ALASKA LEGISLATURE COMMITTEE FILES, 1989-1990 8672
6367 SENATE JUDICIARY

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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.

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

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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Appendices

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