effort . . . to inform consumers of the availability of the toll-free number or indeed of any mechanism for redress against dishonest or incompetent attorneys."[11] Worse yet, the persistent few who discovered the toll-free number could expect the line to be busy two-thirds of the time.[12]

Although HALT and others might assert that agencies need to take more initiative to uncover attorney misconduct, all can agree that from a practical standpoint the agencies must rely heavily on clients, who as victims of misconduct, file almost all

complaints.[13] If clients do not know that the disciplinary agencies exist, they cannot complain. As a result:

- ✓ Many consumers, in effect, have no opportunity to complain.
- ✓ Misconduct goes undetected and therefore repeat misconduct is encouraged.
- ✓ The public is misled about the incidence of lawyer misconduct.

Recommendations

Options available for advertising the system are numerous. At a minimum, every agency should be listed in the Yellow Pages as well as in the white pages of local telephone directories. In addition, HALT recommends that agencies:

✓ Regularly send all state and local consumer protection offices as well as public libraries brochures that explain the complaint process.

✓ Regularly report disciplinary actions taken to all state and local consumer protection offices.

✓ Encourage government and private consumer advocacy organizations to refer consumers to the disciplinary agencies.

✓ Advertise regularly in newspapers of major circulation and in consumer publications.

✓ Publish a list of disciplined attorneys in local newspapers and advertise the availability of a comprehensive list of attorneys disciplined in recent years.

✓ Publish and distribute an annual report.

✓ Maintain an active speakers' bureau that includes consumers who have gone through the process, to encourage people to report misconduct and allay fear or confusion about the complaint process. Speakers could address community, student, religious, social and professional groups.

✓ Require lawyers to distribute a brochure on discipline to each client when the attorney is hired.

III. Secrecy

In most states, agencies dispose of complaints in secret. Thirty-five agencies (80 percent of the 44 agencies responding) release no information about a complaint unless public discipline is ordered or a formal charge recommending public discipline is filed with the court. Because less than 4 percent of all complaints in 1986 resulted in filing a formal charge with the court, those 35 agencies made no information public about 96 percent of all the complaints they handled that year.[14]

Regardless how many times a lawyer has been investigated or received a private reprimand, no information about that lawyer's disciplinary record is made public. Agency hearings on complaints are closed to the public in all but five states. Twelve agencies (38 percent of 31 agencies responding) can even exclude complainants from attending parts of the hearing on their complaints.[15]

Every agency except Oregon's and Washington's keeps secret their records of the number and grounds for complaints filed and the findings of any subsequent investigations. In all but those two states, no one is given the right to know how many complaints have been filed against a lawyer, whether a lawyer has ever been privately reprimanded, whether a lawyer is being investigated for misconduct or why the agency has dismissed complaints against a lawyer. In fact, although every agency sends out notices to complainants when their complaints are dismissed, even the complainants themselves are often not informed of the evidence used to support the dismissals and sometimes are not informed that the lawyer was privately reprimanded.

Agencies reason that this secrecy is necessary to protect lawyers from "publicity predicated upon unfounded accusations."[16] HALT finds such reasoning unpersuasive. Concern for falsely accused lawyers does not justify keeping the public in the dark about

complaints, investigations (sometimes lasting years) or the agency's reasons for deciding to dismiss complaints or recommend discipline.[17]

Moreover, this secrecy is not consistent with procedures of other consumer protection agencies, which routinely disclose complaint records. As allegations of misconduct, complaints can provide a barometer of customer satisfaction and forewarn consumers about possible misconduct. However, even if complaints are kept secret because they might include "unfounded accusations," this does not justify keeping private reprimands confidential as well. These cases do not involve "unfounded accusations" because by definition they are cases in which the agency has found misconduct.

Finally, secrecy shields the agency's work from public scrutiny and accountability. Secret lawyer-grievance proceedings are particularly troublesome because lawyers are self-disciplining. As the American Civil Liberties Union of the National Capital Area commented on proposed changes in the District of Columbia's disciplinary rules, "Criminal trials and police trials are open to the public, not simply for the protection of the accused, but, just as essentially, because history teaches that operations that function secretly do not function well."[18]

At bottom, secrecy is anti-consumer. Under secrecy rules, when consumers cannot find out about complaint records, private reprimands or ongoing investigations, they:

✓ Don't have information necessary to make informed hiring decisions.

✓ Don't have information with which to protect themselves from repeat misconduct.

In addition, secrecy:

✓ Eliminates any public relations incentive for lawyers to guard against problems with their "customers."

✓ Shields the agency's process and decisions from public scrutiny and accountability.

Recommendations

HALT recommends that disciplinary agencies:

✓ Disciose the number of complaints filed against a lawyer, the number of complaints still pending, the basis of complaints (theft, neglect, etc.), the investigative findings and the resolution of closed complaints.

✓ Open disciplinary hearings and governing board meetings to the public.

Discipline for Misappropriation or Felony Conviction

Misappropriation

Misappropriation of client funds 1974-1984. Figures are in percent.

Disbarment:

California	60
Florida	70
Illinois	50
New York	60
Texas	100

Indefinite suspension, or suspension for more than 3 years:

California	0
Florida	0
Illinois	0
New York	10.0
Texas	0

Suspension of 6 months to 3 years:

California	21.4
Florida	20.0
Illinois	50.0
New York	20.0
Texas	0

Suspension of less than 6 months:

California	7.1
Florida	0
Illinois	0
New York	0
Texas	0

Reprimand:

California	7.1
Florida	10.0
Illinois	0
New York	10.0
Texas	0

Probation:

California	14.3
Florida	0
Illinois	0
New York	0
Texas	0

Convictions

Disposition of lawyers convicted of felonies, 1974-1984 cases.

Disbarment:

California	61.8
Florida	40.0
Illinois	100.0
New York	84.4
Texas	31.6

Indefinite suspension, or suspension for more than 3 years:

California	16.4
Florida	20.0
Illinois	0
New York	6.6
Texas	52.7

Suspension of 6 months to 3 years:

California	6.4
Florida	20.0
Illinois	.0
New York	4.4
Texas	15.8

Suspension for less than 6 months:

California	1.8
Florida	0
Illinois	0
New York	0
Texas	0

Reprimand:

California	0
Florida	10.0
Illinois	0
New York	4.4
Texas	0

Probation:

California	14.5
Florida	10.0
Illinois	0
New York	0
Texas	0

Source: American Bar Association statistics published by San Francisco Examiner, March 26, 1987.

IV. Leniency

Only 2 percent (about 1,400) of all complaints filed with disciplinary agencies resulted in public discipline in 1986.[19] Another 3 percent (2,100) resulted in private (secret) reprimands. Ninety percent, more than 63,000 complaints, were dismissed without disciplinary action. (Five percent were referred to other agencies.) Moreover, these numbers do not even include inquiries dismissed by the agencies before an official complaint was filed.[20]

The typical justification officials give for these embarrassing numbers is that few lawyers deserve discipline and that when discipline is meted out, it is appropriately severe.[21] Because agencies process complaints in secret and do not issue reports of their findings or decisions, this claim is hard to challenge. However, even the little information that agencies make available does not support their claim. Instead, it suggests that lawyers are judged with extreme leniency.

Lawyers who are publicly disciplined are usually thieves, felons or guilty of repeated misconduct.[22] In fact, even thieves or felons may receive only a public reprimand or temporary suspension as the tables on pages 12 and 14 show. These lawyers are free to continue to take cases.

Almost every disbarred lawyer in the nation may reapply to practice law after a few years. (The ABA recommends five years.)[23] In 1970, the Clark Commission reported that some agencies readmitted lawyers "as a matter of course,"[24] and even today only five agencies (12 percent of 39 agencies reporting) have the option of permanent disbarment. Only six agencies (18 percent of 32 agencies reporting) have any way of checking whether a lawyer continues to practice law in defiance of disbarment.

Public or private reprimands are most agencies' discipline of choice for lawyers found guilty of a history of misconduct that involves several clients or several acts of misconduct.[25] Yet, neither form of reprimand is meaningful to consumers. Neither affects the attorney's right to practice, and in the case of private discipline, (the most common), no one has the right to know about the misconduct or sanction, including prospective clients.

The agency's expectation that a lawyer will reform because of the disgrace of a private or public "shame on you" is contradicted by the number of lawyers found guilty of repeat misconduct. Moreover, regardless whether a lawyer chooses to reform or not, the public has a right to be notified of past misconduct. Shielding the lawyer instead of informing the public clearly favors the interests of lawyers over consumers.

Partial List of Sanctions Imposed for Specific Offenses During 1985

(percentages reflect frequency of offenses for the sanction imposed)

	SUSPENSION	PUBLIC REPRIMAND
General Neglect	*15%*	*24%*
General Misrepresentation to Client	*6%*	*4%*
Commingling	*4%*	*2%*
Conversion	*2%*	*0%* *
Felonies	*5%*	*0%* *
Misappropriation	*2%*	*0%* *

Based on Statistical Report, June, 1985
American Bar Association
Center for Professional Responsibility

* *Percentages so small not representative of whole number.*

In the past five years, concerted media attention on lawyer discipline has exposed dozens of "horror stories" in which egregious lawyer misconduct was followed by dismissal, reprimand or brief suspension.[26] Although such media accounts don't provide careful analysis of an agency's handling of cases across a period of time, the sheer number of such lenient sanctions makes a convincing case.

Complaints result in lenient discipline or no discipline at all for four reasons: valid complaints are dismissed, discipline is reduced because of factors the agency considers to "mitigate" the lawyer's misconduct, lawyers resign while still under disciplinary investigation and complaints are rejected because they fail to allege misconduct under the narrow scope of the professional conduct rules.

Dismissals of Valid Complaints

The Clark Commission reported in 1970 that disciplinary personnel "had a tendency" to dismiss complaints based on "self-serving," "unilateral" statements from the accused lawyer. In 1976, Steele and Nimmer found all but a small fraction of complaints were dismissed after "summary screening" and reported "there is often an underlying perception that the lawyer is 'one of us' and the complainant 'one of them,' an outsider who inevitably must meet a higher burden of proof and credibility."[27]

Based on close scrutiny of hundreds of California files, Bar Monitor Fellmeth noted that "the detection and initial acceptance of [a] case for discipline depends on an aggressive and articulate complaining witness."[28] Worse yet, Fellmeth reported that upon receiving a complaint, the bar sends a letter warning that it will be six months before it can begin working on the case. Some 12 to 18 months later, the bar sends another letter — requesting additional information. If it receives no answer, the case is closed and the investigator notes that the complaining witness lacked sufficient interest to pursue the matter.[29]

ABA statistics show that in 1986, agencies found probable cause in fewer than 10 percent of the cases.[30] This finding is a prerequisite to holding a hearing on the complaint.

HALT believes that valid complaints are often dismissed because of unmanageable backlogs and because screeners adhere to a basic belief that lawyers are rarely incompetent or dishonest and that many complaining clients are "cranks" or "sore losers."[31] It is of little consolation to consumers that the screening personnel who are responsible for such dismissals are often well-intentioned.

Mitigating Factors

Besides dismissing valid complaints, agencies often reduce discipline because of what are called "mitigating factors." The ABA's 1986 "Standards for Imposing Lawyer Sanctions" recommends the following (among others) as justifying a reduction in the severity of discipline:

- ✓ Personal and emotional problems.
- ✓ Full and free disclosure to the disciplinary board.
- ✓ Inexperience in the practice of law.
- ✓ Past good character or reputation.
- ✓ Delay in disciplinary proceedings.
- ✓ Remorse.[32]

From the client's perspective, reducing discipline based on these mitigating factors is baffling.[33] Lawyers who steal from clients, ignore cases or are too inexperienced to handle a case pose an obvious risk to other clients. It would seem to be the agencies' job to make sure this risk is eliminated or minimized, not excused. This kind of leniency is not accorded elsewhere — one can hardly imagine a bank forgiving a teller's theft of thousands of dollars and keeping them on the job based on excuses such as alcoholism, mental disability or willingness to pay it back.[34]

Resignation

A number of lawyers escape investigation and/or public exposure of their misconduct by resigning.

For example, the *Courier-Tribune* of Louisville, Kentucky, reported that 14 of the 16 lawyers who lost their licenses in 1986 were allowed to resign from the bar to keep their misconduct secret from the public.[35] Although some states preserve evidence of misconduct or require the lawyer to admit misconduct before resigning, every state allows lawyers to resign while under investigation and some states allow them to resign even after the agency has decided to seek disbarment. The ABA reported that in 1985, 33 percent of the lawyers who resigned had been charged with theft (called either "commingling" or "misappropriation").[36] Lawyers who resign may reapply at any time for a license to practice law.

Narrow Scope of Rules

Officials explain that part of the reason so many complaints are dismissed is that they do not allege misconduct under the state's ethical rules. This is because ethical rules are so narrowly drawn or interpreted that misconduct which may be grounds for malpractice may well not violate the ethical code.

According to apologists for the legal profession, these rules are and should be narrow because they are intended to maintain "minimum" licensing standards.[37] Disciplinary rules and procedures, they argue, are not designed to punish wrongdoing, to resolve disputes, to warn consumers of an attorney's past misconduct or to compensate consumers when misconduct is uncovered. They are also not intended, in most cases, to address misconduct that involves fees, malpractice or neglect, except when the conduct oversteps the licensing standards.

Authorities justify this limited authority by pointing out that consumers with problems can also turn to fee arbitration, client security trust funds and malpractice suits. Therefore, they contend, the jurisdiction of discipline agencies does not need to be expanded. In fact, each of these alternative forums has serious limitations.[38]

Despite the limitations of these alternatives, however, the legal profession consistently resists establishing new consumer protection forums precisely on the grounds that such forums will duplicate or conflict with the existing discipline mechanisms.[39] In essence, the legal profession argues both that disciplinary agencies should only be required to uphold "minimum" standards and that this gives consumers enough protection.

Conclusion

For consumers the data speaks for itself: one has at best a one in 10 chance at a hearing on a complaint and a less than one in 50 chance that public discipline will be given out. If public discipline is given, it is most likely to be nothing more severe than a reprimand. Further, an attorney who is disbarred may be reinstated within a few years or move to another state to take up practice.

Inappropriate dismissals and lenient sanctions contribute more to making the discipline systems ineffective than any other shortcoming. Specifically, lenient sanctions:

- ✓ Discourage people from complaining.
- ✓ Encourage repeat misconduct.
- ✓ Mislead consumers about a lawyer's record.
- ✓ Mislead consumers about the incidence of lawyer misconduct.

Recommendations

HALT suggests that a coalition of consumer, community and professional responsibility experts assume responsibility for drafting model ethical rules and model rules for agency procedure and a model code of ethics to help eliminate leniency. In the meantime, HALT recommends the following:

Process

Discipline agencies should:

✓ Keep records on standard intake forms of all consumer "inquiries" telephoned in or sent to the agency, even where they do not appear to warrant an investigation. This could be critical to demonstrating a pattern of misconduct. Such records will also provide insight into consumers' needs both from the discipline agency and from the profession.

✓ Provide in-person and over-the-telephone help to clients in framing their allegations of misconduct and advise them throughout the disciplinary process. Such help is essential if those other than the "articulate and aggressive" are to help the agency detect misconduct. This help should be provided by someone other than the complaint investigator, as the functions could conflict.

✓ Implement plain-language standards that state what constitutes grounds for dismissing a complaint, for a finding of probable cause and for imposing discipline. Although HALT does not support some of the rules in the ABA's "Standards for Imposing Lawyer Discipline," we strongly support establishing and publicizing uniform public standards both to minimize subjective bias and to help consumers frame allegations. Minimum standards of competence should be included.

✓ Never dismiss complaints based solely on the responding attorney's answer. The complaining client should be given an opportunity to reply and to dispute the answer. Should the two sides disagree about the facts, the agency should investigate further.

✓ Set up public review systems for complaints the agency plans to dismiss.

✓ Draft brief written decisions in plain language explaining all agency actions, including dismissals, and send copies to both the complainant and the attorney; the decision should also be available to the public.

Sanctions

Disciplinary agencies should:

✓ Eliminate private reprimands as a form of discipline.

✓ Consider instituting fines. Fines are more likely to deter misconduct.

✓ Impose permanent disbarments and rename what is now called disbarment "indefinite suspension" to make it clear that the lawyer has a right to reapply for admission.

✓ Permanently disbar any lawyer found guilty of intentional theft, regardless whether it is called "commingling," "misappropriation," or "conversion" and regardless of "mitigating factors."

✓ Disbar lawyers found guilty of a pattern of neglect and suspend or fine lawyers guilty of "simple" neglect. Disciplinary agencies consistently underrate the seriousness of neglect and thereby the importance of client control over their legal affairs.

✓ Automatically disbar attorneys convicted of a felony or those disbarred in another state.

✓ Limit factors considered to mitigate possible discipline to unintentional misconduct and absence of a prior disciplinary or complaint record.

✓ Adopt rules that allow the agency to order restitution to complainants in cases involving stolen money, unearned fees or incompetent work.

V. Delay

Sixteen agencies (46 percent of 35 agencies responding) reported that they have no deadlines for processing complaints, either formal or informal. And 12 agencies (55 percent of 22 agencies responding) reported backlogs of six to 12 months. In fact, these numbers seem generous in light of what has been documented elsewhere.

✓ In 1987, the District of Columbia reported taking as long as three to eight years to complete the disciplinary process.[40]

✓ The year before, Fellmeth reported some California complaints sat around in the Los Angeles "'TNT' room (getting so full it may blow up)" so long that they were not settled a decade after the events occurred.[41]

✓ A *Houston Post* reporter found that, despite major improvements since the 1981 ABA audit of the Texas process, "the bar still takes more than two years to investigate some complaints and then as much as five more years before getting some accused lawyers disbarred . . .or cleared. . . "[42]

✓ In 1985, Michigan reported a backlog increase of 66 percent since the previous year.[43]

✓ In 1982, an ABA team sent to evaluate the New Jersey discipline system found "two serious and related problems: delay and backlog."[44]

✓ The ABA team sent to New Mexico in 1981 "was impressed dramatically with the unanimity of expression by every [disciplinary staff] interviewed that the greatest and most profound fault of the system in New Mexico is delay."[45]

In human terms, the effect of delay is illustrated by the following case. A complaint filed in 1981 alleged that California attorney Eugene Bambic had stolen more than $60,000 from a client. In the two years after the complaint was filed and before he was suspended, Bambric stole $300,000 from more than a dozen other clients.[46]

Because processing complaints takes place in secret in most states, the effects of delay are heightened further. Combined with secrecy, delays:

- ✓ Shield attorneys who are guilty of misconduct, sometimes for years.
- ✓ Expose the public to unethical or incompetent lawyers.
- ✓ Discourage clients from pursuing their complaints.
- ✓ Encourage attorney contempt for the discipline system.

Recommendations

HALT recommends that agencies:

- ✓ Adopt and adhere to deadlines for all stages of complaint resolution.
- ✓ Institute fines to apply to lawyers who do not cooperate with investigations within designated deadlines.
- ✓ Make public monthly case management reports to show that deadlines for processing complaints are being met.

VI. Unfair and Unresponsive Process

Consumers are discouraged from filing complaints against lawyers when the only agency that receives such complaints is created and controlled by lawyers.[47] Instead of trying to overcome such resistance, agency procedures for accepting and processing complaints seem designed to further discourage clients from reporting misconduct.

The agencies' most common way of letting clients know they have a right to file a complaint, the informational brochure, usually warns consumers that what may appear to be misconduct is often merely a misunderstanding because "few" lawyers engage in misconduct.[48] Most state agencies have such a brochure and they vary; but they do have a discouraging note in common. Many take care to explain that clients should not complain about disagreements, mistakes, failures of communication or "simple" neglect because these do not usually constitute unethical conduct.[49] Others remind consumers to take filing seriously because it could "drastically affect the lawyer's ability to earn a living as well as his personal standing in the community."[50]

If a consumer does file a complaint, most agencies warn that all information about the complaint must be kept confidential on threat of being found in contempt of court.[51] The Mississippi "gag rule" is printed directly on the complaint form:

> Everything about this complaint, including the fact that a complaint has been made, is confidential. This means everything should be kept secret. A violation of that law is punishable by a fine of not more than $500.00 or by imprisonment in the county jail for not more than thirty (30) days, or both.[52]

The discouraging effect of this type of warning may be compounded by the threat of a lawsuit from the accused lawyer. Fifteen agencies (45 percent of 33 agencies responding) do not provide complainants with immunity from being sued for libel or slander based on the information they provide the discipline agency.[53] In those states,

complainants may be intimidated into dropping their complaint or never filing it to avoid the possible cost of defending a suit brought by the lawyer.

After a complaint is filed, the agency gives the complainant little reason to pursue it vigorously. The investigative and hearing process minimizes the participation of the complainant, who is considered merely a "witness." Thus, the complainant has no right to know the lawyer's response to the complaint or to know about information uncovered during the investigation. And, if the complaint is dismissed before a hearing, (approximately 90 percent of all cases),[54] the complainant may never learn what evidence the agency used to justify the dismissal.

When hearings are held, complainants find their role severely limited. In fact, in most states complainants do not even have the same procedural rights given the lawyer:

✓ Nineteen agencies (61 percent of 31 agencies responding) report that the client has no right to hear the lawyer's testimony, yet every agency reported that the lawyer has the right to hear the complainant's testimony.

✓ Thirty-two agencies (94 percent of 34 agencies responding) do not allow the client to cross-examine the lawyer, but every agency grants the lawyer the right to cross-examine the client.

✓ Twenty-two agencies (68 percent of 32 agencies responding) do not allow the client to appeal a disciplinary decision, but 33 agencies (91 percent of 36 agencies responding) do allow the lawyer to appeal.[55]

The effects of such an unfair and unresponsive process include:

✓ Sending a message to consumers that agencies are more concerned about protecting lawyers than uncovering misconduct or helping the complainants.

✓ A "chilling effect" on the number of complaints filed or pursued by clients.

✓ Failure to uncover misconduct and therefore encouraging repeat misconduct.

Recommendations

To assure that the discipline process encourages reports of misconduct and is fair, HALT recommends that:

✓ Agencies revise the content and tone of their brochures about the complaint process so clients are encouraged to report misconduct as a service to future clients and the community. The brochures should give examples of common misconduct and define what constitutes misconduct. As mentioned before, agencies should help clients frame and pursue their complaints.

✓ Rules grant clients and witnesses immunity from civil liability for any information given to the agency during a disciplinary investigation.

✓ "Gag rules" be eliminated so clients can get others to help support their complaint.

✓ The investigative and hearing process be redesigned to include the complaining clients as full participants. Clients must be allowed to review investigative files, to be present during the entire hearing, to cross-examine the lawyer and to appeal adverse decisions.

VII. Lack of Public Participation

Since 1970, a number of states have begun to allow nonlawyer members on disciplinary hearing panels.[56] Currently, 21 agencies (55 percent of 38 agencies responding) report requiring one nonlawyer among the three members on hearing panels, although another 17 agencies (45 percent of 38 agencies responding) still have no such requirement. However, this is the only attempt agencies have made to respond to the concern that the public is excluded from participating in the process and not every agency has even made this step.

Agency governing boards also are dominated by lawyers, many of whom work for or are closely affiliated with state bar associations. These boards decide whether a hearing panel's recommendation of public discipline should be forwarded to the state's high court, dismissed or reduced to a private reprimand. Recently public members have been included on these boards, but in every state lawyers still control a majority (if not all) of governing board seats.

In addition, processes by which the states adopt their code of professional responsibility has been dominated by the ABA and state bar influence. Every state has adopted some version of either the 1983 or 1969 ABA Model Codes.[57] Both ABA codes were developed by lawyers, mostly those active in the ABA or their state bar associations. Traditionally, almost no nonlawyers participate in the process of developing the model code or adopting the state version.

A bar counsel runs the day-to-day operations of the discipline agency. In every state's agency this position is held by a lawyer. In addition, 34 agencies, (97 percent of 35 agencies responding) reported using only lawyers to screen and investigate complaints. According to the ABA, 90 percent of all complaints are dismissed by these lawyers after screening or investigation and do not make it to the hearing stage.[58]

Although state high courts are charged with overseeing the attorney-discipline systems, they do little more than rubber-stamp agency recommendations for public discipline. Because agency governing boards file few such recommendations, this means little work for the court. Although the courts are also involved with rule changes, even in this they are more likely to follow the lead of their state bar association.

Few nonlawyers participate in processing client complaints, and the value of the little nonlawyer participation is minimized because few agencies permit them to participate at the stages where the bulk of complaints are dismissed. The value of public participation is further limited because nonlawyer work is always subject to review by the bar counsel (a lawyer) or a governing board that includes a majority of lawyer members.

More serious than the control individual lawyers have in the discipline process is the influence wielded by state bar associations. As the profession's trade association, state bar associations advance the profession's public relations and economic interests. These interests conflict with uncovering attorney misconduct.[59]

The debate over whether or not to integrate public members within the disciplinary system revolves around the issue of whether nonlawyers should be allowed to assess lawyer performance.[60] At the heart of this question is ultimate control over the discipline process itself: if nonlawyers are as competent or better at evaluating lawyers' conduct, then lawyers lose their justification for retaining control over policing the profession.

Bar officials argue that an understanding of "lawyers' judgment" is essential in assessing the merits of complaints.[61] Lawyers, they argue, are experts in law and practice and can therefore best determine whether another lawyer has made appropriate judgment calls. Nonlawyers, who lack the expertise and experience necessary to make such assessments, are not considered necessary or even desirable in processing complaints.

HALT does not find this argument persuasive, for these reasons:

✓ Most complaints do not involve sophisticated allegations or inappropriate judgments; rather, they involve allegations of theft, inordinate delay, substance abuse and the like.

✓ Juries in both civil and criminal trials include nonlawyers regardless of the complicated facts or laws they are asked to understand. Special masters and expert witnesses satisfy any need for an expert advice.

✓ Both nonlawyers and lawyers need training in disciplinary rules; no evidence suggests that lawyers are more likely than nonlawyers to grasp the information needed in judging complaints.

✓ "Lawyers' judgment" has little meaning outside of the knowledge and practice in a specific area of law. Yet, disciplinary agencies do not require that panelists be knowledgeable about the area of law each case involves. Thus, no evidence suggests that a lawyer panelist will be better able to assess a lawyer's legal judgment than a trained nonlawyer.[62]

HALT believes that the conflict of interest inherent in self-regulation is at the root of the other problems with attorney discipline. Because of lawyer control, discipline agencies are not accountable to the public. Such control, coupled with the total lack of public accountability, has led inexorably to a system characterized by invisibility, leniency, secrecy, delay and client intimidation.

Recommendations

The only way to assure that the public's concerns are perceived to be and actually are paramount to discipline agencies is to involve public members throughout the process and assign control of the entire system to a publicly accountable body. In particular, HALT supports measures that:

✓ Place control of discipline with an independent agency under executive or legislative oversight.

✓ Involve legislators, consumer advocates, concerned members of the public and others in rulemaking, overall governance, processing complaints and selecting agency personnel.

✓ Require nonlawyer majorities on disciplinary governing boards and rulemaking committees. Public members should draft the discipline rules, not merely comment on rules that are drafted by lawyers. Public involvement should not be limited to one or two token seats on governing boards.

✓ Require that nonlawyers control complaint processing. Qualified nonlawyers should screen complaints and hearing panels should have a majority of nonlawyers so that if a decision is split between lawyers and nonlawyers, nonlawyers will prevail.

✓ Institute immediate public audits of each state's system, including all relevant records and files of discipline agencies, disciplinary governing boards and courts. (See Appendix III for HALT's Model Discipline Monitoring Commission.)

Conclusion

The nation's attorney-discipline agencies and procedures are in critical need of change. As Richard Abel, a University of California at Los Angeles legal scholar, has reported, the state of discipline nationally is a "travesty" in which:

> Misconduct is rarely perceived. If perceived, it is not reported. If reported, it is not investigated. If investigated, violations are not found. If found, they are excused. If they are not excused, penalties are light. And if significant penalties are imposed, the lawyer soon returns to practice, in that state or another.[63]

HALT recommends a great variety of reforms. However, it is not enough to ask disciplinary officials that these reforms be instituted. Years of attempt by some state bar associations and disciplinary officials have failed to make significant improvement. (See Appendix IV, Chronology of California 'Reforms'.) This is because each reform attempt at best has cured symptoms of the problem, but none have addressed the fundamental conflict-of-interest inherent in self-regulation. To reform the system effectively, we must go beyond recommendations for reform of current procedures and identify what consumers need and legitimately expect and how such expectations can best be met.

Consumers must lead the effort to create new forums to ensure that they meet consumer needs. Although this report does not include a study of these needs, in HALT's experience clients expect the discipline system to:[64]

- ✓ Help resolve disputes.
- ✓ Get compensation for any injury.
- ✓ Punish wrongdoers.
- ✓ Deter misconduct.
- ✓ Warn consumers about potential misconduct.
- ✓ Remove serious incompetents and wrongdoers from practice.

Resistance to creating forums that meet these needs is unconscionable, but it is not inexplicable. As long as lawyers are charged with disciplining themselves, discipline agencies will not even meet their stated and limited goal of maintaining minimum licensing standards. As Stanford Law Professor Deborah Rhode testified about the failings of California's lawyer-discipline system: "No matter how well intentioned . . . no vocational group is well-situated to pass judgment on matters that directly implicate its economic interests, social status, and self-image."[65]

Unless and until the conflict in self-regulation is acknowledged and the entire system, from rulemaking to licensing and consumer protection, is taken out of the hands of lawyers and placed with a publicly accountable body, consumer interests will be second to the economic protectionism in the system. And as long as consumers' interests are secondary, discontent with lawyers and legal services will mount as will pressure for consumer reforms.

Footnotes

1 The total complaints filed was calculated using the ABA *Survey on Lawyer Discipline* (American Bar Association Standing Committee on Professional Discipline and Center for Professional Responsibility, *1986 Survey on Lawyer Discipline Systems*, ABA, 1987, p. 7 *[1986 ABA Discipline Survey]*) and telephone inquiries to agency officials who had not submitted data to the ABA. The total is, however, an approximation as HALT had to estimate figures for four jurisdictions (Idaho, Iowa, North Carolina and Puerto Rico) based on figures for states with comparable populations.

2 Since 1970, when the ABA Clark Commission found the state of attorney discipline "scandalous" (American Bar Association Special Committee on Evaluation of Disciplinary Enforcement, *Problems and Recommendations in Disciplinary Enforcement*, ABA, 1970, p. 1. [Clark Report]), the discipline system has been the subject of several law review articles. However, writers of these articles consistently presume that what is good for the legal profession (including its "image") is good for consumers. As a result, even severe critics of the discipline system do not question the basic premise of self-regulation or the overall goals of the discipline system.

3 HALT's survey data are reported throughout this report using this convention, as the number of agencies that responded to each question varied. (See also, Appendices I and II of this report.)

4 As one legal scholar explains, "Courts serve largely as passive sounding boards and official approvers or disapprovers of initiatives that are taken by lawyers operating through bar associations." Charles Wolfram, *Modern Legal Ethics*, West Publishing Co., 1986, p. 34.

5 American Bar Association Center for Professional Responsibility, *Memorandum on Discipline Enforcement System Responsibility from Lori Schaffel to Dori Weiner Monitz*, ABA, March 29, 1983, p. 1.

6 For further discussion of state bar influence, see Wolfram, p. 34.

7 American Bar Association Commission on Professionalism, *" . . . In The Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism*, ABA, 1986, p. 37 [Professionalism Report], *Report of Michael J. Hoover, Director of Lawyers' Professional Responsibility*, Minnesota, July 1, 1985, pp. 12-13 [Hoover Report], Clark Report, p. 167.

8 *1986 ABA Discipline Survey*, p. 7.

9 Clark Report, p. 143.

10 This information was gathered in a HALT telephone survey conducted with 35 agencies between January and March, 1988. Agencies in the following jurisdictions reported they did not have a statewide toll-free number: Alaska, Arkansas, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Jersey, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin and Wyoming.

11 Robert Fellmeth, *Initial Report to the Assembly and Senate Judiciary Committees and Chief Justice of the Supreme Court of California on the Performance of the Disciplinary System of the California State Bar*, June 1, 1987, p. 32 [Fellmeth Report].

12 Ibid., p. 60 of exhibits.

13 Professionalism Report, p. 37, Hoover Report, pp. 12-13, Clark Report, p. 167.

14 *1986 ABA Discipline Survey*, p. 7.

15 Lawyer-discipline procedures more closely resemble a criminal trial than a regulatory hearing, except for the secrecy. Thus, responding lawyers receive the due process rights accorded a criminal defendant with the added advantage of having the proceedings in secret.

16 Wolfram, p. 107. See also, National Organization of Bar Counsel, *Standards for Dissemination of Disciplinary Information*, ABA, 1980, p. 6.

17 The concern about frivolous complaints can be accommodated to a large extent by disclosing the attorneys' response to the complaint and attempts to resolve it. In fact, the Oregon and Washington attorney-discipline agencies do just this.

18 American Civil Liberties Union of the National Capitol Area, *Statement on Proposed Changes in Disciplinary Rules*, March 26, 1976, p. 7.

19 *1986 ABA Discipline Survey*, p. 7.

20 These percentages do not include consumer complaints dismissed before labeling and reporting. For example, the Tampa office of the Florida Disciplinary Committee which serves five Florida counties, reported receiving more than 100 complaints a day (Susan Snyder, "Lawyers Increasingly on Wrong Side of Law," *Clearwater [Fla.] Sun*, September 2, 1986, p. 1a), yet statistics reported to the ABA reflect only 24 complaints a day for the entire state *(1986 ABA Discipline Survey*, p. 2). Also, Fellmeth found that the California Bar's count of 8,674 complaints filed in 1986 did not include those dismissed as "inquiries" or those filed with local bar associations. He estimates actual complaints for 1986 were about triple those reported. Fellmeth Report, p. 50, n. 4.

21 Even if this claim were true, the number of dismissals suggests two things: that many clients are unhappy with their lawyers' conduct and that the disciplinary system does nothing to solve the problem. As one member of the public remarked about the California attorney-discipline system at HALT's Oct. 26, 1987, public hearing in San Diego, "The system is just there to allow people to vent and blow off steam, they never do anything about the complaints." *Lawyer Discipline Hearing Report*, HALT, 1987, p. 4.

22 Data from Steele and Nimmer's research showed that agency-initiated actions, including action based on criminal convictions, accounted for only 3.4 percent of the agency's caseload but led to 40 percent of all public sanctions imposed. Eric Steele and Raymond Nimmer, "Lawyers, Clients, and Professional Regulation," *American Bar Foundation Research Journal*, vol. 1976, p. 981. In 1985, ABA data show that of 12 possible offenses, felony convictions led to the second greatest number of lawyers disbarred. American Bar Association Center for Professional Responsibility, *Statistical Report re: Factual Information on Public Discipline Imposed Against Lawyers by State Jurisdictions During 1985*, ABA, 1986, p. 6 *[1985 ABA Sanctions Survey]*. See also, Wolfram, p. 90.

23 American Bar Association Center for Professional Responsibility, *Professional Discipline for Lawyers and Judges*, ABA, 1979, p. 103 *[ABA on Discipline for Lawyers and Judges]*.

24 Clark Report, p. 150.

[25] For example, the "Current Reports" section of the *ABA/BNA Lawyers' Manual on Professional Conduct* described the case of a Florida lawyer who received only a reprimand for billing a client more than $24,000 for representing her in a dispute over $3,000. *The Florida Bar v. Mirabole*, No. 67,693; Fla. Sup. Ct., 12/11/86. Another issue of the Current Reports described a case in which a Minnesota lawyer was given a reprimand and a 6-year suspension (which was stayed) after it was found that between 1980 and 1984 the lawyer failed to hold client funds in trust, misappropriated other funds, commingled client and other funds, failed to maintain proper books and records, falsely certified that they were maintained and failed to disburse settlement proceeds promptly. *In re Isaacs*, No. C6-84-2215; Minn. Sup. Ct., 6/5/87. In yet another case, a Louisiana lawyer who refused to return an $18,000 unearned fee was let off with a reprimand by the agency. *Louisiana State Bar Association v. Pugh*, No. 86-B-0950; La. Sup. Ct., 6/22/87.

Enforcement reports from states that publish them also reveal cases of egregious, repeated misconduct followed by minimal discipline. For example, in 1986 Michigan reported that an attorney who admitted failing to appear at a hearing, failing to notify a client that the case was dismissed due to lack of service of process, failing to notify the client of his change of address and a number of other counts of neglect was merely given a reprimand and, in another case, a lawyer was disbarred only after five clients complained about "aggravated neglect" and lying over a period of seven years. *Joint Annual Report for October, 1985 - December, 1986*, State of Michigan Discipline Board and State of Michigan Attorney Grievance Commission, undated, pp. 70, 33 [Michigan's 1985-86 Annual Report].

[26] Some of the more noteworthy investigative news series include:

Arnold Grahl and Todd Sloane, "Judging Our Lawyers," *Pioneer Press Newspapers*. This three-part series appeared in Illinois papers on Jan. 15, Jan. 22, and Jan. 29, 1987.

Brad Bumsted and Jeannine Guttman, "Beyond the Law," *A Gannett News Services Special Report*. Articles from this five-part report appeared in Gannett newspapers across the country during October and November, 1986. Gannett published the complete report in December, 1986.

James Finefrock and Connie Kang, "The Brotherhood, Justice for Lawyers," *The San Francisco Examiner*. This six-part series was published daily from March 25, 1985, to March 30, 1985.

Thomas French, "Discipline of Lawyers Is Shrouded in Secrecy," *The St. Petersburg [Fla.] Times*. This three-part series was published on July 8, July 9, and July 10, 1984.

[27] Steele and Nimmer, p. 997, pp. 998-999.

[28] Fellmeth, p. 41.

[29] Ibid., p. 45.

[30] *1986 ABA Discipline Survey*, p. 7.

[31] For support for this position, see Steele and Nimmer, pp. 965-968.

[32] American Bar Association Center for Professional Responsibility, *Standards for Imposing Lawyer Sanctions*, ABA, 1986, p. 50.

[33] Agencies and courts often reduce discipline based on these factors. The following examples are but a few of numerous such instances reported recently. In 1986, the California disciplinary system gave a private reprimand to an attorney who failed for four

years to file a required probate inventory/appraisal and ignored letters from the judge; the leniency was justified by a claim that he was overwhelmed by the complexity of the case. "Discipline," *California Lawyer*, April, 1986, p. 56. The D.C. Court of Appeals ruled that an attorney's alcoholism warranted reducing his punishment from a suspension to probation although he had been found to have misappropriated client funds on three occasions. *In re Kersey*, No. 84-739; D.C. Ct. App., 1/28/87. In yet another case, the same court considered a lawyer's psychiatric condition of atypical depression sufficient to reduce his license suspension to probation although he had repeatedly "disrupted" court proceedings. *In re Crowley*, No. D-8; N.J. Sup.Ct., 1/16/87.

In a recent New Jersey case, a solo practitioner's discipline was reduced to a public reprimand despite his "gross neglect" of six cases because the court considered his inexperience, inadequate staff and high volume of litigation as mitigating factors. *In re Maurello*, 102 N.J. 622 (1986).

34 The good news for consumers is that in some states, most notably New Jersey, lawyers caught stealing are automatically disbarred. *In re Wilson*, 81 N.J. 451 (1979). New Jersey's rule has withstood attempts to erode it based on mitigating factors such as the intention to return the money, good character and fitness *(In re Noonan*, 102 N.J. 157 (1986)) poor accounting practices with prior unblemished record *(In re Fleischer*, 102 N.J. 440 (1986)) or severe financial pressures *(In re Lennan*, 102 N.J. 518 (1986)).

35 Andrew Wilson, "Lawyers in Trouble," *The Courier-Journal*, Louisville, Ky, Feb. 22, 1987, p. 1.

36 *1986 ABA Sanctions Survey.*

37 *ABA on Discipline for Lawyers and Judges*, p. 79.

38 A quick review of these alternatives shows they are not sufficient to meet consumer needs.

Fee Arbitration

Fee arbitration is not available everywhere. Six states do not offer any arbitration at all, while in 14 other states, arbitration is not available in some parts of the state. *Arbitrating Lawyer-Client Fee Disputes: A National Survey*, HALT, 1988, p. 3. Furthermore, although a client or an attorney disciplinary committee might refer a fee dispute to a fee arbitration committee, in all but six states the attorney is under no obligation to arbitrate the dispute and can simply ignore the complaint. Ibid., p. 4.

Moreover, arbitration panels are limited because they are not permitted to decrease a fee because of incompetent performance or malpractice. Finally, consumers are discouraged from filing because they feel the lawyer-run programs will protect lawyers' right to charge whatever fee they desire.

Client Security Funds

Most states have special funds that reimburse clients money stolen by their attorney. These programs are also limited. State bars consider any reimbursement as awarded by the "grace of lawyers' largesse" because the programs are funded by lawyer dues. As a result, clients have no legal right or claim for reimbursement and, in every state but California, no right to challenge a denial. In addition, most programs cap the amount one can recover regardless of how much was stolen. Although many state bars proudly publicize the money reimbursed through these funds, a more accurate barometer of the programs' success would be the number of valid claims left uncompensated.

Malpractice Lawsuits

The major problem with the catch-all option, malpractice suits, is that they are often prohibitively expensive. Many clients do not even consider filing a malpractice suit because they see no point in exposing themselves to possible further loss caused by a second attorney hired to file an action against the first. As the saying goes, "Once burned, twice shy."

May clients who do decide to take this risk find themselves in the position described by the state bar counsel who reported: ". . . The bulk of the cases that come to my attention. . . involve incompetence. The answer you give to the client is that he doesn't have an ethics matter but he may have a civil action. They will tell you that they have been to 10 or 20 or 30 lawyers and they can't get one to take their case." Clark Report, p. 187.

Some attorneys won't take cases because of an unwillingness to sue a fellow lawyer or because of the difficulty in winning. Malpractice actions involve proving two cases: that the attorney was guilty of misconduct, and that the misconduct caused the loss of an award they would otherwise have won. Thus, clients must prove both the original case (that they would have received an award if the original case had been handled properly) *and* that there was attorney misconduct that caused them to lose.

Often lawyers also turn down malpractice cases because the amounts involved, even though thousands of dollars, will not support the fees and expenses needed to bring the suit. As a HALT member wrote in February, 1987, "[I]n the last few months I have discussed our situation with six different . . . law firms which handle malpractice. While all agree that evidence of malpractice exists, none is willing to represent us . . . . The usual reason given for turning us down is that the amount of the damage is too small."

Other times the lawyer to be sued does not have either malpractice insurance or the money to pay a successful client suit.

Finally, filing suit is never a solution when a dispute involves an ongoing relationship. For clients who are looking for a solution to a lawyer's neglect, failure to communicate or failure to follow directions, filing a malpractice suit is not only pointless, it is likely to destroy any chance of repairing the relationship.

39 For example, in 1985 the ABA testified in the reauthorization hearing for the Federal Trade Commission (FTC) that the FTC should have no authority over lawyers because "lawyers are regulated very extensively, regulated by state bars, the agents of the Supreme Court in 31 jurisdictions. This is duplicative regulation and there is no need for it. . . . States are doing an effective job." *Testimony on the Reauthorization of the Federal Trade Commission*, Hearings on S. 1078 Before the Subcommittee on Commerce, Transportation and Tourism of the Committee on Energy and Commerce, 99th Congress, 1st Session, 1985, statement of J. Chrys Dougherty, ABA.

40 Pauline Schneider, "Report on the Board of Governors," *Washington Lawyer*, March/April, 1987, p. 56.

41 Fellmeth Report, p. 67. The California State Bar has also been accused of "number massaging." Accusations were based on information from a state senator's aide who interviewed disciplinary staff and reported, "When the 1985 deadline for concluding pre-1983 cases approached and many were not yet closed, according to a [disciplinary staff] investigator, their supervisor directed them to close the remaining cases informally — and then reopen them as 1985 cases." Monica Bay, "Bar Attorneys Charge 'Number Massaging,'" *The Recorder Newspaper*, San Francisco, Calif., March 21, 1986, p. 1.

42 Ira Perry, "Disbarment Proceedings Drag On," *The Houston Post*, Jan. 26, 1987, p. 14a.

43 Michigan's 1985-86 Annual Report, p. 10.

44 American Bar Association Standing Committee on Professional Discipline, *Evaluation of the Lawyer Discipline System of New Jersey*, ABA, 1982, p. 7.

45 American Bar Association Standing Committee on Professional Discipline, *Evaluation of the Lawyer Discipline System in the State of New Mexico*, ABA, 1981, p. 8.

46 Connie Kang and James Finefrock, "Half Who Steal Return to Practice," *The San Fransisco Examiner*, March 26, 1985.

47 As the Clark Commission explained: "The unsophisticated complainant approaches the filing of a complaint with reservations. He realizes that he is asking a group of lawyers to take action against one of their brethren. He is aware that he has slight knowledge of the standards of the profession and that the attorney's conduct he questions may not violate the Code of Professional Responsibility. He often feels he cannnot state his complaint adequately because his attorney has not kept him properly informed." Clark Report, p. 72.

48 See, for example, the consumer brochures published by the discipline agencies for Florida, Georgia, North Carolina and Oregon.

49 See, for example, the consumer brochures published by the discipline agencies for New Jersey, Oregon, Tennessee and Virginia.

50 Disciplinary Board of the Supreme Court of Pennsylvania, "Information About Complaint Procedures and Discipline of Lawyers," undated, p. 1. Many other states use similar or identical language in their brochures.

51 HALT conducted a telephone survey of discipline agencies during March and April 1988. Twenty-eight agencies (82 percent of 34 contacted) have a "gag rule." They include: Alaska, California, Colorado, Connecticut, District of Columbia, Florida, Hawaii, Idaho, Illinois, Kentucky, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin and Wyoming. States that do not have a "gag rule" include: Arkansas, Maryland, Minnesota, New Mexico, Oregon and Washington.

52 Mississippi State Bar Association, "Complaint," undated, p. 2.

53 HALT's telephone survey of discipline agencies during March and April, 1988 included a question about whether the agency gave complainants absolute immunity from civil suit based on information provided to the agency. The 15 agencies that do not provide immunity include: Alaska, Arkansas, Connecticut, Illinois, Kentucky, Missouri, Nevada, New Mexico, Ohio, Pennsylvania, Rhode Island, Vermont, Virginia, Wisconsin and Wyoming. States that reported having an immunity provision include: California, Colorado, District of Columbia, Florida, Hawaii, Idaho, Maryland, Massachusetts, Minnesota, Montana, New Jersey, North Carolina, Oregon, South Carolina, Tennessee, Texas, Utah and Washington.

54 *1986 ABA Discipline Survey*, p. 7.

55 Twenty-four agencies (71 percent of 34 agencies responding) reported that the bar counsel or disciplinary agency could appeal a decision.

56 The first state to provide for nonlawyer participation was Michigan. F. LaMar Forshee, "Professional Responsibility in the Twenty-First Century," *Ohio Law Review*, vol. 39, 1978, p. 694.

57 Twenty-six states have adopted versions of the 1983 Model Code. The remaining states still use versions of the 1969 Code. "More States Adopt Model Rules," *Bar Leader*, March/April 1988, p. 30.

58 *1986 ABA Discipline Survey*, p. 7. A few states do not regularly hold hearings (Wisconsin, for example). States that do hold hearings do so after a finding of probable cause. Thus, using *1986 ABA Discipline Survey* data HALT has approximated the percentage of complaints which reach the hearing stage.

59 A recent example of the seriousness of bar influence was the Minnesota State Bar's successful campaign to undermine the work of Michael Hoover, then Bar Counsel and President of the National Organization of Bar Counsel.

The Minnesota State Bar Association petitioned the Minnesota Supreme Court to appoint a committee to recommend changes in the discipline system based on concerns about "an excessively adversarial posture in the Director's Office and the inappropriate treatment of the 'innocent' lawyer." Minnesota Supreme Court Advisory Committee, "Report of the Supreme Court Advisory Committee on Lawyer Discipline," April 15, 1985, p. 1. Six of the nine committee members were appointed by the Bar Association. The committee urged checks in the "excessive zeal" of the Bar Counsel. As a result of the campaign, Michael Hoover resigned his position.

60 As Wolfram points out, "[o]ne is tempted to believe that most of these reforms [incorporating public members into the process] were initiated, and are being maintained more as a public relations effort than as genuine attempts to change the rules and practice of lawyer discipline in a radical way." Charles Wolfram, "Barriers to Effective Public Participation," *Minnesota Law Review*, vol. 62 (1978), p. 694.

61 It has also been argued that the Supreme Court has and must retain oversight of discipline, precluding public control through the legislature or any public agency. Courts claim authority to regulate the legal profession based on the doctrine of *inherent judicial power*. Courts declare an "inherent" power over the practice of law, including discipline, in order to protect the dignity and effective operation of the judicial process.

HALT believes that jurisdiction over lawyer discipline is unrelated to the orderly administration of the courts. Courts can regulate lawyer conduct in court and court proceedings and even participate in decisions about who should be licensed to practice before them without having sole control of attorney discipline.

HALT's position is strengthened by an examination of the history of court intrusion in this area and by the fact that courts have done little to exercise oversight of discipline. There is considerable evidence that the real reason that lawyers and judges pushed to restrict legislative control over lawyers was to heighten lawyers' status and diminish competition from outsiders. For further discussion of this issue, see, Katherine Lee, *Challenges to the Lawyer Monopoly*, HALT, 1988, pp. 6-9, 47-55, Thomas Alpert, "The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis," *Buffalo Law Review*, vol. 32 (1983), pp. 525-56, Comment, "Control of the Unauthorized Practice of Law: Scope of Inherent Judicial Power," *Univ. of Chicago Law Review*, vol 28 (1960), pp. 162-73.

62 Based loosely on a list developed by Wolfram, in his article, "Barriers to Effective Public Participation," p. 629.

63 Brad Bumsted and Jeannine Guttman, "Beyond the Law," *A Gannett News Services Special Report*, December, 1986, p. 3.

64 HALT bases this claim on expectations consistently voiced in letters from consumers.

65 *Testimony of Professor Deborah Rhode, Stanford Law School*, Hearings Before the Assembly Judiciary Committee and the Senate Judiciary Committee, 1985-86 Regular Session of the California Legislature, vol. 86, p. 38.

Appendix I
State-By-State Survey Questionnaire

HALT staff designed the lawyer-discipline survey questionnaire using existing studies and the wealth of questions asked by consumers over the years. The questionnaire used a "multiple choice" format wherever practical. The questions were reviewed by several authorities including three bar counsels.

As usual with surveys, after the data was collected, a number of additional questions were identified. Some were pursued in follow-up telephoning. Others not asked include:

✓ What standard of proof must be met to find a disciplinary violation (i.e., "beyond a reasonable doubt," "clear and convincing" or "preponderance of the evidence")?

✓ How many nonlawyers are currently serving on your disciplinary board?

✓ How many lawyers and nonlawyers are currently in your pool of hearing panelists? How often do your hearing panels include one nonlawyer? Two? Three?

✓ What mitigating factors can the agency take into consideration when determining the appropriate level of discipline?

ATTORNEY GRIEVANCE PROCEDURE QUESTIONNAIRE

State

[1] Authority Over Disciplinary System

a. What body or bodies have the authority to make the rules for your state's attorney disciplinary system?
___ high court
___ state bar
___ legislature
___ other (explain)

b. What is the source of that authority?
___ state statutes, cite:
___ constitution, cite:
___ court rules, cite:
___ other (describe)

c. Is the state bar association a legal extension of the state supreme court, or an "integrated" bar? Yes [ ] No [ ]

d. What is the source of your agency's budget?
___ appropriation from bar association dues
___ appropriation from attorney licensing fees (if separate from bar dues)
___ fee paid by licensed attorneys directly to agency
___ appropriation from legislature
___ other (describe)

e. What is your agency's budget for 1985? (Feel free to enclose a financial statement if you have one prepared for the public.) $_____

f. Is the budget and staffing adequate for the agency's caseload? Yes [ ] No [ ]
If no, how much more (money and staff) is needed for timely action on the caseload?

[2] Filing Complaints

a. What person (title) or body are complaints filed with?
___ bar counsel
___ disciplinary committee
___ state/county/regional bar association
___ other (name)

b. Must complaints be filed on a specific form? Yes [ ] No [ ]

Are there any requirements about their form? Yes [ ] No [ ]
If so, must they be:
___ written
___ verified
___ other (describe)

c. What is the title and training of the person(s) who initially screens complaints?

d. What types of complaints does your office have authority over?
___ failure to represent client zealously (within bounds of law)
___ failure to protect client confidences
___ improper use of client funds
___ neglect of client's case
___ charging excessive fee to client
___ criminal act outside attorney/client relationship
___ in-person solicitation of clients
___ misrepresentation of facts to client, court or third party
___ lying on bar application
___ improper advertising
___ conflict-of-interest
___ failure to pay bar dues
___ others (list)

e Are fee disputes handled separately from other disputes?
Yes [ ] No [ ]

If yes, explain the system for handling fee disputes.

f What is the statute of limitations for filing complaints?
[ ] None ___ Years

g Is the system publicized? Yes [ ] No [ ]
If yes how?
___ brochure available to public
___ advertisement in yellow pages
___ publication of filing of disciplinary charges or imposition of public discipline
___ other (describe)

[3] Processing Complaints

a. What criteria are used to decide which complaints are docketed for investigation?
___ within jurisdiction
___ verifiable
___ other (list)

What are the most common reasons for dismissing a case before docketing?

b. What is the title and training of the person(s) who perform the preliminary investigation and the person(s) who oversee their work?

c. How many people are assigned to perform this function?
___

Do investigators perform other functions? Yes [ ] No [ ]
If, so what are they?

d Do you have a statutory or informal deadline on processing complaints? Yes [ ] No [ ]
If yes, which: Statutory ___ Informal ___

What is the length of that period?

How often is it met?

e What are the most common reasons for dismissing a docketed case?
___ not verifiable ___%
___ alleged conduct does not constitute misconduct ___%
___ evidence not sufficient to meet required standard ___%
___ other (describe)

f Is there provision for interim suspension of an attorney?
Yes [ ] No [ ]
If so, when?
___ after probable cause has been determined
___ when attorney has been convicted of a felony or "serious crime"
___ when attorney is deemed to present imminent threat to clients or the public
___ other (describe)

4 Hearing Process

Do you hold a hearing, following determination of probable cause and/or petitioning of the matter? Yes ☐ No ☐

If not, on a separate sheet, describe as fully as possible the system that your state uses at this point in the process and omit the remaining questions under this section.

a. How are hearing panel/committee members recruited?
___ members volunteer
___ disciplinary committee solicits members
___ disciplinary committee members serve
___ place advertisements in newspaper
___ other (describe)

b. Who chooses the hearing panel/committee?
___ disciplinary agency
___ disciplinary counsel
___ other (describe)

c. What qualifications are required for lawyer members of the hearing panel/committee?
___ member of bar
___ practice related to type of case in question
___ specified number of years' experience
___ other (describe)

d. How many members do panels/committees have?

e. How many non-lawyers are required to be on each panel?
___ none
___ (give number)

g. What qualifications are required for non-lawyer members?
___ membership on bar board
___ membership on disciplinary committee
___ recommendation by bar members
___ other (describe)

h. Can both attorney and client appear at the hearing?
Yes ☐ No ☐
Can attorney bring witnesses? Yes ☐ No ☐
Can client? Yes ☐ No ☐
Does the prosecutor call experts? Yes ☐ No ☐
Does the prosecutor call its own witnesses? Yes ☐ No ☐

i. Who is required to appear at the hearing?
Both attorney and client? Yes ☐ No ☐
Attorney only? Yes ☐ No ☐
Client only? Yes ☐ No ☐
Other (describe)

j. Can prior discipline of the attorney be considered as evidence in the hearing? Yes ☐ No ☐

If so, under what circumstances?
___ if prior discipline was public (not private reprimand)
___ if prior discipline was "serious" (suspension or disbarment)
___ when guilt has been determined and discipline is being decided
___ if evidence of prior discipline is needed to prove present charges (such as continuing to practice after suspension)
___ other (describe)

k. Can client be present during attorney testimony?
Yes ☐ No ☐

Can client cross-examine the attorney? Yes ☐ No ☐

l. Can attorney be present during client testimony?
Yes ☐ No ☐

Can attorney cross-examine the client? Yes ☐ No ☐

m. Is the prosecutor responsible for building the record?
Yes ☐ No ☐

Is client responsible for building the record? Yes ☐ No ☐

n. Can witnesses or documents be subpoenaed? Yes ☐ No ☐

o. Do the rules of evidence apply in disciplinary hearings?
Yes ☐ No ☐

p. Are hearings recorded? Yes ☐ No ☐

q. Is a written report of the hearing required? Yes ☐ No ☐

r. If so, is there a deadline by which the report must be produced? Yes ☐ No ☐

If yes, what is it?

5 Powers of Hearing Committee/ Panel

Does the hearing committee
___ issue informal admonition/private reprimand
___ impose discipline
___ recommend discipline
___ forward its report to the Bar Board or the Court for a determination on disciplinary action
___ other (describe)

6 Disciplinary Action

a. What body actually metes out discipline for attorneys?
___ hearing panel or committee
___ disciplinary commission
___ high court
___ other (describe)

b. What are the possible types of discipline handed out?
___ informal admonition/private reprimand
___ public reprimand
___ probation
___ censure
___ suspension
___ disbarment
___ permanent disbarment
___ other (list)

c. Does discipline for certain offenses require a showing of fitness before readmission to practice? Yes ☐ No ☐
If yes, describe types of offenses or under what circumstances.

d. Do the rules provide for a disability suspension?
Yes ☐ No ☐
If so, what are the standards?

e. Can financial restitution to clients be required?
Yes ☐ No ☐
Under what circumstances?
___ if attorney misused client funds
___ if attorney overcharged client
___ if disciplinary body recommends restitution
___ other (describe)

Are there any limitations? Yes ☐ No ☐
If yes, what are they?
___ limit on amount
___ other (list)

f. Are attorneys given the right to appeal decisions of the disciplinary body? Yes ☐ No ☐
Is disciplinary counsel given the right to appeal decisions of the disciplinary body? Yes ☐ No ☐
Are clients given the right to appeal decisions of the disciplinary body? Yes ☐ No ☐
If so, do appeals take place
___ within the state bar system
___ outside the bar system
___ both

g. Does the disciplinary agency have a system to monitor whether disbarred attorneys are practicing? Yes [ ] No [ ]
If so, describe.

h. Are full records maintained on all cases? Yes [ ] No [ ]
For how long? ...months
On dismissed cases? Yes [ ] No [ ]
For how long? ...months

If records of dismissed cases are expunged, does the skeletal record (name, date, type of case) remain? Yes [ ] No [ ]

7 Publicity

a. Are disciplinary cases made public:
___ when the complaint is filed
___ when probable cause is found or case is docketed for investigation
___ when discipline is recommended
___ when discipline is imposed
___ when disciplinary action is something other than private reprimand
___ when discipline is "serious" (suspension or disbarment)

b. If made public prior to discipline, how are cases made public?
___ record of complaint open to public
___ file opened to public
___ hearing record or report open to public
___ notice printed in bar publication
___ other (describe)

c. How is the public informed about attorneys who have been disciplined?
___ notice printed in bar publication
___ notice published in area newspapers
___ notice sent to area newspapers
___ other (describe)

d. Does public notification apply only to public discipline?
Yes ☐ No ☐

8 Distinguishing Characteristics

Are you aware of any components of your system that make it significantly different from those in other places? (Such as a system that is not statewide but regional or local, provisions for automatic disbarment, jury trials, etc. You may wish to use the ABA Model Rules as a standard of comparison.)

9 Enforcement

(If your agency compiles a year-end report which contains the information requested in the following questions, please feel free to enclose a copy of the report, in lieu of answering the following.)

Do you keep records on the enforcement of your disciplinary rules? Yes [ ] No [ ]

a. How many complaints did you receive in 1983? ___
In 1984? ___

b. How many complaints did you investigate in 1983? ___
In 1984? ___

c. Do you have a backlog? Yes [ ] No [ ]
How long is it?

d. What is the average amount of time it takes to complete work on a complaint, from its receipt to final disposition?

e. How many cases does your agency now have on its docket that are more than:
___ 90 days old ___ 120 days old
___ 180 days old ___ 360 days old

f. Of the complaints you received in 1984, how many resulted in disciplinary action? ___
In 1983? ___

g. Of the lawyers investigated in 1984, how many resigned before disciplinary action was taken? ___
In 1983? ___

h. How many lawyers were disciplined for:
Note type of discipline and approximate no. of each type

___ failure to represent client zealously (within bounds of law)

___ failure to protect client confidences

___ improper use of client funds

___ neglect of client's case

___ charging excessive fee to client

___ criminal act outside attorney-client relationship

___ in-person solicitation of clients

___ misrepresentation of facts to client, court or third-party

___ lying on bar application

___ failure to pay bar dues

___ improper advertising

___ conflict-of-interest

___ felony conviction

___ others (list)

10 Suggestions/Plans for change

What problems do you see in your state's system? What ideas do you have for improving it? (Ways to reduce backlog, ways to simplify process, etc.)

Are there any plans or proposals currently being considered for changes in the system? What are they?

Do you wish to receive a copy of our study results?
Yes [ ] No [ ]

Name of person(s) completing questionnaire

_____

Address _____

Phone _____

Please return to
Karen Leichtnam
HALT
1319 F St., N.W., Suite 300
Washington, D.C. 20004

Appendix II
State-By-State Survey Results

Agencies returned their answers to HALT's questionnaire between April 1985 and January 1986. For those agencies that did not respond, in some instances HALT staff was able to get answers to the questions over the telephone. In other cases, unreturned or uncompleted questionnaires were completed by staff using previously published materials, such as brochures, complaint forms and procedural rules.

Each state has one disciplinary agency, except New York which has eight independently operated agencies. HALT sent questionnaires to all 58 agencies, of which 34 responded (including two New York agencies).

In February and March of 1988, HALT telephoned each agency again to update the survey information about the stage at which they make case information public (under the heading "cases made public").

STATES	RULEMAKING AUTHORITY				SOURCE OF AUTHORITY				INTEGRATED BAR		FINANCING					ADEQUATE BUDGET		COMPLAINTS FILED WITH				COMPLAINT FORM	
	HIGH COURT	STATE BAR	LEGISLATURE	OTHER	STATUTES	CONSTITUTION	COURT RULES	OTHER	YES	NO	BAR DUES	LICENCES	ATTORNEY FEES	LEGISLATURE	OTHER	YES	NO	BAR COUNSEL	BAR COMMITTEE	BAR ASSOC.	OTHER	YES	NO
ALABAMA																X							
ALASKA	X					X			X		X							X					X
ARIZONA	X	X					X		X		X					X			X				X
ARKANSAS	X					X				X		X				X			X			X	
CALIFORNIA																							
COLORADO	X					X	X			X			X			X			X				X
CONNECTICUT	X					X				X				X		X					X	X	
DELAWARE																							
DISTRICT OF COLUMBIA	X	X							X		X					X		X				X	
FLORIDA	X					X			X		X					X		X					X
GEORGIA		X					X											X					
HAWAII	X	X			X	X	X			X			X			X		X					X
IDAHO	X				X				X		X							X				X	
ILLINOIS	X					X	X			X			X				X		X				X
INDIANA																							
IOWA	X						X		X											X		X	
KANSAS	X						X			X		X				X			X				X
KENTUCKY	X				X	X	X		X		X						X						X
LOUISIANA																							
MAINE																							
MARYLAND	X						X			X			X					X					X
MASSACHUSETTS	X					X				X			X					X	X				X
MICHIGAN	X						X				X								X				X
MINNESOTA	X									X		X				X		X					X
MISSISSIPPI	X				X		X	X	X		X					X				X			X
MISSOURI	X						X		X			X				X			X				X
MONTANA	X								X					X			X		X				X

STATES	RULEMAKING AUTHORITY				SOURCE OF AUTHORITY				INTEGRATED BAR		FINANCING					ADEQUATE BUDGET		COMPLAINTS FILED WITH				COMPLAINT FORM	
	HIGH COURT	STATE BAR	LEGISLATURE	OTHER	STATUTES	CONSTITUTION	COURT RULES	OTHER	YES	NO	BAR DUES	LICENCES	ATTORNEY FEES	LEGISLATURE	OTHER	YES	NO	BAR COUNSEL	BAR COMMITTEE	BAR ASSOC.	OTHER	YES	NO
NEBRASKA	X							X	X		X					X		X					X
NEVADA	X				X	X	X		X		X					X		X					X
NEW HAMPSHIRE																							
NEW JERSEY	X					X				X		X					X			X		X	
NEW MEXICO	X						X	X	X				X			X							X
NEW YORK (1ST)			X	X	X	X				X				X		X			X				X
NEW YORK (2ND)	X									X				X			X	X		X			X
NEW YORK (3RD)																							
NEW YORK (4TH)																							
NORTH CAROLINA		X			X				X				X			X					X		X
NORTH DAKOTA																							
OHIO	X					X				X			X			X		X		X			X
OKLAHOMA																							
OREGON	X				X				X		X					X		X					X
PENNSYLVANIA	X					X				X			X				X	X					X
RHODE ISLAND	X						X					X					X	X					X
SOUTH CAROLINA	X								X					X		X			X			X	
SOUTH DAKOTA																							
TENNESSEE	X						X			X		X				X				X			
TEXAS																							
UTAH	X						X		X		X							X	X				
VERMONT																							
VIRGINIA	X		X		X				X				X			X		X				X	
WASHINGTON	X				X	X	X		X		X					X		X					X
WEST VIRGINIA	X				X	X			X		X					X		X					
WISCONSIN																							
WYOMING	X						X		X		X					X			X				X
TOTALS	36	5	2	1	11	16	19	3	21	15	15	6	11	5	0	25	7	21	14	5	2	8	27

STATES	MUST COMPLAINTS BE:			WHO SCREENS COMPLAINTS			FEE DISPUTES INCLUDED?		STATUTE OF LIMITATIONS		CRITERIA FOR INVESTIGATING			MOST COMMON REASON FOR NOT INVESTIGATING		
	WRITTEN	VERIFIED	OTHER	LAWYER	NONLAWYER	OTHER	YES	NO	YEARS (X)	NONE	WITHIN JURISDICTION	VERIFIABLE	OTHER	INSUFFICIENT EVIDENCE	NO JURISDICTION	OTHER
ALABAMA																
ALASKA	X				X			X	5		X			X		
ARIZONA	X			X						X	X				X	
ARKANSAS	X	X		X			X			X	X				X	
CALIFORNIA																
COLORADO	X			X				X		X	X	X			X	
CONNECTICUT	X	X		X			X			X	X					
DELAWARE																
DISTRICT OF COLUMBIA	X			X				X		X	X			X	X	
FLORIDA	X			X				X		X	X					
GEORGIA	X	X		X				X			X	X		X		
HAWAII	X			X				X		X	X				X	
IDAHO	X			X				X		X	X	X			X	
ILLINOIS				X				X		X	X					
INDIANA																
IOWA	X	X												X		
KANSAS	X			X			X			X		X		X		
KENTUCKY	X	X		X				X		X		X		X		
LOUISIANA																
MAINE																
MARYLAND				X				X		X	X				X	
MASSACHUSETTS	X			X				X		X	X				X	
MICHIGAN	X			X			X					X		X		
MINNESOTA	X			X				X		X	X				X	
MISSISSIPPI	X			X				X		X			(1)			X
MISSOURI	X			X				X		X					X	
MONTANA				X				X		X		X				

STATES	MUST COMPLAINTS BE:			WHO SCREENS COMPLAINTS			FEE DISPUTES INCLUDED?		STATUTE OF LIMITATIONS		CRITERIA FOR INVESTIGATING			MOST COMMON REASON FOR NOT INVESTIGATING		
	WRITTEN	VERIFIED	OTHER	LAWYER	NONLAWYER	OTHER	YES	NO	YEARS (X)	NONE	WITHIN JURISDICTION	VERIFIABLE	OTHER	INSUFFICIENT EVIDENCE	NO JURISDICTION	OTHER
NEBRASKA				X			X			X						
NEVADA	X			X				X			X			X	X	
NEW HAMPSHIRE																
NEW JERSEY				X				X		X					X	
NEW MEXICO	X			X				X	3		X	X		X		
NEW YORK (1ST)	X			X				X		X	X					
NEW YORK (2ND)	X			X				X		X		X				
NEW YORK (3RD)																
NEW YORK (4TH)																
NORTH CAROLINA				X			X			X	X					
NORTH DAKOTA																
OHIO				X	X			X		X	X					
OKLAHOMA																
OREGON	X			X				X		X	X	X				
PENNSYLVANIA	X			X				X	6		X					
RHODE ISLAND	X							X		X	X				X	
SOUTH CAROLINA	X							X		X				X		
SOUTH DAKOTA																
TENNESSEE				X				X		X	X			X	X	
TEXAS																
UTAH				X			X		3		X					X
VERMONT																
VIRGINIA	X			X				X		X	X	X				
WASHINGTON				X				X		X	X	X			X	
WEST VIRGINIA				X			X			X	X	X			X	
WISCONSIN																
WYOMING								X		X						
TOTALS	27	5	0	34	1	0	8	29	4	31	27	13	1	11	16	2

STATES	WHO DOES PRELIMINARY INVESTIGATION			DEADLINE FOR COMPLAINT PROCESSING			HOW LONG	HOW OFTEN MET				MOST COMMON REASON FOR DISMISSING INVESTIGATED CASE				INTERIM SUSPENSION?				
	LAWYER	NONLAWYER	OTHER	STATUTORY	INFORMAL	NONE	DAYS	ALWAYS	OFTEN	OCCASIONALLY	RARELY	NOT VERIFIABLE	NOT MISCONDUCT	INSUFFICIENT EVIDENCE	OTHER	YES/NO	AFTER PROBABLE CAUSE	CONVICTED FOR SERIOUS CRIME	ATTY. POSES IMMINENT THREAT	OTHER
ALABAMA																				
ALASKA	X				X		180						X	X		Y		X	X	
ARIZONA	X						120		X							Y			X	
ARKANSAS	X					X										N				
CALIFORNIA																				
COLORADO	X				X		2		X			X	X	X		Y		X	X	X
CONNECTICUT	X			X												Y		X	X	
DELAWARE																				
DISTRICT OF COLUMBIA	X				X		90		X				X	X		Y		X	X	X
FLORIDA	X	X			X		180		X				X	X		Y		X	X	X
GEORGIA																Y			X	
HAWAII	X					X							X	X		Y		X	X	
IDAHO	X	X				X										Y		X	X	
ILLINOIS	X				X											Y		X	X	
INDIANA																				
IOWA																				
KANSAS	X					X						X	X	X		N				
KENTUCKY	X					X							X			Y		X	X	
LOUISIANA																				
MAINE																				
MARYLAND	X				X		30		X					X		Y		X	X	
MASSACHUSETTS	X	X				X						X	X			Y		X	X	
MICHIGAN	X																			
MINNESOTA	X	X		X			45		X							Y			X	
MISSISSIPPI	X					X										N		(2)		
MISSOURI	X					X						X	X	X		Y		X		
MONTANA	X																			

STATES	WHO DOES PRELIMINARY INVESTIGATION			DEADLINE FOR COMPLAINT PROCESSING			HOW LONG	HOW OFTEN MET				MOST COMMOM REASON FOR DISMISSING INVESTIGATED CASE				INTERIM SUSPENSION?				
	LAWYER	NONLAWYER	OTHER	STATUTORY	INFORMAL	NONE	DAYS	ALWAYS	OFTEN	OCCASIONALLY	RARELY	NOT VERIFIABLE	NOT MISCONDUCT	INSUFFICIENT EVIDENCE	OTHER	YES/NO	AFTER PROBABLE CAUSE	CONVICTED FOR SERIOUS CRIME	ATTY. POSES IMMINENT THREAT	OTHER
NEBRASKA	X				X							X	X	X		Y		X	X	X
NEVADA	X						45									Y			X	
NEW HAMPSHIRE																				
NEW JERSEY	X				X		60						X	X		Y		X	X	(3)
NEW MEXICO	X			X			90						X	X		Y	X	X	X	X
NEW YORK (1ST)	X	X			X		180		X				X	X		Y				
NEW YORK (2ND)	X				X		90		X				X			N		X	X	(4)
NEW YORK (3RD)																				
NEW YORK (4TH)																				
NORTH CAROLINA	X	X				X							X			Y		X	X	
NORTH DAKOTA																				
OHIO	X				X		90		X				X	X		Y		X		
OKLAHOMA																				
OREGON	X			X									X			Y			X	X
PENNSYLVANIA	X	X				X						X	X	X		Y		X	X	
RHODE ISLAND	X					X							X	X		Y		X	X	
SOUTH CAROLINA	X				X		60		X							Y	X	X	X	(5)
SOUTH DAKOTA																				
TENNESSEE	X					X						X	X	X		Y		X	X	
TEXAS																				
UTAH	X				X		90		X							Y			X	
VERMONT																				
VIRGINIA	X					X							X					X	X	
WASHINGTON	X	X				X										Y		X	X	
WEST VIRGINIA	X					X						X	X	X		N		(6)		
WISCONSIN																				
WYOMING						X							X			N				
TOTALS	36	8	0	4	13	16		0	11	0	0	8	23	17	0	Y-29 N-6	2	26	28	9

STATES	HEARING PANEL RECRUITMENT					WHO CHOOSES PANEL				LAWYER QUALIFICATIONS			No. OF COMMITTEE MEMBERS	No. OF NONLAWYERS REQUIRED	NONLAWYER QUALIFICATIONS				ATTY. & CLIENT CAN APPEAR	
	VOLUNTEERS	SOLICITATION	COMMITTEE MEMBERS SERVE	ADVERTISEMENTS	AGENCY	BAR COUNSEL	BAR BOARD/ COMMITTEE	HIGH COURT	BAR MEMBER	PRACTICE IN RELEVANT FIELD	SPECIFIED EXPERTISE	NUMBER	NUMBER	APPOINTMENT BY AGENCY	APPOINTMENT BY COURT	NONE	OTHER	YES	NO
ALABAMA																				
ALASKA	X								X			9	3				X	X		
ARIZONA	X				X				X			3	0					X		
ARKANSAS								X				7	2					X		
CALIFORNIA																				
COLORADO		X	X		X				X			3	1				X	X		
CONNECTICUT									X			3	1				X			
DELAWARE																				
DISTRICT OF COLUMBIA	X						X		X			3	1					X		
FLORIDA	X	X					X		X			5-15	1-5				X	X		
GEORGIA								X	X		X	1	0							
HAWAII							X	X	X			3	1			X			X	
IDAHO	X	X			X							3	1			X		X		
ILLINOIS							X		X		X	3	0					X		
INDIANA															X					
IOWA			X					X	X									X		
KANSAS								X	X		X	3	0					X		
KENTUCKY													0							
LOUISIANA																				
MAINE																				
MARYLAND	X			X			X		X			3	1				X	X		
MASSACHUSETTS		X			X				X			3	0					X		
MICHIGAN							X					3	0					X		
MINNESOTA			X			X			X			3	1	X				X		
MISSISSIPPI	X							X	X			3	0		X			X		
MISSOURI								X	X			4-5	1		X			X		
MONTANA								X	X			11	3					X		

STATES	HEARING PANEL RECRUITMENT				WHO CHOOSES PANEL				LAWYER QUALIFICATIONS			No. OF COMMITTEE MEMBERS	No. OF NONLAWYERS REQUIRED	NONLAWYER QUALIFICATIONS				ATTY. & CLIENT CAN APPEAR	
	VOLUNTEERS	SOLICITATION	COMMITTEE MEMBERS SERVE	ADVERTISEMENTS	AGENCY	BAR COUNSEL	BAR BOARD/ COMMITTEE	HIGH COURT	BAR MEMBER	PRACTICE IN RELEVANT FIELD	SPECIFIED EXPERTISE	NUMBER	NUMBER	APPOINTMENT BY AGENCY	APPOINTMENT BY COURT	NONE	OTHER	YES	NO
NEBRASKA								X	X			7	0		X			X	
NEVADA				X			X					5	1					X	
NEW HAMPSHIRE																			
NEW JERSEY	X							X	X	X	X	3	1				X	X	
NEW MEXICO	X	X			X				X			3	0					X	
NEW YORK (1ST)			X					X				7	2		X			X	
NEW YORK (2ND)									X	X		16	4					X	
NEW YORK (3RD)									X										
NEW YORK (4TH)																			
NORTH CAROLINA	X					X			X			3	1				X	X	
NORTH DAKOTA																			
OHIO							X		X			3	0					X	
OKLAHOMA												3	1						
OREGON																			
PENNSYLVANIA	X	X			X				X			3	0						X
RHODE ISLAND			X		X				X			3	0						X
SOUTH CAROLINA			X		X				X			3	0					X	
SOUTH DAKOTA																			
TENNESSEE					X							3	0					X	
TEXAS																			
UTAH							X		X			3	1		X			X	
VERMONT																			
VIRGINIA							X				X	9	2			X		X	
WASHINGTON							X		X			1	0					X	
WEST VIRGINIA			X				X		X			3	1				X	X	
WISCONSIN																			
WYOMING			X				X		X			5	0					X	
TOTALS	11	6	8	2	9	2	13	9	31	2	5			1	6	3	8	32	3

STATES	ATTY. BRINGS WITNESSES		CLIENT BRINGS WITNESSES		PROSECUTOR CALLS EXPERTS		PROSECUTOR CALLS WITNESSES		ATTY. & CLIENT MUST APPEAR		CLIENT MUST APPEAR		ATTY ONLY MUST APPEAR		PRIOR DISCIPLINE CONSIDERED				
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	Y/N	IF PUBLIC	IF "SERIOUS"	AFTER GUILT DETERMINED	IF NEEDED TO PROVE CHARGES
ALABAMA																			
ALASKA	X			X	X		X								N				
ARIZONA	X		X		X		X			X		X	X		Y			X	X
ARKANSAS	X		X		X		X		X						Y	X			
CALIFORNIA																			
COLORADO	X		X		X		X								Y			X	
CONNECTICUT																			
DELAWARE																			
DISTRICT OF COLUMBIA	X		X		X		X			X		X	X		Y	X	X	X	X
FLORIDA	X		X		X		X			X		X		X	Y			X	X
GEORGIA																			
HAWAII	X			X	X		X								Y			X	
IDAHO	X		X			X	X			X		X	X		Y		X		
ILLINOIS	X		X		X		X			X		X	X		Y				
INDIANA																			
IOWA	X		X				X			X		X			Y				
KANSAS	X		X		X		X		X			X		X	Y			X	
KENTUCKY																			
LOUISIANA																			
MAINE																			
MARYLAND	X		X		X		X			X		X		X	Y	X		X	
MASSACHUSETTS	X		X		X		X			X		X		X	Y				X
MICHIGAN							X		X			X		X	Y			X	
MINNESOTA	X			X		X	X			X		X	X		Y				
MISSISSIPPI	X		X		X		X			X		X		X	Y	X		X	
MISSOURI	X				X		X								Y				X
MONTANA	X		X			X	X		X						Y	X	X	X	X

STATES	ATTY. BRINGS WITNESSES		CLIENT BRINGS WITNESSES		PROSECUTOR CALLS EXPERTS		PROSECUTOR CALLS WITNESSES		ATTY. & CLIENT MUST APPEAR		CLIENT MUST APPEAR		ATTY ONLY MUST APPEAR		PRIOR DISCIPLINE CONSIDERED				
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	Y/N	IF PUBLIC	IF "SERIOUS"	AFTER GUILT DETERMINED	IF NEEDED TO PROVE CHARGES
NEBRASKA	X		X		X		X		X						Y	X	X	X	X
NEVADA	X			X											Y				
NEW HAMPSHIRE																			
NEW JERSEY	X		X		X		X			X		X		X	Y	X			
NEW MEXICO	X			X	X		X						X		Y			X	
NEW YORK (1ST)	X		X		X			X		X		X	X		Y	X		X	X
NEW YORK (2ND)	X			X	X		X		X						Y			X	
NEW YORK (3RD)																			
NEW YORK (4TH)																			
NORTH CAROLINA	X		X		X		X			X			X		Y			X	
NORTH DAKOTA																			
OHIO	X		X			X	X			X			X		N				
OKLAHOMA																			
OREGON	X			X			X								Y			X	X
PENNSYLVANIA	X			X	X		X		X		X			X	Y			X	
RHODE ISLAND	X			X	X		X			X		X	X		N				
SOUTH CAROLINA	X				X		X		X						Y		X		X
SOUTH DAKOTA																			
TENNESSEE	X		X		X		X			X		X	X		Y				X
TEXAS																			
UTAH	X		X		X		X								Y	X			
VERMONT																			
VIRGINIA	X		X		X		X			X		X		X	Y			X	
WASHINGTON	X			X	X		X								Y				
WEST VIRGINIA	X		X		X		X								Y			X	
WISCONSIN																			
WYOMING	X			X			X						X		N				
TOTALS	35	0	22	11	27	4	34	1	8	17	1	17	12	9	Y-32 N-4	9	5	19	11

STATES	CLIENT HEARS ATTORNEY TESTIMONY		CLIENT CROSS-EXAMINES ATTORNEY		ATTORNEY HEARS CLIENT TESTIMONY		ATTORNEY CROSS-EXAMINES CLIENT		SUBPOENA POWER		RULES OF EVIDENCE APPLIED			HEARINGS RECORDED		WRITTEN REPORT REQUIRED		REPORT DEADLINE	
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	YES, BUT RELAXED	NO	YES	NO	YES	NO	YES/NO	DAYS
ALABAMA																			
ALASKA	X			X	X		X		X		X			X		X		Y	30
ARIZONA				X	X		X		X		X			X		X		Y	60
ARKANSAS	X		X		X		X		X				X	X			X		
CALIFORNIA																			
COLORADO	X			X	X		X		X		X			X		X		N	
CONNECTICUT																			
DELAWARE																			
DISTRICT OF COLUMBIA		X		X	X		X				X			X		X		Y	60
FLORIDA	X			X	X		X		X		X			X		X		N	
GEORGIA				X	X		X		X		X			X		X		Y	60
HAWAII		X		X	X		X			X			X		X	X		Y	60
IDAHO	X			X	X		X		X			X		X			X		
ILLINOIS		X		X	X		X		X		X			X		X		Y	60
INDIANA																			
IOWA																			
KANSAS	X			X	X		X		X		X			X		X		N	
KENTUCKY	X			X	X		X		X		X			X		X		Y	30
LOUISIANA																			
MAINE																			
MARYLAND	X			X					X		X			X		X		Y	15
MASSACHUSETTS	X			X	X		X		X			X		X		X		N	
MICHIGAN				X					X		X			X		X		Y	30
MINNESOTA									X			X		X			X		
MISSISSIPPI					X		X		X		X			X		X		N	
MISSOURI		X		X	X		X		X			X		X		X		N	
MONTANA	X		X		X		X				X			X		X		N	

STATES	CLIENT HEARS ATTORNEY TESTIMONY		CLIENT CROSS-EXAMINES ATTORNEY		ATTORNEY HEARS CLIENT TESTIMONY		ATTORNEY CROSS-EXAMINES CLIENT		SUBPOENA POWER		RULES OF EVIDENCE APPLIED			HEARINGS RECORDED		WRITTEN REPORT REQUIRED		REPORT DEADLINE	
	YES	NO	YES	NO	YES	NO	YES	NO	YES	NO	YES	YES, BUT RELAXED	NO	YES	NO	YES	NO	YES/NO	DAYS
NEBRASKA	X			X	X		X		X		X			X					
NEVADA	X			X	X		X		X			X		X		X		Y	60
NEW HAMPSHIRE																			
NEW JERSEY												X		X		X		Y	30
NEW MEXICO	X			X	X		X		X			X		X		X		Y	10
NEW YORK (1ST)		X		X	X		X		X		X			X			X	N	
NEW YORK (2ND)	X			X	X		X		X		X			X		X		N	
NEW YORK (3RD)																			
NEW YORK (4TH)																			
NORTH CAROLIN..	X			X	X		X		X		X			X			X		
NORTH DAKOTA																			
OHIO		X		X	X		X		X		X			X		X		N	
OKLAHOMA																			
OREGON		X		X			X		X							X		Y	21
PENNSYLVANIA		X		X	X		X		X		X			X		X		Y	60
RHODE ISLAND		X		X	X		X		X		X			X		X		Y	60
SOUTH CAROLINA		X		X	X		X		X		X			X		X		Y	60
SOUTH DAKOTA																			
TENNESSEE	X			X	X			X	X		X			X		X		Y	60
TEXAS																			
UTAH	X			X	X		X		X		X			X			X		
VERMONT																			
VIRGINIA	X			X	X		X		X				X	X			X	N	
WASHINGTON		X		X	X		X		X				X	X			X	N	
WEST VIRGINIA	X			X	X		X		X		X			X		X		N	
WISCONSIN																			
WYOMING		X		X	X		X		X		X			X			X		
TOTALS	19	12	2	32	32	0	32	1	33	1	25	7	4	35	1	27	9	Y-17 N-13	

STATES	HEARING COMMITTEE CAN					WHAT BODY GIVES FINAL DISCIPLINE				TYPES OF DISCIPLINE								STANDARDS FOR READMISSION		DISABILITY SUSPENSION		FINANCIAL RESTITUTION POSSIBLE				
	ISSUE PRIVATE DISCIPLINE	IMPOSE DISCIPLINE	RECOMMEND DISCIPLINE	FORWARD REPORT	OTHER	HEARING PANEL	DISCIPLINE COMMISSION	HIGH COURT	OTHER	PRIVATE REPRIMAND	PUBLIC REPRIMAND	PROBATION	CENSURE	SUSPENSION	DISBARMENT	PERMANENT DISBARMENT	OTHER	YES	NO	YES	NO	YES NO	IF ATTY MISUSED FUNDS	IF ATTY OVERCHARGED	IF DISC BODY RECOMMENDS	OTHER
ALABAMA																										
ALASKA			X	X			X	X	X	X	X	X	X	X	X			X		X		Y			X	(9)
ARIZONA			X	X			X			X		X	X	X	X				X	X		Y	X	X	X	
ARKANSAS	X	X				X			(6)	X	X			X								N				
CALIFORNIA																										
COLORADO			X	X		X		X		X	X	X	X	X	X		(7)	X		X		Y	X	X	X	
CONNECTICUT	X			X		X		X		X	X			X	X					X		N				
DELAWARE																										
DISTRICT OF COLUMBIA			X	X			X	X		X	X	X	X	X	X	X		X				Y	X	X	X	
FLORIDA	X			X		X		X		X	X	X		X	X			X		X		Y	X	X	X	(9)
GEORGIA			X	X			X	X		X	X			X	X			X		X		N				
HAWAII			X				X			X	X		X	X	X				X	X		Y	X	X	X	
IDAHO			X	X				X	X	X	X	X	X	X	X			X				Y			X	
ILLINOIS	X		X	X				X		X		X	X	X	X			X		X		Y	X			
INDIANA																										
IOWA	X		X				X	X		X	X			X	X			X		X						
KANSAS	X		X	X				X		X				X	X			X		X		N				
KENTUCKY	X			X		X		X		X	X			X	X			X		X		Y	X		X	
LOUISIANA																										
MAINE																										
MARYLAND	X		X	X				X		X	X	X			X				X	X		Y				
MASSACHUSETTS			X	X			X	X		X		X	X	X	X			X		X		Y	X			(9)
MICHIGAN		X				X				X	X	X		X	X			X		X						
MINNESOTA				X				X	X	X	X	X		X	X			X		X		Y				(9)
MISSISSIPPI	X	X				X		X		X	X	X	X	X	X			X		X		Y	X		X	
MISSOURI	X	X	X					X			X	X		X	X			X		X		N				(10)
MONTANA	X			X				X					X	X	X				X	X		Y	X		X	

STATES	HEARING COMMITTEE CAN					WHAT BODY GIVES FINAL DISCIPLINE				TYPES OF DISCIPLINE								STANDARDS FOR READMISSION		DISABILITY SUSPENSION		FINANCIAL RESTITUTION POSSIBLE				
	ISSUE PRIVATE DISCIPLINE	IMPOSE DISCIPLINE	RECOMMEND DISCIPLINE	FORWARD REPORT	OTHER	HEARING PANEL	DISCIPLINE COMMISSION	HIGH COURT	OTHER	PRIVATE REPRIMAND	PUBLIC REPRIMAND	PROBATION	CENSURE	SUSPENSION	DISBARMENT	PERMANENT DISBARMENT	OTHER	YES	NO	YES	NO	YES AND	IF ATTY MISUSED FUNDS	IF ATTY OVERCHARGED	IF DISC BODY RECOMMENDS	OTHER
NEBRASKA	X			X		X		X		X	X	X	X	X	X					X		N				
NEVADA			X					X		X	X			X	X	X		X				N				
NEW HAMPSHIRE																										
NEW JERSEY			X	X			X	X		X	X			X		X	(8)	X				N				
NEW MEXICO			X	X			X	X		X	X	X	X	X	X		(8)		X	X		Y	X	X	X	(10)
NEW YORK (1ST)	X		X	X				X					X	X	X					X		Y	X	X	X	
NEW YORK (2ND)						X		X		X			X	X	X					X		N				
NEW YORK (3RD)																										
NEW YORK (4TH)																										
NORTH CAROLINA		X							X	X			X	X	X			X		X		Y			X	
NORTH DAKOTA																										
OHIO			X	X				X			X			X	X	X		X			X		N				
OKLAHOMA																										
OREGON	X	X		X		X	X	X			X	X		X	X			X				N				
PENNSYLVANIA			X				X	X		X	X		X	X	X			X		X		Y	X			
RHODE ISLAND			X	X				X		X	X		X	X	X			X		X		N				
SOUTH CAROLINA			X	X				X		X	X			X		X		X		X		Y	X	X	X	(9)
SOUTH DAKOTA																										
TENNESSEE			X	X				X		X	X		X	X	X			X		X		Y			X	
TEXAS																										
UTAH		X						X			X	X		X	X			X		X		Y				
VERMONT																										
VIRGINIA	X					X	X			X	X	X		X	X			X		X		N				
WASHINGTON		X	X			X	X	X		X	X	X	X	X	X	X	(7)	X		X		Y			X	
WEST VIRGINIA			X	X				X			X	X		X	X		(7)	X		X		N				
WISCONSIN																										
WYOMING	X	X	X	X		X		X		X	X	X		X	X				X	X		Y			X	
TOTALS	16	8	25	26	0	13	13	33	5	32	31	21	19	38	36	5	5	28	6	33	0	Y-23 N-1	14	8	17	7

STATES	LIMITS ON RESTITUTION			ATTYS. CAN APPEAL		BAR COUNSEL CAN APPEAL		CLIENTS CAN APPEAL		APPEALS TO			MONITOR DISBARRED ATTORNEYS		RECORDS MAINTAINED			DISMISSED CASE RECORDS MAINTAINED			
	YES/NO	AMOUNT	OTHER	YES	NO	YES	NO	YES	NO	STATE BAR SYSTEM	OUTSIDE BAR	BOTH	YES	NO	YES/NO	INDEFINITELY	NO. YEARS	YES/NO	NO. YEARS	PERMANENTLY	OTHER
ALABAMA																					
ALASKA	N			X		X			X					X	Y	X		Y	5		
ARIZONA				X		X			X			X		X				N			
ARKANSAS				X			X		X	X				X	Y			Y			
CALIFORNIA																					
COLORADO	N			X		X		X			X			X	Y	X		Y	3		
CONNECTICUT				X		X		X				X		X	Y	X		Y		X	
DELAWARE																					
DISTRICT OF COLUMBIA	N			X		X			X					X	Y	X		Y	5		
FLORIDA	N			X		X			X	X			X		Y	X		N			
GEORGIA				X						X				X	Y	X		Y	4		
HAWAII	N			X			X		X					X	Y	X		Y		X	
IDAHO	N			X		X		X		X				X	Y			Y			
ILLINOIS				X		X		X				X	X		Y			Y			
INDIANA																					
IOWA				X											Y						
KANSAS				X		X			X		X			X	Y	X					
KENTUCKY	N			X		X							X		Y	X		Y	1		
LOUISIANA																					
MAINE																					
MARYLAND	N			X		X			X	X				X	Y	X		Y	5-12		
MASSACHUSETTS	N			X					X					X	Y	X		Y	6		
MICHIGAN				X		X		X				X									
MINNESOTA	N				X		X		X					X	Y	X		Y	5		
MISSISSIPPI	N			X		X			X		X		X		Y	X		Y		X	
MISSOURI				X			X		X					X	Y		5	N			
MONTANA	N			X			X		X		X		X		Y	X		Y		X	

STATES	LIMITS ON RESTITUTION			ATTYS. CAN APPEAL		BAR COUNSEL CAN APPEAL		CLIENTS CAN APPEAL		APPEALS TO			MONITOR DISBARRED ATTORNEYS		RECORDS MAINTAINED			DISMISSED CASE RECORDS MAINTAINED			
	Y/N	AMOUNT	OTHER	YES	NO	YES	NO	YES	NO	STATE BAR SYSTEM	OUTSIDE BAR	BOTH	YES	NO	YES/NO	INDEFINITELY	NO YEARS	YES/NO	YEARS	PERMANENTLY	OTHER
NEBRASKA				X		X			X	X				X	Y	X		Y	3		
NEVADA						X								X	Y	X		Y		X	
NEW HAMPSHIRE																					
NEW JERSEY						X		X				X		X	Y	X		Y	5		
NEW MEXICO	N			X			X	X		X				X	Y	X		Y	3		
NEW YORK (1ST)	N			X			X	X		X				X	Y			Y	7		
NEW YORK (2ND)				X		X			X	X				X	Y						
NEW YORK (3RD)																					
NEW YORK (4TH)																					
NORTH CAROLINA	N			X		X			X		X			X	Y	X		Y	1		
NORTH DAKOTA																					
OHIO	Y	X		X		X			X		X			X	Y	X		Y	3		
OKLAHOMA																					
OREGON				X		X		X		X					Y	X		Y		X	
PENNSYLVANIA	Y	X		X		X			X			X		X	Y	X		Y	6		
RHODE ISLAND					X		X		X					X	Y	X		Y			
SOUTH CAROLINA	N													X	Y	X		Y	3		
SOUTH DAKOTA																					
TENNESSEE	N			X		X			X		X		X		Y	X		Y		X	
TEXAS																					
UTAH				X		X		X				X			Y			Y		X	
VERMONT																					
VIRGINIA				X			X		X			X		X	Y		5	Y	5		
WASHINGTON	N			X		X			X			X		X	Y		5	Y	5		
WEST VIRGINIA				X			X			X				X	Y	X		Y			
WISCONSIN																					
WYOMING	N				X			X			X			X	Y	X	(*)	N			
TOTALS	N-19 Y-2	2	0	33	3	24	10	11	22	11	8	9	6	29	Y-37	27		Y-31 N-4		8	0

STATES	SKELETAL RECORD MAINTAINED		DISCIPLINE NOTICE:			CASES BECOME PUBLIC WHEN:				SYSTEM PUBLICIZED					
	YES	NO	SENT TO NEWSPAPER	PRINTED IN NEWSPAPER	PRINTED IN BAR PUBLICATION	COMPLAINT FILED	PROBABLE CAUSE/ AGENCY HEARING	COURT ACTION RECOMMENCED	PUBLIC DISCIPLINE IMPOSED	YES/NO	BROCHURE	YELLOW PAGES	DISCIPLINE PUBLISHED	PUBLIC SPEAKING	OTHER
ALABAMA							X								
ALASKA	X			X	X		X			Y	X		X		
ARIZONA			X		X				X	Y	X		X		
ARKANSAS				X	X				X	Y			X		
CALIFORNIA							X			Y	X		X		
COLORADO		X		X	X				X	Y	X		X	X	
CONNECTICUT							X			Y	X				
DELAWARE								X							
DISTRICT OF COLUMBIA	X		X	X	X			X		Y	X		X		
FLORIDA	X		X		X			X		Y	X	X	X	X	
GEORGIA										Y	X		X		
HAWAII								X		Y			X	X	
IDAHO	X			X	X				X	Y	X		X	X	
ILLINOIS			X		X			X		Y	X		X		
INDIANA								X							
IOWA									X	Y	X				
KANSAS				X			X			Y	X		X		
KENTUCKY				X	X				X	Y	X		X		
LOUISIANA								X							
MAINE								X							
MARYLAND	X		X		X			X		Y	X		X		
MASSACHUSETTS		X	X					X		Y	X		X		
MICHIGAN							X								
MINNESOTA	X		X		X			X		Y			X		
MISSISSIPPI	X		X	X	X				X	Y	X		X		
MISSOURI	X				X			X		Y	X		X	X	
MONTANA				X	X			X		Y				X	

STATES	SKELETAL RECORD MAINTAINED		DISCIPLINE NOTICE:			CASES BECOME PUBLIC WHEN:				SYSTEM PUBLICIZED					
	YES	NO	SENT TO NEWSPAPER	PRINTED IN NEWSPAPER	PRINTED IN BAR PUBLICATION	COMPLAINT FILED	PROBABLE CAUSE/ AGENCY HEARING	COURT ACTION RECOMMENDED	PUBLIC DISCIPLINE IMPOSED	YES/NO	BROCHURE	YELLOW PAGES	DISCIPLINE PUBLISHED	PUBLIC SPEAKING	OTHER
NEBRASKA	X			X	X			X		Y			X		
NEVADA	X		X		X			X		Y			X		•
NEW HAMPSHIRE								X							
NEW JERSEY			X		X			X		Y	X	X			
NEW MEXICO	X		X		X				X	Y			X		
NEW YORK (1ST)	X				X				X	Y			X	X	
NEW YORK (2ND)	X									N					
NEW YORK (3RD)															
NEW YORK (4TH)															
NORTH CAROLINA	X		X		X		X			Y	X		X		
NORTH DAKOTA															
OHIO	X				X			X		Y			X		
OKLAHOMA								X							
OREGON	.				X	X				Y	X		X		
PENNSYLVANIA	X				X			X		Y	X		X		
RHODE ISLAND				X	X				X	Y			X		
SOUTH CAROLINA	X			X	X				X	Y	X		X		
SOUTH DAKOTA									X						
TENNESSEE	X		X						X	Y	X				
TEXAS															
UTAH	X				X		X			Y			X		
VERMONT								X							
VIRGINIA	X		X		X				X	Y	X		X		
WASHINGTON		X		X	X	X				Y	X		X	X	
WEST VIRGINIA	X			X	X			X		Y	X		X	X	
WISCONSIN								X							
WYOMING		X		X	X				X	Y			X	X	
TOTALS	21	4	14	15	30	2	7	24	17	Y-38 N-1	25	2	31	10	0

STATES	HOW MADE PUBLIC					PUBLIC NOTICE ONLY FOR PUBLIC DISCIPLINE		BACKLOG		LENGTH
	COMPLAINT RECORD OPEN	COMPLAINT FILE OPEN	HEARING RECORD OPEN	NOTICE IN BAR PUBLICATION	OTHER	YES	NO	YES	NO	CASES (XXX)
ALABAMA										
ALASKA		X	X			X				
ARIZONA						X			X	
ARKANSAS						X			X	
CALIFORNIA										
COLORADO						X		X		
CONNECTICUT						X			X	
DELAWARE										
DISTRICT OF COLUMBIA				X		X				
FLORIDA	X		X			X				
GEORGIA						X				
HAWAII						X		X		170
IDAHO						X		X		
ILLINOIS						X				
INDIANA										
IOWA						X				
KANSAS	X	X				X			X	
KENTUCKY						X		X		
LOUISIANA										
MAINE										
MARYLAND						X		X		
MASSACHUSETTS						X		X		365
MICHIGAN						X		X		
MINNESOTA						X		X		
MISSISSIPPI						X				
MISSOURI		X				X				
MONTANA		X						X		

STATES	HOW MADE PUBLIC					PUBLIC NOTICE ONLY FOR PUBLIC DISCIPLINE		BACKLOG		LENGTH
	COMPLAINT RECORD OPEN	COMPLAINT FILE OPEN	HEARING RECORD OPEN	NOTICE IN BAR PUBLICATION	OTHER	YES	NO	YES	NO	NO. CASES
NEBRASKA	X	X	X	X					X	
NEVADA				X					X	
NEW HAMPSHIRE										
NEW JERSEY						X				
NEW MEXICO						X			X	
NEW YORK (1ST)						X				
NEW YORK (2ND)										
NEW YORK (3RD)										
NEW YORK (4TH)										
NORTH CAROLINA	X		X			X		X		
NORTH DAKOTA										
OHIO						X			X	
OKLAHOMA										
OREGON	X	X	X	X						
PENNSYLVANIA			X	X		X			X	
RHODE ISLAND						X		X		
SOUTH CAROLINA						X		X		
SOUTH DAKOTA										
TENNESSEE						X				
TEXAS										
UTAH	X	X	X	X		X				
VERMONT										
VIRGINIA										
WASHINGTON	X	X	X			X				
WEST VIRGINIA			X	X		X			X	
WISCONSIN										
WYOMING						X				
TOTALS	7	8	9	7	0	33	0	12	10	

Appendix III
Model Discipline Monitoring Commission

HALT drafted this model legislation with explanatory notes to support our recommendation that every state should empower a commission to provide the public with objective, detailed information, by an independent source, about the performance of a state's attorney discipline system. Only by having accurate, objective information can the public make an intelligent evaluation of how the system could be improved. HALT intends to use this model to urge states to create such independent commissions.

MODEL LEGISLATION
TO CREATE A MONITORING COMMISSION
ON ATTORNEY DISCIPLINE

Drafted by HALT — An Organization of Americans for Legal Reform

Section 1. Creation; Composition; Purpose

a) There is created an Attorney Discipline Monitoring Commission. The Commission appointments specified in Section 3 shall be made by no later than [two months after the legislation's effective date].

b) The Commission shall consist of five Commissioners, at least three of whom must be individuals who have never been members of the State Bar or admitted to practice law before any court. The Commissioners shall serve without compensation, but shall be reimbursed for per diem and travel expenses while engaged in Commission duties. To assist it in fulfilling its duties, the Commission shall hire a staff, as specified in Section 3.

c) The Commission shall investigate, monitor, evaluate, and make reports and recommendations regarding all programs and processes for handling complaints about attorney unresponsiveness, incompetence, fee disputes, and unethical conduct, including, but not limited to:

1) efforts to educate the public and make consumers aware that the discipline system exists and how they can use it;

2) the kinds of complaints registered with the State Bar, the implementation of rules, standards and guidelines, and the extent to which complaints may be and are acted upon;

3) the speed with which complaints are handled and decisions rendered;

4) the efficiency of the system;

5) the courtesy shown to complainants throughout the process, and the level of complainant satisfaction with the discipline process;

6) the openness of the system and the extent of public access to records and proceedings;

7) matters of procedural fairness to all parties involved;

8) the adequacy of program staffing and funding, and the disciplinary staff's evaluation of the system's performance;

9) consistency and appropriateness in applying sanctions, discipline, remedies, and referrals to programs or agencies outside the discipline system; and

10) the State Bar's cooperation with and the extent of regulatory activity by other governmental entities charged with enforcing related laws and regulations that affect members of the State Bar.

d) All records and meetings of the Commission shall be open to the public. The Commission shall take reasonable steps to encourage public attendance at its meetings and provide opportunities for public input.

Section 2. Duties of Commission and Its Staff; Duties of State Bar

a) At its first meeting, the Commissioners shall elect one of its nonattorney members as its Chairperson. The Chairperson shall assure that the Commission meets to consider and act upon the proposed findings and recommendations of its staff at least once every six months.

b) Reports and recommendations of the Commission must be approved by a majority of Commissioners. Individual Commissioners may issue separate or dissenting statements at their discretion.

c) The Commission shall issue its first written report of preliminary findings, conclusions, and recommendations to the Legislature by no later than [twelve months after the legislation's effective date], and make further such reports to the Legislature once every six months thereafter during its period of operation.

d) The Commission and its staff shall be available for oral reports and provide copies of all written reports to the State Bar, the State Supreme Court, and the Chairpersons of interested committees of the Legislature, and assure that sufficient copies of its reports are reproduced to be available to the public and the media.

e) The State Bar shall cooperate with the Commission and its staff, but neither the Commission nor its staff shall exercise any decision-making authority over the State Bar's operations or staff.

f) The State Bar shall provide to the Commission and its staff:

1) access to Grievance Committee hearings, and all case data, information, and files, in unsanitized form; and

2) advance notice of and access to all meetings of the State Bar or its subsidiary bodies relating to any topics which the Commission is charged with monitoring, including closed meetings and executive sessions.

g) The Commission and its staff shall comply with the State Bar's policy of keeping the names of complainants and respondents confidential.

Section 3. Appointment and Qualifications of Commissioners; Hiring of Staff

a) The three nonattorney members of the Commission shall be appointed as follows:

1) The Attorney General shall appoint one Commissioner who represents and has demonstrated experience working on behalf of consumers of legal services on discipline-related concerns;

2) The Chairperson of the Senate [Committee with jurisdiction over consumer affairs] shall appoint one Commissioner who represents and has demonstrated experience advocating on behalf of consumer concerns in general;

3) The Chairperson of the House [Committee with jurisdiction over consumer affairs] shall appoint one Commissioner who has demonstrated experience advocating the public interest in the field of occupational regulation.

b) The other members of the Commission shall be appointed as follows:

1) The Chief Justice of the Supreme Court shall appoint one Commissioner who has demonstrated experience in the actual operation of lawyer discipline procedures and the application of the ethical rules that apply to the legal profession;

2) The Governor shall appoint one Commissioner who has demonstrated knowledge and scholarship in the field of lawyer discipline, ethics, and competence.

c) In the event that a Commissioner is unable to serve for her or his entire term, the official who appointed that Commissioner shall appoint a replacement to fill the vacancy for the unexpired portion of the term.

d) The Commission shall hire for reasonable compensation an Executive Director. The Commission shall advertise the availability of the Executive Director position, interviews the applicants, and hire the successful applicant by no later than [four months after the legislation's effective date]. The successful applicant shall have investigative experience, be familiar with State laws and procedures, and be familiar with the rules and procedures of agencies that regulate matters bearing on consumer protection. The Commission shall supervise the Executive Director and has the authority to dismiss and replace her or him upon a majority vote of the Commissioners.

e) The Executive Director shall hire for reasonable compensation two Investigative Assistants and one Administrative Assistant. The Executive Director shall advertise the availability of these positions, interview the applicants, and hire the successful applicants by no later than [six months after the legislation's effective date]. The Executive Director shall supervise these employees, and has the authority to dismiss and replace them at her or his discretion.

Section 4. Effective Date; Period of Operation; Sunset

a) This Act shall take effect [at the next usual effective date for legislation enacted in the most recent legislative session].

b) The Commission shall monitor and issue reports on a continuing basis [for a period of three years from the date of the Commission's first report].

c) This statute shall remain in effect only until [the date specified in Section 4(b)], and on that date is repealed, unless a later enacted statute, which is enacted before [the date specified in Section 4(b)], extends that date.

Section 5. Funding of Commission Activities

a) On or before [the legislation's effective date], and annually on that date through [the Act's two year anniversary], the Board of Governors of the State Bar shall transmit the sum of one hundred thousand dollars (~~$100,000~~) to the State Comptroller, who shall transfer that sum to the state treasury to carry out the purposes of this Act.

b) There is hereby appropriated annually through [the Act's two year anniversary] an additional two hundred thousand dollars ($~~200,000~~) from the state treasury to carry out the the purposes of this Act.

EDR

EXPLANATORY NOTES

TO HALT'S MODEL LEGISLATION TO CREATE A MONITORING COMMISSION ON ATTORNEY DISCIPLINE

Legislative Intent

In most (33) states, the only agency with the authority to regulate lawyers and handle client complaints is the state bar association, which is accountable only to the state's highest court. In the other states, the state supreme court appoints the governing board officials who oversee the agency. Although this set-up is technically independent of the state bar, the bar exerts considerable influence over who sits on the disciplinary governing board, who runs the system, and how complaints are processed. Whether bar control is de jure or de facto, in both cases the state bar exercises control over attorney discipline.

Typically, these agencies have dismal consumer protection records — they dismiss the overwhelming majority of complaints, take forever to act on complaints, and in the end rarely impose serious sanctions. Nationally, roughly 98% of all complaints are dismissed with no public discipline imposed. Yet, because they operate in almost total secrecy, the public they are supposed to be protecting has no way to know for sure whether these agencies are in fact dismissing valid complaints. The few independent investigations that have been done, however, have revealed substantial problems.

Public outcry has often forced state bars to set up their own study commissions and even to make some reforms. These efforts, however, have rarely had credibility with the public or made any real difference in responding to consumers' concerns, primarily because the study commissions themselves are dominated by lawyers with token, if any, public participation (again, often operating in secret). And if any reforms are proposed, they tend to be only cosmetic.

Bar-controlled disciplinary agencies routinely claim that they are doing a good job, whereas consumers and groups like HALT claim that these agencies are serving consumers poorly.

The intent of this model legislation is to provide the public with objective, detailed information, gathered over a three-year period by an independent source, about the performance of a state's attorney discipline system. Only by having accurate, objective information can the public make an intelligent evaluation of whether that system adequately serves consumers' needs and debate whether and how the system could be improved.

Section-by-Section Explanation

Section 1. Creation; Composition; Purpose

This legislation is modeled after Chapter 1114 (SB 1643), CAL. BUS. & PROF. CODE § 6086.9 (Deering 1986), enacted by the California Legislature in 1986. A key difference, however, exists between that legislation and HALT's model. California's legislation provided for the appointment of one individual to serve as "Bar Monitor," whereas this legislation calls for the creation of a five member Commission.

Despite certain logistical advantages of appointing a single individual, HALT opted to create a Commission for two main reasons. First, the appointment of several individuals instead of just one increases the expertise and resources of the "Monitor." Five individuals can bring varied backgrounds and viewpoints to the task, a variety unlikely to be found in one individual.

More important, although the particular individual selected by the California Attorney General was viewed by consumers as an excellent choice, consumers cannot rely on such excellent appointments in every state. If an individual who is passive or even hostile to consumer interests is selected, the legislation is unlikely to produce a useful investigation in which the public can have confidence. HALT thought that the Commission structure better ensured that the public interest would be served by the legislation.

The Act mandates that the majority of Commissioners be nonlawyers. Because the purpose of the Act is to conduct an *independent* examination of the bar's consumer protection activities, it is vital that those being regulated and those doing the regulating — lawyers — not be able to control investigatory decisions or Commission recommendations. Therefore, at least three Commissioners must be nonlawyers, although there is no requirement that the remaining vacancies be filled by members of the bar.

The Commission's first purpose is to make a detailed investigation and report of at least ten facets of all the bar's programs and operations for dealing with consumer complaints about lawyers. Based on these findings, the Commission is expected to evaluate the agency's performance and make recommendations for improvement. Assuming that reforms are adopted, the Commission must then monitor and evaluate the impact of reforms, and make further recommendations, as appropriate.

The Commission is a public entity convened to conduct a public inquiry into the system. Therefore, all meetings and records of the Commission are open to the public. Further, the Commission is required not only to permit public participation, but to take reasonable steps to *encourage* public attendance at its meetings and public input into its decisions.

Reasonable steps to encourage public attendance might include holding meetings on weekends, sending advance notices of meetings to public interest organizations, posting notices in selected public places and places where clients of lawyers would likely be found, and placing ads or free announcements in newspapers. Reasonable steps to permit public input might include the holding of public hearings on proposed recommendations, publishing proposals in the state's register and seeking written comments from the public, or permitting the public to speak directly to the Commission at its meetings.

Section 8. Duties of Commission and Its Staff; Duties of State Bar

At a minimum, the Chairperson of the Commission is responsible for assuring that the Commission meets at least once every six months to consider and act upon the staff's proposed findings and recommendations. Nothing in the Act prevents the Commission from delegating other duties to the Chair or to the staff.

The Act spells out the process for making decisions and issuing reports. In keeping with the spirit of encouraging public participation, the Commission and its staff should attempt to inform the public, as well as the specified officials, about its findings and recommendations. For this reason, written reports should be made freely available to the public and the media.

A full and open investigation of the complaints process will require full cooperation from the Bar and its staff. The Act thus requires the Bar to cooperate, and to grant the Commission and its staff free access to relevant documents and proceedings. As part of this investigation, the Commission staff may wish to interview the Bar's staff about their views. But, access to Bar staff, documents, and meetings

does not give the the Commission staff any decision-making authority over the Bar's staff and operations.

HALT strongly objects to the policy of most agencies to keep the identities of the complaining clients and the respondent attorneys confidential. But, as long as this is the policy, the Commission and its staff are required to abide by it in the course of performing their duties.

Section 3. Appointment and Qualifications of Commissioners; Hiring of Staff

The appointments process is designed to increase the likelihood of a truly independent investigation that addresses consumers' concerns. First, as to *who makes the appointments*, the power is decentralized so as to assure that no one person's views dominate the Commission. All three branches of government participate in making the appointments. Second, to increase the Commission's accountability to the public, at least four of the five Commissioners are to be appointed by publicly-elected officials.

Third, the specific officials identified in the Act to make appointments were selected because of their likely familiarity with people who have the requisite qualifications. For example, because they are lobbied by consumer advocates, the Chairs of the legislative committees with jurisdiction over consumer matters are likely to be familiar with consumer advocates. In any given state, however, because of politics or the particular individuals involved, it may make sense to alter the appointers.

The same concern for an independent, effective investigation motivated HALT's choice of *who should be appointed*. Even when agencies have included public members on their committees, too often these members have had no experience dealing with consumer concerns. As a result, they have been ill-equipped to represent consumers' viewpoint and thus largely ineffective. In contrast, this legislation requires the three nonattorney members to have a firm grounding in three areas of consumer protection: attorney discipline, occupational regulation, and consumer concerns in general. The qualifications of the other two Commissioners are designed to bring to the Commission knowledge and expertise in lawyer ethics and attorney discipline.

Because the Commissioners are likely to be busy with their other jobs and are uncompensated, it is vital that the Commission have a staff to conduct the actual investigation and to prepare the reports. The Executive Director may but need not be a lawyer, and must have the relevant experience enumerated in the Act. To facilitate the Director's work and enable the Commission to "be" many places at once, the Act provides for the hiring of additional staff supervised by the Executive Director.

Section 4. Effective Date; Period of Operation; Sunset

The period of operation contemplated by Act is three and one half years, with the first six months allocated for start-up tasks, thereby permitting the Commission to have three full years for investigation and reporting. After this time, the Commission will sunset out of existence. Using the Act's effective date as the base from which the other deadlines are calculated, the timeline is as follows:

Start-up: Two months after effective date, named officials appoint Commissioners; the Commission then has two months to hire an Executive Director; and the Executive Director then has two months to hire the rest of the staff.

First Report: From the time the staff is hired, it has six months before the first report is due. Within this time, the staff must begin its investigation and propose preliminary findings; the Commission must meet to consider and vote on the staff's proposals; and the staff must be given time to produce a report of the Commission's findings. Thus,

there is no expectation that the first report be at all conclusive, either as to examination of system operations or recommendations for reform.

Successive Reports: Successive reports are due every six months thereafter, with the final report due three years after the deadline for the Commission's first report. It is expected that the Commission itself will meet at least every six months and in advance of report deadlines so that the staff has enough time to prepare reports on the Commission's decisions.

Obviously, all of these deadlines can and should be adjusted to mesh with the state's legislative schedule. It would be desirable, for example, to time the reports for when the legislature is in session or to permit legislative action on the Commission's recommendations, if appropriate. The deadline explanations within brackets can be replaced by particular dates.

Section 8. Funding of Commission Activities

HALT determined that the minimum annual budget needed to implement the legislation was around $300,000. It is contemplated that roughly half of this amount will be needed for staff salaries and benefits, and the other half is for travel, printing, and overhead costs of the staff and the Commission. Obviously, the budget can be adjusted based on available resources and other variables.

The Commission's funding comes from two sources: one third from the state bar association and two thirds from the state treasury. This financing arrangement is most appropriate for states in which bar membership is required and where the disciplinary agency is directly operated by the bar. Because, in these states, the lawyer-funded bar claims to be a public agency serving a public function, it makes sense for it to help finance the Commission's work.

In states with different set-ups, however, these provisions would probably need to be modified to comport with state traditions and circumstances. In states where the disciplinary agency is theoretically independent of the bar, the judicial branch's appropriation is another potential source of funds.

Appendix IV
Chronology of California 'Reforms'

The following chronology was prepared to accompany HALT — San Diego testimony, *Consumer Perspective on Reform of California's Attorney Discipline System*, presented on October 26, 1987, at a HALT sponsored public hearing on California's attorney-discipline system. It was also presented at a California State Bar hearing on attorney discipline held October 29, 1987, in Los Angeles.

The chronology demonstrates that the public has relied repeatedly on the California State Bar's promises to institute reforms that would resolve problems that have plagued the system for many years, yet the problems continue to persist and, in some instances, to become worse, largely because the "reforms" failed to address the fatal flaw — conflict-of-interest inherent in self-regulation.

CHRONOLOGY:
Seventeen Years of Attorney Discipline "Reform" in California

1970 American Bar Association's blue-ribbon Commission, chaired by former Supreme Court Justice Tom Clark, issues report calling U.S. attorney discipline systems "scandalous."

1976 Legislation introduced to require California Bar Board of Governors to include six nonlawyer members. The bar, attempting to head off legislation, opens Board meetings to the public for the first time. Despite bar lobbying, legislature passes bill requiring nonlawyer members.

1977 Nonlawyer members of Bar Board push for consumer protections, including requiring written fee agreements between lawyers and clients. One Board member angrily responds, "The State Bar is not a consumer protection agency!"

1983

Summer — Huge backlog of disciplinary cases "discovered" by disciplinary agency, some as much as 10 years old.

November — Bar appoints Subcommittee on Expediting the Disciplinary Process (a.k.a., the Coyle Commission) to recommend ways to reduce the backlog.

1984

March — Coyle Report documents backlog of 2,306 cases awaiting investigation; recommends, among other things, adding staff and funds to the Office of Trial Counsel and creating a Master Calendaring System.

September — Bar puts Coyle Commission recommendations into effect.

1985

March — *San Francisco Examiner* publishes HALT-award winning investigative series — "The Brotherhood" — on California attorney discipline system; indicts system as "slow, lenient and secretive."

September — Independent report by Los Angeles police commander Mark Kroeker recommends creating an Office of Investigation headed by a nonlawyer as a means of solving backlog problem. Bar endorses Kroeker recommendations.

September — Legislature, dissatisfied with bar efforts to reduce backlog, refuses to pass bill authorizing Bar to collect dues from lawyers.

Fall — "We will tolerate nothing but success in dealing with this [disciplinary] problem." — *Joe Gray, Chair, Bar Committee on Admissions & Discipline.*

Oct./Nov. — Bar seeks special legislative session for passage of bar dues bill: denied. Seeks intervention by Supreme Court: denied.

November — Bar enacts more reforms, including guidelines for penalties.

December — Backlog of 6-month-old discipline cases reaches 2,345. Bar announces it will start reducing backlog by dismissing more cases without investigation.

1986

January — Sen. Robert Presley (D-Riverside) introduces bill to remove the discipline system from control of Bar. Bar dues bill passes.

May — Backlog of 6-month-old discipline complaints climbs to 2,810—"the highest in memory," says Coyle Commission.

June — "These new rules are working . . . . [T]ransferring discipline to some 'independent state agency' is, at the least, premature." — *Bar President David Heilbron writing in* California Lawyer.

June — Under heavy lobbying from the Bar, Presley bill is amended to let the bar keep the discipline system but create oversight position, "Bar Monitor," in Attorney General's office. Amended bill is enacted over heavy Bar opposition.

September — Sen. Presley holds press conference to hail signing of Bar Monitor bill. HALT, other consumer groups promise not to end vigilance.

1987

January — Robert Fellmeth of University of San Diego's Center for Public Interest Law appointed Bar Monitor.

June — Bar Monitor publishes first report, documents widespread and serious problems with how the system works.

September — Attorney General John Van de Kamp delivers address to Bar's annual meeting, advocates use of administrative law judges in discipline system.

October — "It's time for our critics to step back and let the system we are designing and improving to take hold. The job is getting done, just give us a reasonable amount of time to do it." — *New Bar President Terry Anderlini, addressing Bar's annual meeting.*

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About HALT

Halt — An Organization of Americans for Legal Reform is a national nonpartisan public interest group of more than 150,000 members. It is dedicated to enabling all people to dispose of their legal affairs simply, affordably and equitably. Through education and advocacy, HALT pursues an ambitious program to improve the quality, reduce the cost and increase the accessibility of the civil justice system.

Many members join HALT because of their concern about lawyer regulation. In 1987 alone, HALT received approximately 900 letters from consumers seeking help with a problem with a lawyer or complaining that their state's attorney-discipline system failed to take adequate action on their complaint.

HALT pursues advocacy at the state and federal levels. In addition to reform of attorney discipline, HALT supports:

✓ Developing standard do-it-yourself forms and simplified procedures for routine legal matters such as wills, uncontested divorces and simple bankruptcies.

✓ Creating pro-consumer alternatives to the tort system, such as alternative compensation systems that guarantee swift and fair compensation for those injured.

✓ Reforming "unauthorized practice of law" (UPL) rules which forbid nonlawyers from handling even routine, uncontested matters and which limit consumers' options and make legal services unaffordable to many.

To achieve its education goals, HALT publishes *Citizens Legal Manuals* and an *Everyday Law Series* of brief legal guides to increase consumers' ability to handle their own legal affairs and become informed users of legal services. Written in easy-to-understand language, these materials explain basic legal principles and procedures, including step-by-step "how to" instructions and lists of other resources.

HALT's quarterly magazine, *The Legal Reformer*, is the only national periodical of legal reform news. It informs readers about major legal reform developments and what

they can do to help. For members active in HALT's growing network of community-based chapters, news of local activities is covered in a monthly newsletter, *Frontlines.*

HALT's activities are funded by member contributions.