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neglect, with the result that the lawyer causes injury or potential injury to a client. Most cases involve lawyers who do not communicate with their clients. For example, in *In re Earl J. Taylor*, 666 Ill. 2d 567, 363 N.E.2d 845 (1977), a lawyer was suspended for one year when he failed to appear at a criminal hearing, failed to file a divorce action, and failed to prosecute a civil case. In the third case, the lawyer told the client that "he'd take care of everything," yet did not contact her or return her telephone calls. This last client suffered a default judgment, which forced her to settle and pay a second lawyer; the first two clients suffered the loss of the fee. See also: *Hunt v. Disciplinary Board of the Alabama State Bar*, 381 So. 2d 52 (Ala. 1980); *People v. Dixon*, 616 P.2d 103 (Colo. 1980).

4.43 Reprimand is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client and causes injury or potential injury to a client.

Commentary

Most courts impose a reprimand when the lawyer is negligent. For example, in *In re Logan*, 70 N.J. 222, 358 A.2d 787 (1976), a lawyer who neglected a client matter was reprimanded when, knowing that a motion for reduction of alimony was dependent on the court's examination of his client's tax return, he failed to file a copy of the tax return with the court. See also: *In re Donohue*, 77 A.D.2d 112, 432 N.Y.S.2d 498 (1980), where a lawyer neglected an estate matter, but where the estate was eventually closed to the satisfaction of all parties and with no financial loss, and *Louis Lan*, DP-194180 (Mich. Atty. Dis. Board 1980), where the lawyer attempted to transfer cases to other lawyers without adequately communicating with his clients.

4.44 Admonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client.

4.5 *Lack of Competence*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:

4.51 Disbarment is generally appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

Commentary

Disbarment should be imposed on lawyers who are found to have engaged in multiple instances of incompetent behavior. Since disbarment is such a serious sanction, it should rarely be imposed on a lawyer who has demonstrated only a single instance of incompetence; rather, disbarment should be imposed on lawyers whose course of conduct demonstrates that they cannot or will not master the knowledge and skills necessary for minimally competent practice. For example, in *The Florida Bar v. Blaha*, 366 So.2d 443 (Fla. 1978), the court disbarred a lawyer who totally mishandled a guardianship and real estate transaction, and also filed a complaint for another client in the wrong court, such that relief was denied. In representing a third client, the lawyer mishandled a replevin action, filing replevin under old rules at a time when his client had not yet perfected a security interest necessary to support the action. As a result of this incompetence, the lawyer was eventually held in contempt and fined $3,000.

4.52 Suspension is generally appropriate when a lawyer engages in an area of practice in which the lawyer knows he or she is not competent, and causes injury or potential injury to a client.

Commentary

In order to protect the public, a suspension should be imposed in cases when a lawyer engages in practice in areas in which a lawyer knows that he or she is not competent. In such cases, it may also be

appropriate to attach certain conditions to the suspension, such as a requirement that the lawyer pass the bar examination or limit his or her practice to certain areas.

Such a situation arose in the case of *Office of Disciplinary Counsel v. Henry*, 664 S.W.2d 62 (Tenn. 1983), where the lawyer mishandled four cases in a relatively short period of time. In one case, the lawyer attempted to represent a client charged with murder. The lawyer had never handled any felony case before, and yet did not associate any lawyer with him. He made little investigation of the crime, and filed motions based on statutes which had been superceded. Further, he severely damaged his client's case by filing an "amended answer" to the indictment, following the form which would be filed in a civil action, which set forth his client's version of the homicide. The court imposed a two-year suspension with reinstatement conditioned "upon a showing that he has obtained a level of competence adequate to justify the issuance of a license" (664 S.W.2d at 64).

4.53 Reprimand is generally appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or

(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

Commentary

Most courts impose reprimands on lawyers who are incompetent. For example, in *The Florida Bar v. Gray*, 380 So.2d 1292 (Fla. 1980), the lawyer agreed to represent a client in a claim of violation of the truth in lending laws, but, although the evidence showed that he expected to become qualified in this area, he did not engage in sufficient study and investigation to become competent (only securing a number of laymen's publications). The court imposed a public reprimand. Similarly, in *State ex rel. Nebraska State Bar Association v. Holscher*, 193 Neb. 729, 230 N.W.2d 75 (1975), a county lawyer who filed a claim for services he rendered in foreclosing tax sale certificates without familiarizing himself with the statute prescribing the fee for such services received a reprimand.

While reprimand alone can be appropriate, a combination of reprimand and probation is often a more productive approach. Probation can be very effective in assisting lawyers to improve their legal skills. The court can use probation creatively, imposing whatever conditions are necessary to assist that particular lawyer. It may be appropriate, for example, to require an inexperienced lawyer to associate with co-counsel. In *Florida Bar v. Glick*, 383 So. 2d 642 (Fla. 1980), the court imposed a reprimand and one-year probation on a lawyer who mishandled a quiet title action. The court imposed the following conditions of probation: that the lawyer refrain from representing clients in real estate matters and that he complete 30 hours of approved continuing education courses in real property.

4.54 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether he or she is competent to handle a legal matter, and causes little or no actual or potential injury to a client.

4.6 *Lack of Candor*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent to benefit the lawyer or another, and causes serious injury or potentially serious injury to a client.

Commentary

Disbarment is appropriate when a lawyer intentionally abuses the fiduciary relationship, making misrepresentations to a client in order to benefit himself or another and causing serious injury or potentially serious injury to a client. (For a discussion of lack of candor before a court, see Standard 6.1). For exam-

ple. In *Matter of Wolfson*, 313 N.W.2d 596 (Minn. 1981), the court disbarred a lawyer who asked a client to help him arrange for a loan, and who misrepresented that the loan was for medical treatment for his daughter, when the loan was actually used in his wife's business. The client personally guaranteed payment of the loan and, when the lawyer failed to repay it, the client had to institute legal action against the lawyer to obtain an $832.61 judgment. In imposing disbarment, the court stated that the lawyer had not "hesitated to use his knowledge and skill as a lawyer for improper purposes" (313 N.W.2d at 602). (Note: The lawyer had also engaged in acts of neglect and abuse of the legal process.) Similarly, in (anonymous) 49 Cal. State Bar J. 73 (1974), a lawyer was disbarred after he borrowed money from two clients, falsely leading them to believe that he was solvent, with the result that the clients received an unsecured promissory note. In *Virginia State Bar ex rel. Eighth District Committee v. Fred W. Bender, Jr.*, No. 50228 (Va. App. Ct. 1981), the court revoked the license of a lawyer who intentionally overstated the number of hours he worked on a client's estate to make it appear that he was entitled to $9,500.

4.62 Suspension is generally appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client.

Commentary

Suspension is appropriate when a lawyer knowingly deceives a client, although not necessarily for his own direct benefit, and the client is injured. The most common cases are those in which a lawyer misrepresents the nature or the extent of services performed. For example, in *Kentucky Bar Association v. Reed*, 623 S.W.2d 228 (Ky. 1981), the court suspended a lawyer for one year when he misrepresented the status of three different cases and all three clients suffered injury (two clients suffered a summary judgment against them and another client was denied a settlement payment for an extensive period of time).

4.63 Reprimand is generally appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes injury or potential injury to the client.

Commentary

Reprimand is justified when the lawyer is merely negligent and there is injury or potential injury to a client. In *Hawkins v. State Bar*, 23 Cal.3d 622, 591 P.2d 524, 153 Cal. Rptr. 234 (1979), a lawyer received a public reproval (reprimand) when he failed to fully explain to his clients the nature of a contingency interest which he possessed in insurance proceeds used to satisfy an adverse judgment against the clients in a personal injury action.

4.64 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in failing to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

5.0 *Violations of Duties Owed to the Public*

Introduction

The most fundamental duty which a lawyer owes the public is the duty to maintain the standards of personal integrity upon which the community relies. The public expects the lawyer to be honest and to abide by the law; public confidence in the integrity of officers of the court is undermined when lawyers engage in illegal conduct [Rules 8.4(b) and (c)/DR 1-102(A)(3)(4)) and (5)]. In addition, a lawyer who serves as a public official has the duty to avoid using his public position to obtain any special advantage for himself or a client, or to influence a tribunal to act in favor of himself or a client [Rules 3.5(a), 8.4(e) and (f)/DR 8-101 through DR 8-103, DR 9-101(c)]. Finally, prosecutors have a special obligation to protect the public interest by insuring that charges are brought only after a finding of probable cause, and that exculpatory evidence is turned over to the accused (Rule 3.8(a)/DR 7-103).

It is important to note that the ABA Standards for Lawyer Discipline provide that the court should place a lawyer on interim suspension immediately and without reference to the pendency of an appeal upon proof that the lawyer has been convicted of a "serious crime" or is causing great harm to the public (Standard 6.5). A "serious crime" is defined as any felony and any lesser crime a necessary element of which involves interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, theft, or an attempt or a conspiracy to commit a "serious crime." The sanctions which are set out below are those which should be imposed as final discipline, at which time the interim suspension should be terminated (Standard 6.6).

5.1 *Failure to Maintain Personal Integrity*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is generally appropriate when:

(a) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

Commentary

A lawyer who engages in any of the illegal acts listed above has violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity. This duty to the public is breached regardless of whether a criminal charge has been brought against the lawyer. In fact, this type of misconduct is so closely related to practice and poses such an immediate threat to the public that the lawyer should be suspended from the practice of law immediately pending a final determination of the ultimate discipline to be imposed (see Standards for Lawyer Discipline, Standard 6.5).

In imposing final discipline in such cases, most courts impose disbarment on lawyers who are convicted of serious felonies. As the court noted in a case where a lawyer was convicted of two counts of federal income tax evasion and one count of subornation of perjury, "we cannot ask the public to voluntarily comply with the legal system if we, as lawyers, reject its fairness and application to ourselves." *In the Matter of Grimes*, 414 Mich. 483, 326 N.W.2d 380 (1982). See also: *In re Fry*, 251 Ga. 247, 305 S.E.2d 590 (Ga. 1983), conviction of murder; *Sixth District Committee of the Virginia State Bar v. Albert C. Hodgson*, No. 80-18 (Va. Disciplinary Board, 1981), where a lawyer advised a client that he could make arrangements to have her husband killed in lieu of bringing a child custody suit.

5.12 Suspension is generally appropriate when a lawyer knowingly engages in criminal conduct

which does not contain the elements listed in Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

Commentary

Lawyers who engage in criminal conduct other than that described above in Standard 5.11 should be suspended in cases where their conduct seriously adversely reflects on their fitness to practice. As in the case of disbarment, a suspension can be imposed even where no criminal charges have been filed against the lawyer. Not every lawyer who commits a criminal act should be suspended, however. As pointed out in the Model Rules of Professional Conduct:

> Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, or breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.[30]

The most common cases involved lawyers who commit felonies other than those listed above, such as the possession of narcotics or sexual assault. See: *In re Robideau*, 102 Wis. 2d 16, 306 N.W. 2d 1 (1981), suspension for three years for contributing to the delinquency of a minor and possession of a controlled substance; *In re Lanier*, 309 S.E.2d 754 (S.C. 1983), indefinite suspension for possession of marijuana; *In re Safran*, 18 Cal.3d 134, 554 P.2d 329, 133 Cal. Rptr. 9 (1976), suspension for three years for conviction of two counts of child molesting.

5.13 Reprimand is generally appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

Commentary

There are few situations not involving fraud or dishonesty which are sufficiently related to the practice of law to subject a lawyer to discipline. The Arizona Supreme court applied this standard in *In re Johnson*, 106 Ariz. 73, 471 P.2d 269 (1970), a case where a lawyer was charged with assault, stating that "isolated, trivial incidents of this kind not involving a fixed pattern of misbehavior find ample redress in the criminal and civil laws. They have none of the elements of moral turpitude, arising more out of the infirmities of human nature. They are not the appropriate subject matter of a solemn reprimand by this court" (471 P.2d at 271). However, a pattern of repeated offenses, even ones of minor significance when considered separately, can indicate such indifference to legal obligation as to justify a reprimand.

There can be situations, however, in which the lawyer's conduct is not even criminal, but, because it is directly related to his or her professional role, discipline is required. For example, in *In re Lamberis*, 93 Ill.2d 222, 443 N.E.2d 549 (1982), the court imposed a censure [reprimand] on a lawyer who knowingly plagiarized two published works in a thesis submitted in satisfaction of the requirements for a master's degree. The court noted that although the lawyer's conduct might appear to be "fairly distant from the practice of law," discipline was "appropriate and required because both the extent of the appropriated material and the purpose for which it was used evidence the respondent's complete disregard for values that are most fundamental in the legal profession" (443 N.E.2d at 551). Specifically, the lawyer's plagiarism displayed "an extreme cynicism toward the property rights of others," and a "lack of honesty which cannot go undisciplined, especially because honesty is so fundamental to the functioning of the legal profession" (443 N.E.2d at 551-52).

5.14 Admonition is generally appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

5.2 *Failure to Maintain the Public Trust*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who en-

gage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official:

5.21 Disbarment is generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

Commentary

The public officials who are subject to disbarment generally engage in conduct involving fraud and deceit, and are generally subject to criminal sanctions as well. For example, in *In re Rosenthal*, 73 Ill.2d 46, 382 N.E.2d 257 (1978), two lawyers were disbarred who participated in an extortion scheme to benefit their client as part of a zoning request. One of the lawyers was an assistant Attorney General, a fact which the court emphasized as significant in imposing disbarment: "Despite his obligations as a law officer, he knowingly participated and furthered conduct which he knew to be illegal, and then, further, deliberately misled federal agents" (382 N.E.2d at 262). The court concluded, "corruption within government could not, in most instances, thrive but for those few attorneys, who, like respondents, are willing to tolerate such illegal activity if it will benefit their client. The practice of law is a privilege and demands a greater acceptance of responsibility and adherence to ethical standards than respondents have demonstrated" (382 N.E.2d at 261).

5.22 Suspension is generally appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

Commentary

Suspension is an appropriate sanction when lawyers who are public officials knowingly act improp-
38 erly, but not necessarily for their own benefit. For example, in *In re DeLucia*, 76 N.J. 329, 387 A.2d 362 (1978), a judge fixed a traffic ticket by entering a not guilty judgment when no hearing had been held. He later attempted to cover up his wrongdoing by preparing an affidavit with a backdated acknowledgment. Disciplinary proceedings were instituted after the lawyer had resigned from his part-time judgeship. The court imposed a one-year suspension, noting that he did not personally benefit. Similarly, in *In re Weishoff*, 75 N.J. 326, 382 A.2d 632 (1978), the court held that a municipal prosecutor's knowing participation in an improper disposition of a traffic ticket warranted a one-year suspension. In *In re Vasser*, 75 N.J. 357, 382 A.2d 1114 (1978), the court imposed a six-month suspension on a lawyer/part-time judge who improperly practiced law and also interceded in another court to obtain a postponement of a trial to give his client an advantage in an unrelated civil matter. The lawyer also used official court stationery with respect to a transaction relating solely to his private law practice. The court noted that "the instances of proved misconduct did not assume egregious proportions. His improper intercession in the neighboring municipal court apparently did not result in any tangible or lasting distortion of justice" (382 A.2d at 1117).

5.23 Reprimand is generally appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

Commentary

In *In re Shafir*, 92 N.J. 138, 455 A.2d 1114 (1983), the court imposed a public reprimand on a county prosecutor who improperly placed his supervisor's signature on forms filed in plea bargaining cases. The lawyer stated that he believed he had explicit or implicit authority to sign what he thought were internal records and the disciplinary committee found that the lawyer "was not motivated by personal gain but only by a desire to move cases on his trial list" (455 A. 2d at 1116). Similarly, in *State v. Socclofsky*, 233 Kan. 1020, 666 P.2d 725 (1983), the court imposed a public censure [reprimand] on a county attorney who anonymously mailed to discharged members of a jury a copy of a newspaper article describing that the acquitted defendant had subsequently pled guilty to a misdemeanor charge of delivery of L.S.D. in an

unrelated case. Some of the jurors who received the mailing were called for service only a month later. The lawyer testified that he would not have mailed the article had he realized that the jurors were to be called for further service, and, that in his experience as a prosecutor, "he had never seen jurors called back for further duty so soon" (666 P.2d at 726).

5.24 Admonition is generally appropriate when a lawyer in an official or governmental position engages in an isolated instance of negligence in not following proper procedures or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process.

6.0 *Violations of Duties Owed to the Legal System*

Introduction

Lawyers are officers of the court, and the public expects lawyers to abide by the legal rules of substance and procedure which affect the administration of justice. Lawyers must always operate within the bounds of the law, and cannot create or use false evidence, or make false statement of material fact [Rules 3.3, 3.4, and 4.1/DR 7-102(A)]. Ethical standards require that a lawyer refrain from filing frivolous suits (Rule 3.1/DR 7-102), delaying a trial (Rule 3.2/DR 7-102), improperly communicating with a party, juror, witness, or judge (Rules 3.5, 4.2, 4.3/DR 7-104, DR 7-108 through DR 7-110), threatening criminal prosecution (DR 7-105), or otherwise interfering with a legal process (Rules 3.4, 3.6, 4.1, 4.4/DR 7-106 and DR 7-107).

6.1 *False Statements, Fraud, and Misrepresentation*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court:

6.11 Disbarment is generally appropriate when a lawyer, with the intent to deceive the court, makes a false statement, submits a false document, or improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

Commentary

The lawyers who engage in these practices violate the most fundamental duty of an officer of the
40 court. As the court noted in a case in which a criminal defense lawyer was disbarred for putting a client on the stand to testify falsely, "A lawyer's participation in the presentation of knowing false evidence is the clearest kind of ethical breach" [*Board of Overseers of the Bar v. James Dineen*, No. 83-46 (Maine 1983) at 4]. In *Office of Disciplinary Counsel v. Grigsby*, 493 Pa. 194, 425 A.2d 730 (1981), a lawyer was disbarred where he filed a false sworn pleading in connection with a pending garnishment proceeding. The pleading stated that the funds in the lawyer's checking account belonged to clients and could not be reached. The lawyer's action to save his money from garnishment was both intentional and damaging to his creditors. Similarly, in *Matter of Discipline of Agnew*, 311 N.W.2d 869 (Minn. 1981), the court disbarred a lawyer who refused to return a client's documents after an initial consultation and, without the client's knowledge or consent, then instituted a suit on his behalf in which he made false allegations that the client had been harmed by the defendant. Because of the lawyer's actions, the client incurred legal bills of $8,000 and lost time appearing in court to obtain his own documents.

6.12 Suspension is generally appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Commentary

Suspension is appropriate when a lawyer has not acted with intent to deceive the court, but when he knows that material information is being withheld and does not inform the court, with the result that there is injury or potential injury to a party, or an adverse or potentially adverse effect on the legal proceeding. For example, in *In re Nigohosian*, 88 N.J. 308, 442 A.2d 1007 (1982), the court suspended a lawyer for six months when he failed to disclose to the court or to opposing counsel the fact that he had previously conveyed property that was the subject of a settlement to someone else. The court noted that, while a lawyer does not have a continuing obligation to inform the court of the state of a client's assets, he "has a

duty of disclosure of any significant fact" touching upon the status of an asset which is the subject matter of a stipulation before the court (442 A.2d at 1009).

6.13 Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

Commentary

Reprimand is appropriate when a lawyer is merely negligent. For example, in *Gilbert E. Meitry*, D.P. 144/81 (Mich. Atty. Dis. Brd. 1981), the lawyer was publicly reprimanded where he accidentally filed a motion for a bond which contained inaccurate statements. Similarly, in *In re Coughlin*, 91 N.J. 374, 450 A.2d 1326 (1982), the court held that a public reprimand should be imposed on a lawyer who did not follow proper procedures in acknowledging a deed (neglecting to secure the grantor's acknowledgement in his presence). The court noted that "his actions were not grounded on any intent of self-benefit, nor was any one harmed as a result of his actions" (450 A. 2d at 1327). In *Davidson v. State Bar*, 17 Cal. 3d 570, 551 P.2d 1211, 131 Cal. Rptr. 379 (1976), the court imposed a public reprimand on a lawyer who failed to disclose to the court the location of his client in a child custody case when his conduct occurred in confused circumstances caused by contradictory *ex parte* custody orders.

6.14 Admonition is generally appropriate when a lawyer engages in an isolated instance of neglect in determining whether submitted statements or documents are false or in failing to disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect on the legal proceeding.

6.2 *Abuse of the Legal Process*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:

6.21 Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party, or causes serious or potentially serious interference with a legal proceeding.

Commentary

Lawyers should be disbarred for intentionally misusing the judicial process to benefit the lawyer or another when the lawyer's conduct causes injury or potentially serious injury to a party, or serious or potentially serious interference with a legal proceeding. For example, in *In the Matter of Daniel Friedland*, 416 N.E.2d 433 (Ind. 1981), the lawyer filed charges against members of the Disciplinary Committee and witnesses in the lawyer disciplinary hearing. The lawyer attempted to use the lawsuit to intimidate and discredit those who administered and prosecuted grievances against him. In holding that the lawyer was not protected by the First Amendment, the court recognized the harm to judicial integrity. "It is the Constitutional duty of this Court, on behalf of sovereign interest, to preserve, manage, and safeguard the adjudicatory system of this State. The adjudicatory process cannot function when its officers misconstrue the purpose of litigation. The respondent attempted to influence the process through the use of threats and intimidation against the participants involved. This type of conduct must be enjoined to preserve the integrity of the system. The adjudicatory process, including disciplinary proceedings, must permit the orderly resolution of issues; Respondent's conduct impeded the order of this process" (416 N.E. 2d at 438). See also: *In re Crumpacker*, 269 Ind. 630, 383 N.E.2d 36 (1978), where the court disbarred a lawyer who had engaged in nineteen acts of misconduct, including shouting at and verbally abusing witnesses and op-

posing counsel, taking an action merely to harass another, and generally using offensive tactics. In the words of the court, his misconduct showed that he was "a vicious, sinister person, tunnel-visioned by personal pique, willing to forego all professional responsibilities which conflict with acts of preconceived vengeance on personal enemies" (383 N.E.2d at 52).

6.22 Suspension is appropriate when a lawyer knows that he is violating a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding.

Commentary

In many cases, lawyers are suspended when they knowingly violate court orders. Such knowing violations can occur when a lawyer fails to comply with a court order that applies directly to him or her, as in the case of lawyers who do not comply with a divorce decree ordering spousal maintenance or child support. Suspension is also appropriate where the lawyer interferes directly with the legal process. For example, in *In re Vincenti*, 92 N.J. 591, 458 A.2d 1268 (1983), the court imposed a suspension for one year and until further order of court where the lawyer made repeated discourteous, insulting and degrading verbal attacks on the judge and his rulings which substantially interfered with the orderly trial process. The court noted that it was not confronted with "an isolated example of loss of composure brought on by the emotion of the moment; rather, the numerous instances of impropriety pervaded the proceedings over a period of three months" (458 A. 2d at 1274).

6.23 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

Commentary

Most courts impose a reprimand on lawyers who engage in misconduct at trial or who violate a court order or rule that causes injury or potential injury to a client or other party, or who cause interference or potential interference with a legal proceeding. For example, in *McDaniel v. State of Arkansas*, 640 S.W. 2d 442 (Ark. 1982), a lawyer who failed to file briefs in a timely manner after having been given extensions received a reprimand. In *Florida Bar v. Rosenberg*, 387 So. 2d 935 (Fla. 1980), the court imposed a reprimand on a lawyer who used harassing delay tactics at trial and who also refused to send copies of documents to opposing counsel. Courts also impose reprimands when lawyers neglect to respond to orders of the disciplinary agency. For example, in *In re Minor*, 658 P.2d 781 (Alaska 1983), the court imposed a public censure [reprimand] on a lawyer who, because of poor office procedures, neglected to respond to a letter from the Alaska Bar Association.

6.24 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with a legal proceeding.

6.3 *Improper Communications with Individuals in the Legal System*

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving attempts to influence a judge, juror, prospective juror or other official by means prohibited by law:

6.31 Disbarment is generally appropriate when a lawyer:

(a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

(b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or

(c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.

Commentary

Disbarment is warranted in cases where the lawyer uses fraud or undue influence to injure a party or to affect the outcome of a legal proceeding. For example, in *In the Matter of Stroh*, 97 Wash. 2d 289, 644 P.2d 1161 (1982), a lawyer was disbarred when he was convicted of tampering with a witness. The court justified imposing disbarment on the following basis: "First, the crime of tampering with a witness strikes at the very core of the judicial system and therefore necessarily involves moral turpitude. . . . An attorney presents his case almost entirely through the testimony of witnesses. Although an occasional witness may perjure him/herself, the presentation of the opponent's other witnesses and effective cross-examination frequently reveals the falsehood before a fraud has been perpetrated upon the court. A witness, tampered by an attorney, however, becomes much more destructive to the search for truth. That witness, privy to the testimony of other witnesses, can avoid the pitfalls of contradiction and refutation by judicious fabrication. Vigorous cross-examination may become ineffective as the coached witness would know both the questions and the proper answers. In sum, the legal system is virtually defenseless against the united forces of a corrupt attorney and a perjured witness" (644 P.2d at 1165). Similarly, in *Matter of Holman*, 286 S.E.2d 148 (S.C. 1982), a lawyer was disbarred who was convicted of contempt of court based on a communication with a member of a jury selected for trial.

6.32 Suspension is generally appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

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Commentary

In the case of *John Arnold Fitzgerald* (Tenn. 1980) (unpublished decision), a lawyer was suspended for one year for threats to an opposing party. Similarly, in *The Florida Bar v. Lopez*, 406 So.2d 1100 (Fla. 1982), a lawyer was suspended for one year where he urged two parties he was suing on behalf of his client to change their testimony in exchange for general releases from prosecution. In imposing this sanction, the court rejected a referee's recommendation of a three-month suspension with automatic reinstatement, stating, "we feel that a three-month suspension is insufficient to impress upon respondent, the bar, and the public our dissatisfaction with and distress over his conduct. If Mr. Lopez had been convicted in a court of this state of tampering with a witness, he would have been subject to a one-year term of imprisonment. Using the witness-tampering statute as a guideline, we find a one-year suspension appropriate in this case" (406 So. 2d at 1102). In *The Florida Bar v. Mason*, 334 So. 2d 1 (Fla. 1976), the court imposed a reprimand and suspension for one year and until proof of rehabilitation when a lawyer engaged in ex parte communications with justices of the Florida Supreme Court concerning the merits of a pending case and subsequently concealed his actions from opposing counsel.

6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

Commentary

Most courts impose reprimands on lawyers who engage in improper communications. For example, in *In re McCaffrey*, 549 P.2d 666 (Or. 1976), the court imposed a reprimand on a lawyer who unknowingly improperly communicated with a party represented by a lawyer. Even though the lawyer claimed that he thought the party, the husband in a dispute of visitation, was representing himself, the court stated that

discipline could be imposed in cases of misconduct that the rule is designed to prevent, and it is "immaterial whether the communication is an intentional or a negligent violation of the rule" (549 P.2d at 668).

6.34 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in improperly communicating with an individual in the legal system, and causes little or no actual or potential injury to a party, or causes little or no actual or potential interference with the outcome of the legal proceeding.

7.0 *Violations of Duties Owed to the Profession*

Introduction

The Model Rules include many ethical standards that are not fundamental to the professional relationship but which define certain standards of conduct. These standards concern restrictions on advertising (Rules 7.1, 7.2, 7.4, 7.5/DR 2-101, DR 2-102, DR 2-105), recommending employment (Rule 7.3/DR 2-103, DR 2-104), fees (Rules 1.5, 5.4 and 5.6/DR 2-106, DR 2-107 and DR 3-102), and assisting unauthorized practice (Rule 5.5/DR 3-101 and DR 3-103). Other such standards include the duty to comply with proper procedures for admission to the bar (Rule 8.1/DR 1-101), to report other lawyers who engage in unethical behavior (Rule 8.3/DR 1-103) and to properly withdraw from representation [Rule 1.16/DR 2-110].

While these standards have been developed out of a desire to protect the public, such as by restricting practice to those persons who have met appropriate educational requirements, a violation of these standards generally is less likely to cause injury to a client, the public, or the administration of justice than the other standards discussed above. In fact, in the area of advertising, the United States Supreme Court has ruled that lawyer advertising is protected by the First Amendment and has struck down certain ethical prohibitions on advertising [see *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. E. 2d 810 (1977), *In re R.M.J.*, 455 U.S. 191, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982); *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 53 U.S.L.W. 4587, decided May 28, 1985].

In general, then, a sanction of disbarment or suspension will rarely be required, and a sanction of reprimand, admonition or probation will be sufficient to insure that the public is protected and the bar is educated. While it will as a rule be inappropriate to impose a sanction of disbarment or suspension for six months or more, there are situations when a more severe sanction should be imposed. The standards set out below identify those exceptional situations.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving false or misleading communication about the lawyer or the lawyer's services, improper communication of fields of practice, improper solicitation of professional employment from a prospective client, unreasonable or improper fees, unauthorized practice of law, improper withdrawal from representation, or failure to report professional misconduct.

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Commentary

Disbarment should be imposed in cases when the lawyer knowingly engages in conduct that violates a duty owed to the profession with the intent to benefit the lawyer or another, and which causes serious injury or potentially serious injury to a client, the public or the legal system. For example, disbarment is appropriate when a lawyer intentionally makes false material statements in his application for admission to the bar. For example, in *In re W. Jason Mitan*, 75 Ill. 2d 118, 387 N.E.2d 278 (1979), *cert. denied*, 444 U.S. 916 (1979), the respondent made false statements and deliberately failed to disclose certain information on his application for admission to the bar. These false statements and omissions included his failure to disclose at least four of his previous addresses, the wrong birth date, his change of name, a previous marriage, a subsequent divorce, other law schools attended, application for admission to another state's bar, previous employers and occupations, prior civil suits and arrests, and conviction of a felony. The court felt that these falsehoods and omissions had a direct effect on the ability to practice law and be a competent member of the profession, and imposed disbarment.

7.2 Suspension is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

Commentary

Suspension is appropriate when the lawyer knowingly violates a duty owed to the profession and causes injury or potential injury to a client, the public, or the legal system, even when a lawyer does not intentionally abuse the professional relationship by engaging in deceptive conduct. Suspension is appropriate, for example, when the lawyer did not mislead a client but engages in a pattern of charging excessive or improper fees. A suspension is also appropriate when a lawyer solicits employment knowing that the individual is in a vulnerable state. For example, in *In re Teichner*, 75 Ill. 2d 88, 387 N.E.2d 265 (1979), the court suspended a lawyer for two years who was invited by a minister to speak to victims of a railway disaster, but who then contacted victims whom he knew were still in a vulnerable state as a result of the tragedy.

7.3 Reprimand is generally appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed to the profession, and causes injury or potential injury to a client, the public, or the legal system.

Commentary

Reprimand is the appropriate sanction in most cases of a violation of a duty owed to the profession. Usually there is little or no injury to a client, the public, or the legal system and the purposes of lawyer discipline will be best served by imposing a public sanction that helps educate the respondent lawyer and deter future violations. A public sanction also informs both the public and other members of the profession that this behavior is improper. For example, in *Carter v. Falcarelli*, 402 A.2d 1175 (RI 1979), the court imposed public censure (reprimand) on a lawyer who failed to divulge the identity of another lawyer when matters had been forwarded and subsequently neglected.

Courts typically impose reprimands when lawyers engage in a single instance of charging an excessive or improper fee. See *In the Matter of Donald L. Fasig*, 444 N.E.2d 849 (Ind. 1983), where the court imposed a public reprimand when the lawyer entered into an agreement for a contingent fee in a criminal case; *Russell J. Perry*, DP 63 (Mich. Atty. Dis. board 1983), where a lawyer charged an excessive fee by improperly adding investigation costs; and *The Florida Bar v. Sagrans*, 388 So.2d 1040 (Fla. 1980), where the lawyer improperly split fees with a chiropractor.

Courts also impose reprimands on lawyers who are negligent in supervising their employees. For example, in the case of *Donald Franklin Kotter*, 52 Calif. State Bar J. 552-3 (Cal. 1977), the court imposed a public reproval (reprimand) on a lawyer who neglected properly to instruct his employees regarding what acts constitute solicitation.

7.4 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer's conduct violates a duty owed to the profession, and causes little or no actual or potential injury to a client, the public, or the legal system.

8.0 *Prior Discipline Orders*

Introduction

Severe sanctions should be imposed on lawyers who violate the terms of prior disciplinary orders. While such lawyers may also demonstrate a pattern of misconduct that will serve as an aggravating factor (see Standard 9.22), these violations are so serious as to warrant special discussion.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving prior discipline.

8.1 Disbarment is generally appropriate when a lawyer:

(a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Commentary

Disbarment is warranted when a lawyer who has previously been disciplined intentionally or knowingly violates the terms of that order and, as a result, causes injury or potential injury to a client, the public, the legal system, or the profession. The most common case is one where a lawyer has been suspended but, nevertheless, practices law. The courts are generally in agreement in imposing disbarment in such cases. As the court explained in *Matter of McInerney*, 389 Mass. 528, 451 N.E.2d 401, 405 (1983), when the record establishes a lawyer's willingness to violate the terms of his suspension order, disbarment is appropriate "as a prophylactic measure to prevent further misconduct by the offending individual." See also: *In re Reiser*, M.R. 2269 (Ill. 1980), where a lawyer was disbarred when he continued to practice law in violation of an order of suspension and caused serious injury to a client by neglecting her legal matter.

Disbarment is also appropriate when a lawyer intentionally or knowingly engages in the same or similar misconduct. For example, in *Benson v. State Bar*, 13 Cal. 3d 581, 531 P.2d 1001, 119 Cal. Rptr. 297 (1975), the court disbarred a lawyer who induced a client to loan him money by making false representations and who then failed to repay the loan. The lawyer in that case had previously been suspended for one year (with a four-year probationary period) for misappropriation of client funds. See also: *Matter of Friedland*, 416 N.E.2d 433 (Ind. 1981).

8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Commentary

Lawyers should be suspended when they engage in the same or similar misconduct for which they were previously disciplined when that misconduct causes injury or potential injury to a client, the public, the legal system, or the profession. As the court noted in *The Florida Bar v. Glick*, 397 So.2d 1140, 1141 (Fla. 1981), "[W]e must deal more severely with an attorney who exhibits cumulative misconduct."

8.3 Reprimand is generally appropriate when a lawyer:

(a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or

(b) has received an admonition for the same or similar misconduct and engages in further acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

Commentary

Reprimands are most commonly imposed on lawyers who have been disciplined and engage in the same or similar acts of misconduct. For example, in *Shalant v. State Bar of California*, 33 Cal. 3d 485, 658 P.2d 737, 189 Cal. Rptr. 374 (1983), the court imposed a public reproval [reprimand] on a lawyer who

failed to communicate with a client and who had received a private reproval for the same misconduct. See also *Matter of Davis*, 280 S.E.2d 644 (S.C. 1981), where the court explained that a reprimand for neglect was necessary because prior warnings for similar behavior were "ignored" (280 S.E.2d at 647).

8.4 **An admonition is generally not an appropriate sanction when a lawyer violates the terms of a prior disciplinary order or when a lawyer has engaged in the same or similar misconduct in the past.**

Commentary

An admonition is a sanction which should only be imposed in cases of minor misconduct, where the lawyer's acts cause little or no injury to a client, the public, the legal system, or the profession, and where the lawyer is unlikely to engage in further misconduct. Lawyers who do engage in additional similar acts of misconduct, or who violate the terms of a prior disciplinary order, have obviously not been deterred, and a more severe sanction should be imposed.

9.0 *Aggravation and Mitigation*

9.1 *Generally*

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

Commentary

Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary sanctions, consideration must necessarily be given to the facts pertaining to the professional misconduct and to any aggravating or mitigating factors (see Standards for Lawyer Discipline, Standard 7.1). Aggravating and mitigating circumstances generally relate to the offense at issue, matters independent of the specific offense but relevant to fitness to practice, or matters arising incident to the disciplinary proceeding.

9.2 *Aggravation*

9.21 *Definition.* Aggravation or aggravating circumstances are any considerations, or factors that may justify an increase in the degree of discipline to be imposed.

9.22 *Factors which may be considered in aggravation.* Aggravating factors include:

(a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(g) refusal to acknowledge wrongful nature of conduct;
(h) vulnerability of victim;
(i) substantial experience in the practice of law;
(j) indifference to making restitution.

Commentary

Cases citing each of the factors listed above include: (a) prior disciplinary offenses: *Matter of Walton*, 251 N.W.2d 762 (N.D. 1977), *People v. Vernon*, 660 P.2d 879 (Colo. 1982); (b) dishonest or selfish motive: *In re: James H. Dineen*, SJC-535 (Maine 1980); (c) pattern of misconduct: *The Florida Bar v. Mavrides*, 442 So. 2d 220 (Fla. 1983); *State v. Dixon*, 233 Kan. 465, 664 P.2d 286 (1983); (d) multiple offenses: *State ex rel. Oklahoma Bar Association v. Warzya*, 624 P.2d 1068 (Okla. 1981), *Ballard v. State Bar of California*, 35 Cal. 3d 274, 673 P.2d 226, 197 Cal. Rptr. 556 (1983); (e) bad faith obstruction of disciplinary proceedings: *In re Brody*, 65 Ill. 2d 152, 357 N.E.2d 498 (1976), *Committee on Prof. Ethics v. Brodsky*, 318 N.W.2d 180 (Iowa 1982); (f) lack of candor during the disciplinary process: *In re Stillo*, 68 Ill. 2d 49, 368 N.E.2d 897 (1977), *Weir v. State Bar*, 23 Cal. 3d 564, 591 P.2d 19, 152 Cal. Rptr. 921 (1979); (g) refusal to acknowledge wrongful nature of conduct: *Greenbaum v. State Bar*, 18 Cal. 3d 893, 544 P.2d 921, 126 Cal. Rptr. 785 (1976), *H. Parker Stanley v. Bd. of Professional Responsibility*, 640 S.W.2d 210 (Tenn. 1982); (h) vulnerability of victim: *People v. Lanza*, 613 P.2d 337 (Colo. 1980); (i) substantial experience in the practice of law: *John F. Buckley*, 2 Mass. Atty. Dis. Rpt. 24 (1980); (j) indifference to making restitution: *The Florida Bar v. Zinzell*, 387 So. 2d 346 (Fla. 1980); *Bate v. State Bar of California*, 34 Cal. 3d 920, 671 P.2d 360, 196 Cal. Rptr. 209 (1983).

9.3 *Mitigation*

9.31 *Definition.* Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

9.32 *Factors which may be considered in mitigation.* Mitigating factors include:

(a) absence of a prior disciplinary record;
(b) absence of a dishonest or selfish motive;
(c) personal or emotional problems;
(d) timely good faith effort to make restitution or to rectify consequences of misconduct;
(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
(f) inexperience in the practice of law;
(g) character or reputation;
(h) physical or mental disability or impairment;
(i) delay in disciplinary proceedings;
(j) interim rehabilitation;
(k) imposition of other penalties or sanctions;
(l) remorse;
(m) remoteness of prior offenses.

Commentary

While the courts generally agree that each of these factors can be considered in mitigation, the courts differ on whether restitution is a mitigating factor. Some courts hold that restitution should not be considered. See *Ambrose v. State Bar*, 31 Cal. 3d 184, 643 P.2d 486, 481 Cal. Rptr. 903 (1982); *Oklahoma Bar Association v. Lowe*, 640 P.2d 1361 (Okla. 1982), *In re Galloway*; 300 S.E.2d 479 (S.C. 1983). Other courts do consider restitution. See *People v. Luxford*, 626 P.2d 675 (Colo. 1981); *The Florida Bar v. Pincket*, 398 So.2d 802 (Fla. 1980); *In re Suernick*, 100 Wis. 2d 427, 321 N.W.2d 298 (1982). While restitution should not be a complete defense to a charge of misconduct, the better policy is to allow a good faith effort to make restitution to be considered as a factor in mitigation. Such a policy will encourage lawyers to make restitution, reducing the degree of injury to the client and helping insure that the lawyer has recognized the wrongfulness of his conduct. Restitution which is made upon the lawyer's own initiative should be considered as mitigating; lawyers who make restitution prior to the initiation of disciplinary proceedings present the best case for mitigation, while lawyers who make restitution later in the proceedings present a weaker case.

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Cases citing personal and emotional problems as mitigating factors include a wide range of difficulties, most often involving marital or financial problems. The factor which has been treated most inconsistently by the courts is (h): physical/mental disability or impairment. The cases include the following types of behaviors or conditions: alcoholism, *The Florida Bar v. Ullensvang*, 400 So. 2d 969 (Fla. 1981); mental disorders, *In re Weyrich*, 339 N.W.2d 274 (Minn. 1983); drug abuse, *In re Maragos*, 285 N.E.2d 541 (N.D. 1979); and senility, *In re Hansen*, 318 N.W.2d 856 (Minn. 1982). While most courts treat such disabilities or impairments as mitigating factors, it is important to note that the consideration of these factors does not completely excuse the lawyer's misconduct. In the words of the Illinois Supreme Court, "alcoholism is at most an extenuating circumstance, a mitigating fact, not an excuse." *In re Driscoll*, 85 Ill. 2d 312, 423 N.E.2d 873, 874 (1981).

Cases citing each of the factors listed above include: (a) absence of a prior disciplinary record: *In re Battin*, 617 P.2d 1109, 168 Cal. Rptr. 477 (1980), *The Florida Bar v. Shannon*, 398 So.2d 453 (Fla. 1981); (b) absence of selfish or dishonest motive: *People ex rel. Goldberg v. Gordon*, 607 P.2d 995 (Colo. 1980); (c) personal/emotional problems: *In re Stout*, 75 N.J. 321, 382 A.2d 630 (1981), *Matter of Barron*, 246 Ga. 327, 271 S.E.2d 474 (1980); (d) timely good faith effort to make restitution or to rectify consequences of misconduct: *Matter of Byars*, 268 S.E.2d 155 (Ga. 1980), *Matter of Rubi*, 133 Ariz. 491, 652 P.2d 1014 (1982); (e) full and free disclosure to disciplinary board/cooperative attitude toward proceedings: *Matter of Shaw*, 298 N.W.2d 133 (Minn. 1980), *In the Matter of Rhame*, 416 N.E.2d 823 (Ind. 1981); (f) inexperience in the practice of law: *In re: James M. Pool*, No. 83-37 BD (Sup. Jud. Ct. Suffolk Cty., Mass. 1984); *Matter of Price*, 429 N.E.2d 961 (Ind. 1982); (g) character/reputation: *Matter of Shaw*, 298 N.W.2d 133 (Minn. 1980), *In re Bizar*, 97 Ill. 2d 127, 454 N.E.2d 271 (1983); (h) physical/mental disability or impair-

ment: *The Florida Bar v. Routh*, 414 So. 2d 1023 (1982), *In re Hopper*, 85 Ill. 2d 318, 423 N.E.2d 900 (1981); (i) delay in disciplinary proceedings: *Yokozeki v. State Bar*, 11 Cal. 3d 436, 521 P.2d 858, 113 Cal. Rptr. 602 (1974), *The Florida Bar v. Thomson*, 429 So. 2d 2 (Fla. 1983); (j) interim rehabilitation: *In re Barry*, 90 N.J. 286, 447 A.2d 923 (1982), *Tenner v. State Bar of California*, 617 P.2d 486, 168 Cal. Rptr. 333 (1980); (k) imposition of other penalties or sanctions: *In re Lamberis*, 93 Ill. 2d 222, 443 N.E.2d 549 (1982), *In re: John E. Walsh*, SJC—53.9 (Maine 1980); *Matter of Garrett*, 399 N.E.2d 369 (Ind. 1980); (l) remorse: *In re Power*, 91 N.J. 408, 451 A.2d 666 (1982), *In re Nadler*, 91 Ill. 2d 326, 438 N.E.2d 198 (1982); (m) remoteness of prior offenses: (no cases found).

9.4 *Factors which are neither aggravating nor mitigating.*

The following factors should not be considered as either aggravating or mitigating:

(a) forced or compelled restitution;
(b) agreeing to the client's demand for certain improper behavior or result;
(c) withdrawal of complaint against the lawyer;
(d) resignation prior to completion of disciplinary proceedings;
(e) complainant's recommendation as to sanction;
(f) failure of injured client to complain.

Commentary

While courts have considered each of these factors, the purposes of lawyer discipline are best served by viewing them as irrelevant to the imposition of a sanction. Lawyers who make restitution voluntarily and on their own initiative demonstrate both a recognition of their ethical violation and their responsibility to the injured client or other party. Such conduct should be considered as mitigation (see Standard 8.32), even if the restitution is made in response to a complaint filed with the disciplinary agency. Lawyers who make restitution only after a disciplinary proceeding has been instituted against them, however, cannot be regarded as acting out of a sense of responsibility for their misconduct, but, instead, as attempting to circumvent the operation of the disciplinary system. Such conduct should not be considered in mitigation. See *Fitzpatrick v. State Bar of California*, 20 Cal. 3d 73, 141 Cal. Rptr. 169, 569 P.2d 763 (1977); *In re O'Bryant*, 425 A.2d 1313 (D.C. 1981).

Similarly, mitigation should not include a lawyer's claim that "the client made me do it". Each lawyer is responsible for adhering to the ethical standards of the profession. Unethical conduct is much less likely to be deterred if lawyers can lessen or avoid the imposition of sanctions merely by blaming the client (see *In re Price*, 429 N.E.2d 961 (Ind. 1982); *People v. Kennelly*, 648 P.2d 1065 (Colo. 1982). In addition, neither the withdrawal of the complaint against the lawyer nor the lawyer's resignation prior to completion of disciplinary proceedings should mitigate the sanction imposed. In order for the public to be protected, sanctions must be imposed on lawyers who engage in unethical conduct. The mere fact that a complainant may have decided to withdraw a complaint should not result in a lesser sanction being imposed on a lawyer who has behaved unethically and from whom other members of the public need protection (see *In re McWhorter*, 405 Mich. 563, 275 N.W.2d 259 (1979), *on reh'g*, 407 Mich. 278, 284 N.W.2d 472 (1979)). Similarly, the lawyer's resignation is irrelevant; the purposes of deterrence and education can only be served if sanctions are imposed on all lawyers who violate ethical standards (see *In re Johnson*, 290 N.W.2d 604 (Minn. 1980) and *In re Phillips*, 452 A.2d 345 (D.C. 1982)).

The complainant's recommendation as to a sanction is a factor which should be neither aggravating nor mitigating. The consistency of sanctions cannot be assured if any individual's personal views concerning an appropriate sanction can either increase or decrease the severity of the sanction to be imposed by the court. Although the court should not consider the complainant's recommendation as to sanction, the complainant's feelings about the lawyer's misconduct need not be completely ignored. The complainant's views will be relevant and important in determining the amount of injury caused by the lawyer's misconduct, a factor which can be either aggravating [Standard 8.22(j)] or mitigating [Standard 8.32(i)].

Finally, the fact that an injured client has not complained should not serve as mitigation. The disciplinary system is designed to protect all members of the public. The fact that one injured person is willing to forgive and forget should not relieve or excuse the lawyer, who then has the capability of injuring others (see *In re Krakauer*, 81 N.J. 32, 404 A.2d 1137 (1979); *State ex rel. Oklahoma Bar Association v. Braswell*, 663 P.2d 1228 (Okla. 1983)).

FOOTNOTES

1. Standards for Lawyer Discipline and Disability Proceedings (Chicago: Joint Committee of Professional Discipline of the Appellate Judges' Conference and the American Bar Association Standing Committee on Professional Discipline, 1979).
2. *In re* Gold, 77 Ill. 2d 224, 396 N.E.2d 25 (1979).
3. *In re* Oliver, M.R. 2454, 79-CH-6 (1980).
4. *In re* Smith, 63 Ill. 2d 250, 347 N.E.2d 133 (1976).
5. *In re* DiBella, 58 Ill. 2d 5, 316 N.E.2d 771 (1974).
6. *In re* Sherman, 60 Ill. 2d 590, 328 N.E.2d 553 (1975).
7. Problems and Recommendations in Disciplinary Enforcement (Chicago: American Bar Association, Special Committee on Evaluation of Disciplinary Enforcement, 1970), at 167.
8. Lawyers have a duty to report ethical misconduct of other lawyers under Rule 8.3 of the Model Rules of Professional Conduct (American Bar Association, 1983) and under DR1-103 of the Code of Professional Responsibility (American Bar Association, 1981). Judges have a similar duty under the Code of Judicial Conduct, Canon 3(B)(3) (American Bar Association, 1972).
9. *Id.*, Code of Judicial Conduct.
10. See Appendix 3 for a listing of the actual number of reported cases from each jurisdiction. The differences in the number of reported cases among the jurisdictions is a function not only of the differences in lawyer populations, but in the operation of the state discipline systems. States differ dramatically in the sophistication of their disciplinary systems: most importantly for this study, states vary in the extent to which disciplinary orders are published. In those jurisdictions where disciplinary decisions are not published in the regional reporters, summaries in state bar publications or unreported cases (supplied by bar counsel) were examined. (To obtain copies of unreported decisions, contact the ABA Center for Professional Responsibility.) The states in which only reported cases were examined were: Alabama, Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maryland, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, South Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Washington, West Virginia, and Wisconsin. In the following jurisdictions both reported and unreported cases were examined: Arizona, California, District of Columbia, Florida, Illinois, Kentucky, Massachusetts, New York, Pennsylvania, Tennessee, Virginia, and Wyoming. In the following jurisdictions, all data were collected from unreported decisions (supplied by bar counsel or taken from case summaries in bar publications): Maine, Michigan, New Hampshire, and Texas.
11. Because of the difficulty in getting complete factual statements, the report does not include cases which were the result of consent orders, or cases in which reciprocal discipline was imposed.
12. Ballard v. State Bar of California, 35 Cal. 3d 274, 673 P.2d 226, 197 Cal. Rptr. 556 (1983).
13. An example of the problems which would be encountered in such an approach will suffice to demonstrate why that approach was rejected. It is improper for a lawyer to neglect a legal matter entrusted to him (Rule 1.3/DR 6-101(A)(3)). Sanctions which are imposed for violations of this ethical rule vary dramatically. Such conduct may be an intentional violation of the rule (as where a lawyer takes a client's money never intending to perform the services requested), or it may result from negligence (as where an overworked or inexperienced lawyer does not meet a deadline relating to some aspect of the representation). The Sanctions Committee felt that a listing of sanctions based merely on the type of lawyer misconduct would not adequately differentiate between conduct which has an extremely deleterious effect on the client, the public, the legal system, and the profession, and conduct which has only a minimal effect. In short, the Sanctions Committee concluded that an approach that reviewed each type of misconduct would result in nothing more than a general statement that the individual circumstances of a case dictate the type of sanction which ought to be imposed.
14. Although the House of Delegates of the American Bar Association adopted the Model Rules of Professional Conduct on August 2, 1983, as the ethical standards for the legal profession, references to the Code of Professional Responsibility are included here because most states' ethical standards still follow the Code in both form and substance.
15. While it is not possible to discuss in detail each of the 2,991 cases which have been examined in preparing this report, statistical summaries are available from the American Bar Association Center for Professional Responsibility.
16. Preamble to Model Rules, paragraph 11, *supra* note 8.
17. *In re* Stout, 75 N.J. 321, 382 A.2d 630 (1978); Matter of Rubi, 133 Ariz. 491, 652 P.2d 1014 (1982).

18. *In re* Zderic, 92 Wash. 2d 777, 600 P.2d 1297 (1979); *In re* Nadler, 91 Ill. 2d 326, 438 N.E.2d 198 (1982).
19. Matter of McInerney, 389 Mass. 528, 451 N.E.2d 401 (1983).
20. Matter of Carroll, 124 Ariz. 80, 602 P.2d 461 (1979); Committee on Professional Ethics v. Gross, 326 N.W.2d 272 (Iowa 1982); The Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983).
21. Matter of Maragos, 285 N.W.2d 541 (N.D. 1979); Matter of Grimes, 414 Mich. 483, 326 N.W.2d 380 (1982).
22. Lawyer Standards, *supra* note 1.
23. Only 19 jurisdictions currently follow the provision of Standard 8.25 (1983 Survey of Lawyer Disciplinary Procedures in the United States, American Bar Association Center for Professional Responsibility): Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, Oregon, Texas, Utah, Washington, and Wisconsin.
24. Levi and Denham v. Mississippi State Bar, 436 So. 2d 781, 786 (Miss. 1983).
25. Some states, for example, delegate this power to other agencies. See Standards for Lawyer Discipline, Standards 1.2, 2.1.
26. Attorney Grievance Commission v. Velasquez, 301 Md. 450, 483 A.2d 354 (1984); *In re* McDaniel, 470 N.E.2d 1327 (Ind. 1984).
27. See Definitions, Standards for Lawyer Discipline.
28. The National Discipline Data Bank is operated by the American Bar Association Center for Professional Responsibility. For further information on how to report or to receive current statistical data, contact the Center for Professional Responsibility at the American Bar Association, 750 N. Lake Shore Drive, Chicago, Illinois, 60611, or call (312) 988-5000.
29. Comment to Rule 6.2, paragraph 1, Model Rules, *supra* note 8; EC 2-26, Code of Professional Responsibility, *supra* note 8.
30. Comment to Rule 8.4, Model Rules, *Id.*

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APPENDIX 1

Cross-Reference Table: ABA Model Rules of Professional Conduct and Standards for Imposing Sanctions

ABA Model Rules of Professional Conduct	*Standards for Imposing Sanctions*
Competence	
Rule 1.1	Standard 4.5
Scope of Representation	
Rule 1.2(a), (b), (c), (e)	Standard 4.4
Rule 1.2(d)	Standard 6.1
Diligence	
Rule 1.3	Standard 4.4
Communication	
Rule 1.4	Standard 4.4
Fees	
Rule 1.5	Standards 4.6 & 7.0
Confidentiality of Information	
Rule 1.6	Standard 4.2
Conflict of Interest	
Rule 1.7	Standard 4.3
Prohibited Transactions	
Rule 1.8	Standard 4.3
Former Client	
Rule 1.9	Standard 4.3
Imputed Disqualification	
Rule 1.10	Standard 4.3
Successive Government and Private Employment	
Rule 1.11	Standard 4.3
Former Judge or Arbitrator	
Rule 1.12	Standard 4.3
Organization as Client	
Rule 1.13	Standard 4.3
Disabled Client	
Rule 1.14	Standard 7.0
Safekeeping Property	
Rule 1.15	Standard 4.1
Declining or Terminating Representation	
Rule 1.16	Standard 7.0
Advisor	
Rule 2.1	Standard 7.0
Intermediary	
Rule 2.2	Standard 4.3

ABA Model Rules of Professional Conduct	*Standards for Imposing Sanctions*
Evaluation for Use by Third Persons Rule 2.3	Standard 7.0
Meritorius Claims and Contentions Rule 3.1	Standard 6.2
Expediting Litigation Rule 3.2	Standard 6.2
Candor Toward the Tribunal Rule 3.3	Standard 6.1
Fairness to Opposing Party and Counsel Rule 3.4	Standard 6.2
Impartiality and Decorum Rule 3.5	Standard 6.3
Trial Publicity Rule 3.6	Standard 6.2
Lawyer as Witness Rule 3.7	Standard 4.3
Special Responsibilities of a Prosecutor Rule 3.8	Standard 5.2
Advocate in Nonadjudicative Proceedings Rule 3.9	Standard 6.2
Truthfulness to Others Rule 4.1	Standard 6.1
Communication with Represented Persons Rule 4.2	Standard 6.3
Dealing with Unrepresented Persons Rule 4.3	Standard 6.3
Respect for Rights of Third Persons Rule 4.4	Standard 6.2
Responsibilities of a Partner or Supervisory Lawyer Rule 5.1	Standard 7.0
Responsibilities of a Subordinate Lawyer Rule 5.2	Standard 7.0
Responsibilities Regarding Nonlawyer Assistants Rule 5.3	Standard 7.0
Professional Independence of Lawyer Rule 5.4(a)&(b) Rule 5.4(c) Rule 5.4(d)	 Standard 7.0 Standard 4.3 Standard 7.0
Unauthorized Practice of Law Rule 5.5	Standard 7.0
Restrictions on Right to Practice Rule 5.6	Standard 7.0

ABA Model Rules of Professional Conduct	*Standards for Imposing Sanctions*
Pro Bono Publico Service	
Rule 6.1	No Applicable Standard
Accepting Appointments	
Rule 6.2	Standard 7.0
Membership in Legal Services Organization	
Rule 6.3	Standard 4.3
Law Reform Activities Affecting Client Interests	
Rule 6.4	Standard 5.2
Communication Concerning Lawyer's Services	
Rule 7.1	Standard 7.0
Advertising	
Rule 7.2	Standard 7.0
Direct Contact with Prospective Clients	
Rule 7.3	Standard 7.0
Communication of Fields of Practice	
Rule 7.4	Standard 7.0
Firm Names and Letterheads	
Rule 7.5	Standard 7.0
Bar Admission and Disciplinary Matters	
Rule 8.1	Standards 5.1 & 7.0
Judges and Legal Officials	
Rule 8.2	Standard 6.1
Reporting Professional Misconduct	
Rule 8.3	Standard 7.0
Misconduct	
Rule 8.4(a)	Standards 4.0, 5.0, 6.0, & 7.0
Rule 8.4(b)	Standard 5.1
Rule 8.4(c)	Standards 4.6 & 5.1
Rule 8.4(d)	Standard 6.0
Rule 8.4(e)&(f)	Standard 6.2
Jurisdiction	
Rule 8.5	None

APPENDIX 2

Cross-Reference Table: ABA Code of Professional Responsibility and Standards for Imposing Sanctions

ABA Code of Professional Responsibility	*Standards for Imposing Sanctions*
Canon 1: Integrity of Profession	
DR 1-101	Standard 7.0
DR 1-102	Standards 4.6, 5.1, 6.2
DR 1-103	Standard 7.0
Canon 2: Making Counsel Available	
DR 2-101	Standard 7.0
DR 2-102	Standard 7.0
DR 2-103	Standard 7.0
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DR 2-107	Standard 7.0
DR 2-108	Standard 7.0
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DR 2-110	Standard 7.0
Canon 3: Unauthorized Practice	
DR 3-101(A)	Standard 7.0
DR 3-101(B)	Standard 8.0
DR 3-102	Standard 7.0
DR 3-103	Standard 7.0
Canon 4: Confidences and Secrets	
DR 4-101	Standard 4.2
Canon 5: Independent Judgment	
DR 5-101	Standard 4.3
DR 5-102	Standard 4.3
DR 5-103	Standard 4.3
DR 5-104	Standard 4.3
DR 5-105	Standard 4.3
DR 5-106	Standard 4.3
DR 5-107	Standard 4.3
Canon 6: Competence	
DR 6-101(A)(1) & (2)	Standard 4.5
DR 6-101(A)(3)	Standard 4.4
DR 6-102	Standard 4.3
Canon 7: Zealous Representation	
DR 7-101(A)(1) & (2)	Standard 4.4
DR 7-101(A)(3)	Standard 4.6
DR 7-101(B)	Standard 7.0
DR 7-102	Standards 6.1 & 6.2
DR 7-103	Standard 5.2

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DR 7-104	Standard 6.3
DR 7-105	Standard 6.2
DR 7-106	Standard 6.2
DR 7-107	Standard 6.2
DR 7-108	Standard 6.3
DR 7-109	Standard 6.3
DR 7-110	Standard 6.3
Canon 8: Improving the Legal System	
DR 8-101	Standard 5.2
DR 8-102	Standard 5.2
DR 8-103	Standard 5.2
Canon 9: Appearance of Impropriety	
DR 9-101(A) & (B)	Standard 4.3
DR 9-101(C)	Standard 5.2
DR 9-102	Standard 4.1

APPENDIX 3

Frequency Statistics

Jurisdiction	*Total Number of Cases*	*Percentage of Total*	*Years*
Alabama	13	.4%	1980-84
Alaska	8	.3%	1980-84
Arkansas	5	.2%	1980-84
Arizona	96	3.2%	1974-84
California	681	22.8%	1974-84
Colorado	56	1.9%	1980-84
Delaware	3	.1%	1980-84
D. of Columbia	126	4.2%	1974-84
Florida	347	11.6%	1974-84
Georgia	12	.4%	1980-84
Hawaii	4	.1%	1980-84
Idaho	10	.3%	1980-84
Illinois	198	6.6%	1974-84
Indiana	44	1.5%	1980-84
Iowa	39	1.3%	1980-84
Kansas	53	1.8%	1980-84
Kentucky	32	1.1%	1980-84
Louisiana	20	.7%	1980-84
Maine	17	.6%	1980-84
Maryland	3	.1%	1980-84
Massachusetts	92	3.1%	1980-84
Michigan	228	7.6%	1980-83
Minnesota	18	.6%	1980-84
Mississippi	4	.1%	1980-84
Missouri	1	0%	1980-84
Montana	3	.1%	1980-84
Nebraska	3	.1%	1980-84
Nevada	1	0%	1980-84
New Hampshire	0	0%	1980-84
New Jersey	69	2.3%	1974-84
New Mexico	4	.1%	1980-84
New York	243	8.1%	1979-82
North Carolina	1	0%	1980-84
North Dakota	16	.5%	1974-84
Ohio	16	.5%	1980-84
Oklahoma	15	.5%	1980-84
Oregon	47	1.6%	1980-84
Pennsylvania	4	.1%	1980-84
Rhode Island	6	.2%	1980-84
South Carolina	30	1.0%	1980-84
South Dakota	1	0%	1980-84
Tennessee	69	2.3%	1980-84
Texas	225	7.5%	1974-84
Utah	28	.9%	1980-84

Jurisdiction	Total Number of Cases	Percentage of Total	Years
Vermont	0	0%	1980-84
Virginia	56	1.9%	1980-84
Washington	24	.8%	1980-84
West Virginia	2	.1%	1980-84
Wisconsin	12	.4%	1980-84
Wyoming	1	0%	1980-84
(Missing cases)	(5)	(.2%)	
	2991	100%	

CODE OF PROFESSIONAL RESPONSIBILITY

CODE OF PROFESSIONAL RESPONSIBILITY

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Definitions

PREAMBLE

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this rule requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the everchanging relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

PRELIMINARY STATEMENT

In furtherance of the principles stated in the Preamble this Code of Professional Responsibility has been promulgated consisting of three separate but interrelated parts: Canons, Ethical Considerations, and Disciplinary Rules. The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.

Obviously the Canons, Ethical Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their nonprofessional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client.

The Canons are statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession. They embody the general concepts from which the Ethical Considerations and the Disciplinary Rules are derived.

The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive. They constitute a body of principles upon which the lawyer can rely for guidance in many specific situations.

The Disciplinary Rules, unlike the Ethical Considerations, are mandatory in character. The Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities. The Code makes no attempt to prescribe either disciplinary procedures or penalties for violation of a Disciplinary Rule, nor does it undertake to define standards for civil liability of lawyers for professional conduct. The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances. An enforcing agency, in applying the Disciplinary Rules, may find interpretive guidance in the basic principles embodied in the Canons and in the objectives reflected in the Ethical Considerations.

CANON 1. A LAWYER SHOULD ASSIST IN MAINTAINING THE INTEGRITY AND COMPETENCE OF THE LEGAL PROFESSION

DR 1-101. Maintaining Integrity and Competence of the Legal Profession.

(A) A lawyer is subject to discipline if he has made a materially false statement in, or if he has deliberately failed to disclose a material fact requested in connection with, his application for admission to the bar.

(B) A lawyer shall not further the application for admission to the bar of another person known by him to be unqualified in respect to character, education, or other relevant attribute.

DR 1-102. Misconduct.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Annotations

Cases

Prosecutor's failure to reveal possible taint of identification procedure was apparently violative of DR 1-102(a)(4) and (5) and DR 7-102(a)(6). **Buchanan v. State**, Op. No. 2553, 544 P2d 1153 (Alaska 1976).

Conduct leading to conviction as accessory after the fact to first degree murder was "illegal conduct involving moral turpitude." **Matter of Webb**, Op. No. 1879, 602 P2d 408 (Alaska 1979).

Conduct leading to conviction for offense of accessory after the fact to murder was conduct prejudicial to the administration of justice. **Matter of Webb**, Op. No. 1879, 602 P2d 408 (Alaska 1979).

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

Public censure was appropriate sanction for gross negligence in responding to an interrogatory and for failing to heed an admonition against commingling of funds. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Grossly negligent misconduct is not within the ambit of the rule prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, but does violate the rule on failing to act competently as well as other disciplinary rules. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

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

Disciplinary rules under which attorney was cited were not overboard or void for vagueness. **Discipline of Vollintine**, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Statements by attorney in letters to two federal officials during the attorney's representation of clients in a federal quiet title and ejectment action, which accused certain official of perjury and cheating and warned that they might find themselves criminally or personally liable in tort, were improper and required public censure. **Discipline of Vollintine**, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Discipline of attorney for writing letters to two federal officials accusing certain officials of perjury and cheating and warning that they might find themselves criminally or personally liable in tort did not violate the attorney's right of free speech. **Discipline of Vollintine**, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Attorney, representing plaintiff in a personal injury action, who agreed to assert a military claim for reimbursement of the cost of providing medical care to the plaintiff, breached her fiduciary obligation to the military when she negotiated a settlement and distributed all of the proceeds to the plaintiff and to herself as attorney's fees; accordingly, since her conduct as a matter of law involved dishonesty and misrepresentation, suspension was the appropriate sanction. **In re Miner**, Op. No. 2726, 681 P2d 1347 (Alaska 1983).

Any possible violation of the disciplinary rules of the Code of Professional Responsibility by police officers, who knew that defendant had an attorney but nevertheless conducted a non-custodial interview with defendant without first informing his attorney, was so attenuated that the substantial interest in admitting reliable evidence resulting from the interview substantially outweighed the marginal purpose that would be served by suppressing the evidence. **Depp v. State**, Op. No. 390, 686 P2d 712 (Alaska App. 1984).

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

Under the ABA standards, sanctioning courts must: (1) determine what ethical duty the lawyer violated, the lawyer's mental state, and the extent of the actual or potential injury caused by the lawyer's misconduct; (2) look to the ABA standards to discern what sanction is recommended for the "type" of misconduct in question; and (3) ascertain whether any aggravating or mitigating circumstances exist which warrant increasing or decreasing the otherwise appropriate sanction. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

Lawyer misconduct, which included defrauding a client by fabricating a "settlement agreement" and intentionally representing the same as genuine, abuse of the legal process by forging a judge's signature, and the embezzlement of client funds, warranted disbarment rather than suspension. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

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

DR 1-103. Disclosure of Information to Authorities.

(A) A lawyer possessing unprivileged knowledge or evidence of a violation of DR 1-102 concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

ETHICAL CONSIDERATIONS

EC 1-1 A basic tenet of the professional responsibility of lawyers is that every person in our society should have ready access to the independent professional services of a lawyer of integrity and competence. Maintaining the integrity and improving the competence of the bar to meet the highest standards is the ethical responsibility of every lawyer.

EC 1-2 The public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral standards or of other relevant factors but who nevertheless seek to practice law. To assure the maintenance of high moral and educational standards of the legal profession, lawyers should affirmatively assist courts and other appropriate bodies in promulgating, enforcing, and improving requirements for admission to the bar. In like manner, the bar has a positive obligation to aid in the continued improvement of all phases of pre-admission and post-admission legal education.

EC 1-3 Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character. Although a lawyer should not become a self-appointed

investigator or judge of applicants for admission, he should report to proper officials all unfavorable information he possesses relating to the character or other qualifications of an applicant.

EC 1-4 The integrity of the profession can be mantained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

EC 1-5 A lawyer should maintain high standards of professional conduct and should encourage fellow lawyers to do likewise. He should be temperate and dignified, and he should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession. Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.

EC 1-6 An applicant for admission to the bar or a lawyer may be unqualified, temporarily or permanently, for other than moral and educational reasons, such as mental or emotional instability. Lawyers should be diligent in taking steps to see that during a period of disqualification such person is not granted a license or, if licensed, is not permitted to practice. In like manner, when the disqualification has terminated, members of the bar should assist such person in being licensed, or, if licensed, in being restored to his full right to practice.

(Added by SCO 158 effective May 6, 1971)

CANON 2. A LAWYER SHOULD ASSIST THE LEGAL PROFESSION IN FULFILLING ITS DUTY TO MAKE LEGAL COUNSEL AVAILABLE

DR 2-101. Publicity.

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, the following information in print media distributed or over television or radio broadcast in the geographic area or areas in which the lawyer resides or maintains offices or in which a significant part of the lawyer's clientele resides, provided that the information disclosed by the lawyer in such publication or broadcast complies with DR 2-101(A), and is presented in a dignified manner:

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers.

(2) One or more fields of law in which the lawyer or law firm practices or a statement that the practice is limited to one or more fields of law, to the extent authorized under DR 2-105.

(3) Date and place of birth.

(4) Date and place of admission to the bar of state and federal courts.

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions.

(6) Public or quasi-public offices.

(7) Military service.

(8) Legal authorships.

(9) Legal teaching position.

(10) Memberships, offices, and committee assignments, in bar associations.

(11) Membership and offices in legal fraternities and legal societies.

(12) Technical and professional licenses.

(13) Memberships in scientific, technical and professional associations and societies.

(14) Foreign language ability.

(15) Names and addresses of bank references.

(16) With their written consent, names of clients regularly represented.

(17) Prepaid or group legal services programs in which the lawyer participates.

(18) Whether credit cards or other credit arrangements are accepted.

(19) Office and telephone answering service hours.

(20) Fee for an initial consultation.

(21) Availability upon request of a written schedule of fees and/or an estimate of the fee to be charged for specific services.

(22) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of costs.

(23) Range of fees for services, provided that the statement discloses that the specific fee within the range which will be charged will vary depending upon the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee within the range likely to be charged, in print size equivalent to the largest print used in setting forth the fee information.

(24) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information.

(25) Fixed fees for specific routine legal services, the description of which would not be misunderstood or be deceptive, provided that the statement discloses that the quoted fee will be available only to clients whose matters fall into the services described and that the client is entitled without obligation to a specific estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information.

(C) Any person desiring to expand the information authorized for disclosure in DR 2-101(B), or to provide for its dissemination through other forms may apply to the Alaska Bar Association. Any such application shall be served upon the agencies having jurisdiction under state law over the regulation of the legal profession and consumer matters who shall be heard, together with the applicant, on the issue of whether the proposal is necessary in light of the existing provisions of the Code, accords with standards of accuracy, reliability and truthfulness, and would facilitate the process of informed selection of lawyers by potential consumers of legal services. The relief granted in response to any such application shall be promulgated as an amendment to DR 2-101(B), universally applicable to all lawyers.

(D) If the advertisement is communicated to the public over television or radio, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

(E) If a lawyer advertises a fee for a service, the lawyer must render that service for no more than the fee advertised.

(F) Unless otherwise specified in the advertisement if a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue, the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(G) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101 (B), the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(H) This rule does not prohibit limited and dignified identification of a lawyer as a lawyer as well as by name:

(1) In political advertisements when his professional status is germane to the political campaign or to a political issue.

(2) In public notices when the name and profession of a lawyer are required or authorized by law or are reasonably pertinent for a purpose other than the attraction of potential clients.

(3) In routine reports and announcements of a bona fide business, civic, professional, or political organization in which he serves as a director or officer.

(4) In and on legal documents prepared by him.

(5) In and on legal textbooks, treatises, and other legal publications, and in dignified advertisements thereof.

(I) A lawyer shall not compensate or give any thing of value to representatives of press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

(Amended by SCO 263 effective December 31, 1976; by SCO 356 effective April 1, 1979; and by SCO 377 Effective July 1, 1979)

DR 2-102. Professional Notices, Letterheads and Offices.

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form.

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the name of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or addresses, change of firm name, or similar matters pertaining to the professional offices of a lawyer or law firm which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm, associates and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more of the lawyers in the firm, except that the name of a professional corporation or professional association may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization, and if otherwise lawful a firm may use as, or continue to include in, its name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out as having a partnership with one or more lawyers unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged in both the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use of, in connection with his name, an earned degree or title derived therefrom indicating his training in the law.

(Amended by SCO 356 § 2 effective April 1, 1979)

DR 2-103. Recommendation of Professional Employment.

(A) A lawyer shall not, except as authorized in DR 2-101(B), recommend employment as a private practitioner, or himself, his partner, or associate to a layperson who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except as authorized in DR 2-101, and except that:

(1) He may request referral from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103(D)(1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer or his partner or associate or any other lawyer affiliated with him or his firm may be recommended, employed or paid by, or cooperate with, one of the following offices or organizations that promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its members or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization for the particular matter involved; and the legal service plan of such organization provides appropriate relief for any member or beneficiary who asserts a claim that representation by counsel furnished, selected or approved would be unethical, improper or inadequate under the circumstances of the matter involved and the plan provides an appropriate procedure for seeking such relief.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the appropriate disciplinary authority at least annually a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

(E) A lawyer shall not accept employment when he knows or it is obvious that the person who seeks his services does so as a result of conduct prohibited under this Disciplinary Rule.

(Amended by SCO 263 effective December 31, 1976; and by SCO 356 § 3, effective April 1, 1978)

DR 2-104. Suggestion of Need of Legal Services.

(A) A lawyer who has given in-person unsolicited advice to a layperson that he should obtain counsel or take legal action shall not accept employment resulting from that service, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laypersons to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by a qualified legal assistance organization.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D)(1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

(Amended by SCO 263 effective December 31, 1976; and by SCO 356 § 4 effective April 1, 1979)

DR 2-105. Limitation of Practice.

A lawyer shall not hold himself out publicly as a specialist, as practicing in certain areas of law or as limiting his practice permitted under DR 2-101(B), except that

(1) A lawyer permitted to practice before the United States Patent and Trademark Office may use the designation "Patents," "Patent Attorney," "Patent Lawyer," or "Registered Patent Attorney" or any combination of those terms, on his letterhead and office sign.

(2) A lawyer who publicly discloses fields of law in which the lawyer or the law firm practices or states that his practice is limited to one or more fields of law shall do so by using designations and definitions authorized and approved by the Board of Governors. Such disclosures and statements shall include the following statement: "The Alaska Bar Association does not certify that any attorney possesses specified training or skill in a particular field of law."

(Amended by SCO 356 § 5 effective April 1, 1979)

DR 2-106. Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee. Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

(C) A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case.

DR 2-107. Division of Fees Among Lawyers.

(A) A lawyer shall not divide a fee for legal services with another lawyer who is not a partner in or associate of his law firm or law office, unless:

(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made.

(2) The division is made in proportion to the services performed and responsibility assumed by each.

(3) The total fee of the lawyers does not clearly exceed reasonable compensation for all legal services they rendered the client.

(B) This Disciplinary Rule does not prohibit payment to a former partner or associate pursuant to a separation or retirement agreement.

DR 2-108. Agreements Restricting the Practice of a Lawyer.

(A) A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by the agreement, except as a condition to payment of retirement benefits.

(B) In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law.

DR 2-109. Acceptance of Employment.

(A) A lawyer shall not accept employment on behalf of a person if he knows or it is obvious that such person wishes to:

(1) Bring a legal action, conduct a defense, or assert a position in litigation, or otherwise have steps taken for him, merely for the purpose of harrassing or maliciously injuring any person.

(2) Present a claim or defense in litigation that is not warranted under existing law, unless it can be supported by good faith argument for an extension, modification, or reveaal of existing law.

DR 2-110. Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client,

allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insist that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

ETHICAL CONSIDERATIONS

EC 2-1 The need of members of the public for legal services is met only if they recognize their legal problems, appreciate the importance of seeking assistance, and are able to obtain the services of acceptable legal counsel. Hence, important functions of the legal profession are to educate laymen to recognize their problems, to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.

Recognition of Legal Problems

EC 2-2 The legal profession should assist laypersons to recognize legal problems because such problems may not be self-revealing and often are not timely noticed. Therefore, lawyers should encourage and participate in educational and public relations programs concerning our legal system with particular reference to legal problems that frequently arise. Preparation of advertisements and professional articles for any publications and participation in seminars, lectures, and civic programs should be motivated by a desire to educate the public to an awareness of legal needs and to provide information relevant to the selection of the most appropriate counsel rather than to obtain publicity for particular lawyers. The problems of advertising on television require special consideration, due to the style, cost, and transitory nature of such media. If the interests of laypersons in receiving relevant lawyer advertising are not adequately served by print media and radio advertising, and if adequate safeguards to protect the public can reasonably be formulated, television advertising may serve a public interest.

(Amended by SCO 356 § 6 effective April 1, 1979)

EC 2-3 Whether a lawyer acts properly in volunteering in-person advice to a layperson to seek legal services depends upon the circumstances. The giving of advice that one should take legal action could well be in fulfillment of the duty of the legal profession to assist laypersons in recognizing legal problems. The advice is proper only if motivated by a desire to protect one who does not recognize that he may have legal problems or who is ignorant of his legal rights or obligations. It is improper if motivated by a desire to obtain personal benefit, secure personal publicity, or cause legal action to be taken merely to harass or injure another. A lawyer should not initiate an in-person contact with a non-client, personally or through a representative, for the purpose of being retained to represent him for compensation.

(Amended by SCO 356 § 7 effective April 1, 1979)

EC 2-4 Since motivation is subjective and often difficult to judge, the motives of a lawyer who volunteers in-person advice likely to produce legal controversy may well be suspect if he receives professional employment or other benefits as a result. A lawyer who volunteers in-person advice that one should obtain the services of a lawyer generally should not himself accept employment, compensation, or other benefit in connection with that matter. However, it is not improper for a lawyer to volunteer such advice and render resulting legal services to close friends, relatives, former clients (in regard to matters germane to former employment), and regular clients.

(Amended by SCO 356 § 8 effective April 1, 1979)

EC 2-5 A lawyer who writes or speaks for the purpose of educating members of the public to recognize their legal problems should carefully refrain from giving or appearing to give a general solution applicable to all apparently similar individual problems, since slight changes in fact situations may require a material variance in the applicable advice; otherwise, the public may be misled and misadvised. Talks and writings by lawyers for laypersons should caution them not to attempt to solve individual problems upon the basis of the information contained therein.

(Amended by SCO 356 § 9 effective April 1, 1979)

Selection of a Lawyer

EC 2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laypersons to make intelligent choices. The law has become increasingly complex and specialized. Few lawyers are willing and competent to deal with every kind of legal matter, and many laypersons have difficulty in determining the competence of lawyers to render different types of legal services. The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.

(Amended by SCO 356 § 11 effective April 1, 1979)

EC 2-8 Selection of a lawyer by a layperson should be made on an informed basis. Advice and recommendation of third parties — relatives, friends, acquaintances, business associates, or other lawyers — and disclosure of relevant information about the lawyer and his practice may be helpful. A layperson is best served if the recommendation is disinterested and informed. In order that the recommendation be disinterested, a lawyer should not seek to influence another to recommend his employment. A lawyer should not compensate another person for recommending him, for influencing a prospective client to employ him, or to encourage future recommendations. Advertisements and public communications, whether in law lists, telephone directories, newspapers, other forms of print media, television or radio, should be formulated to convey only information that is necessary to make an appropriate selection. Such information includes: (1) office information, such as, name, including name of law firm and names of professional associates, addresses; telephone numbers, credit card acceptability; fluency in foreign languages, and office hours; (2) relevant biographical information; (3) description of the practice, but only by using designations and definitions authorized by the Board of Governors; for example, one or more fields of law in which the lawyer or law firm practices, and/or a statement that practice is limited to one or more fields of law; (4) permitted fee information. Laudation of the lawyer, or law firm, by himself or by others, testimonials, statements of quality of service to be rendered, comparative statement about the lawyer's or law firm's services in relation to those of others, and statements of performance records are considered undignified, are primarily solicitative rather than informative, and are apt to be misleading to the public. They should be avoided.

(Amended by SCO 356 § 12 effective April 1, 1979; and by SCO 377 effective July 1, 1979)

Selection of a Lawyer: Lawyer Advertising

EC 2-9 The importance of the interests affected by the choice of a lawyer and prior experience with unrestricted lawyer advertising require that special care be taken by lawyers to avoid misleading the public and to assure that the information set forth in any advertising is relevant to the selection of a lawyer. The lawyer must be mindful that the benefits of lawyer advertising depend upon its reliability and accuracy. Examples of information in law advertising that would be deceptive include misstatements of fact, suggestions that the ingenuity or prior record of a lawyer rather than the justice of the claim are the principal factors likely to determine the result, inclusion of information irrelevant to selecting a lawyer, and representations concerning the quality of service. Since lawyer advertising is calculated and not spontaneous, reasonable regulation of lawyer advertising designed to foster compliance with appropriate standards serves the public interest without impeding the flow of useful, meaningful, and relevant information to the public.

(Amended by SCO 356 § 13 effective April 1, 1979)

EC 2-10 A lawyer should ensure that the information contained in any advertising which the lawyer publishes, broadcasts or causes to be published or broadcast is relevant, is disseminated in an objective and understandable fashion, and would facilitate the prospective client's ability to compare the qualifications of the lawyers available to represent him. A lawyer should strive to communicate such information without undue emphasis upon style and advertising stratagems which serve to hinder rather than to facilitate intelligent selection of counsel. Because technological change is a recurrent feature of communications forms, and because perceptions of what is relevant in lawyer selection may change, lawyer advertising regulations should not be cast in rigid, unchangeable terms. Machinery is therefore available to advertisers and consumers for prompt consideration of proposals to change the rules governing lawyer advertising. The determination of any request for such change should depend upon whether the proposal is necessary in light of existing Code provisions, whether the proposal accords with standards of accuracy, reliability and truthfulness, and whether the proposal would facilitate informed selection of lawyers by potential consumers of legal services. Representatives of lawyers and consumers should be heard in addition to the applicant concerning any proposed change. Any change which is approved should be promulgated in the form of an amendment to the Code so that all lawyers practicing in the jurisdiction may avail themselves of its provisions.

(Amended by SCO 356 § 14 effective April 1, 1979)

EC 2-11 The name under which a lawyer conducts his practice may be a factor in the selection process. The use of a trade name or an assumed name could mislead laypersons concerning the identity, responsibility, and status of those practicing thereunder. Accordingly, a lawyer in private practice should practice only under a designation containing his own name, the name of a lawyer employing him, the name of one or more of the lawyers practicing in a partnership, or, if permitted by law, in the name of a professional legal corporation, which should be clearly designated such. For many years some law firms have used a firm name retaining one or more names of deceased or retired partners, and such practice is not improper if the firm is a bona fide successor of a firm in which the deceased or retired person was a member, if the use of the name is authorized by law or by contract, and if the public is not misled thereby. However, the name of a partner who withdraws from a firm but continues to practice law should be omitted from the firm name in order to avoid misleading the public.

(Amended by SCO 356 § 15 effective April 1, 1979)

EC 2-12 A lawyer occupying a judicial, legislative, or public executive or administrative position who has the right to practice law concurrently may allow his name to remain in the name of the firm if he actively continues to practice law as a member thereof. Otherwise, his name should be removed from the firm name, and he should not be identified as a past or present member of the firm; and he should not hold himself out as being a practicing lawyer.

EC 2-13 In order to avoid the possibility of misleading persons with whom he deals, a lawyer should be scrupulous in the representation of a professional status. He should not hold himself out as being a partner or associate of a law firm if he is not one in fact, and thus should not hold himself out as a partner or associate if he only shares offices with another lawyer.

EC 2-14 In some instances a lawyer confines his practice to a particular field of law. In the absence of state controls to insure the existence of special competence, a lawyer should not be permitted to hold himself out as a specialist or as having official recognition as a specialist, other than in the fields of admiralty, trademark, and patent law where a holding out as a specialist historically has been

permitted. A lawyer may, however, indicate in permitted advertising, if it is factual, a limitation on his practice or one or more particular areas or fields of law in which he practices using designations and definitions authorized for that purpose by the Board of Governors.

(Amended by SCO 356 § 16 effective April 1, 1979)

EC 2-15 The legal profession has developed lawyer referral systems designed to aid individuals who are able to pay fees but need assistance in locating lawyers competent to handle their particular problems. Use of a lawyer referral system enables a layman to avoid an uninformed selection of a lawyer because such a system makes possible the employment of competent lawyers who have indicated an interest in the subject matter involved. Lawyers should support the principle of lawyer referral systems and should encourage the evolution of other ethical plans which aid in the selection of qualified counsel.

EC 2-16 The legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered, and reasonable fees should be charged in appropriate cases to clients able to pay them. Nevertheless, persons unable to pay all or a portion of a reasonable fee should be able to obtain necessary legal services, and lawyers should support and participate in ethical activities designed to achieve that objective.

Financial Ability to Employ Counsel: Persons Able to Pay Reasonable Fees

EC 2-17 The determination of a proper fee requires consideration of the interests of both client and lawyer. A lawyer should not charge more than a reasonable fee, for excessive cost of legal service would deter laymen from utilizing the legal system in protection of their rights. Furthermore, an excessive charge abuses the professional relationship between lawyer and client. On the other hand, adequate compensation is necessary in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession.

EC 2-18 The determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules. The fees of a lawyer will vary according to many factors, including the time required, his experience, ability, and reputation, the nature of the employment, the responsibility involved, and the results obtained. Suggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees. It is a commendable and long-standing tradition of the bar that special consideration is given in the fixing of any fee for services rendered a brother lawyer or a member of his immediate family.

EC 2-19 As soon as feasible after a lawyer has been employed it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made. Such a course will not only prevent later misunderstanding but will also work for good relations between the lawyer and the client. It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent. A lawyer should be mindful that many persons who desire to employ him may have had little or no experience with fee charges of lawyers, and for this reason he should explain fully to such persons the reasons for the particular fee arrangement he proposes.

EC 2-20 Contingent fee arrangements in civil cases have long been commonly accepted in the United States in proceedings to enforce claims. The historical bases of their acceptance are that (1) they often, and in a variety of circumstances, provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid. Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of a case, to enter into a contingent fee contract in a civil case with any client who, after being fully informed of all relevant factors, desires that arrangement. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relation cases are rarely justified. In administrative agency proceedings contingent fee contracts should be governed by the same consideration as in other civil cases. Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee.

EC 2-21 A lawyer should not accept compensation or any thing of value incident to his employment or services from one other than his client without the knowledge and consent of his client after full disclosure.

EC 2-22 Without the consent of his client, a lawyer should not associate in a particular matter another lawyer outside his firm. A fee may properly be divided between lawyers properly associated if the division is in proportion to the services performed and the responsibility assumed by each lawyer and if the total fee is reasonable.

EC 2-23 A lawyer should be zealous in his efforts to avoid controversies over fees with clients and should attempt to resolve amicably any differences on the subject. He should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client.

Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees

EC 2-24 A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-25 Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

Acceptance and Retention of Employment

EC 2-26 A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client; but in furtherance of the objective of the bar to make legal services fully available, a lawyer should not lightly decline proffered employment. The fulfillment of this objective requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.

EC 2-27 History is replete with instances of distinguished and sacrificial services by lawyers who have represented unpopular clients and causes. Regardless of his personal feelings, a lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse.

EC 2-28 The personal preference of a lawyer to avoid adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment.

EC 2-29 When a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel, whether for financial or other reasons, he should

not seek to be excused from undertaking the representation except for compelling reasons. Compelling reasons do not include such factors as the repugnance of the subject matter of the proceeding, the identity or position of a person involved in the case, the belief of the lawyer that the defendant in a criminal proceeding is guilty, or the belief of the lawyer regarding the merits of the civil case.

EC 2-30 Employment should not be accepted by a lawyer when he is unable to render competent service or when he knows or it is obvious that the person seeking to employ him desires to institute or maintain an action merely for the purpose of harassing or maliciously injuring another. Likewise, a lawyer should decline employment if the intensity of his personal feeling, as distinguished from a community attitude, may impair his effective representation of a prospective client. If a lawyer knows a client has previously obtained counsel, he should not accept employment in the matter unless the other counsel approves or withdraws, or the client terminates the prior employment.

EC 2-31 Full availability of legal counsel requires both that persons be able to obtain counsel and that lawyers who undertake representation complete the work involved. Trial counsel for a convicted defendant should continue to represent his client by advising whether to take an appeal and, if the appeal is prosecuted, by representing him through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court.

EC 2-32 A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the posibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, cooperating with counsel subsequently employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

(Added by SCO 128 effective May 6, 1971)

Annotations

Cases

This provision is designed to apply when a lawyer withdraws, not when a client secures new counsel; accordingly, it does not mandate return of a client's files when the client terminates the relationship. Miller v. Paul, Op. No. 2152, 615 P2d 615 (Alaska 1980).

EC 2-33 As a part of the legal profession's commitment to the principle that high quality legal services should be available to all, attorneys are encouraged to cooperate with qualified legal assistance organizations providing prepaid legal services. Such participation should at all times be in accordance with the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients. An attorney so participating should make certain that his relationship with a qualified legal assistance organization in no way interferes with his independence, professional representation of the interests of the individual client. An attorney should avoid situations in which officials of the organization who are not lawyers attempt to direct attorneys concerning the manner in which legal services are performed for individual members, and should also avoid situations in which considerations of economy are given undue weight in determining the attorneys employed by an organization or the legal services to be performed for the member or beneficiary rather than competence and quality of service. An attorney interested in maintaining the historic traditions of the profession and preserving the function of a lawyer as a trusted and independent advisor to individual members of society should carefully assess such factors when accepting employment by, or otherwise participating in, a particular qualified legal assistance organization, and while so participating should adhere to the highest professional standards of effort and competence.

(Added by SCO 263 effective December 31, 1976)

CANON 3. A LAWYER SHOULD ASSIST IN PREVENTING THE UNAUTHORZED PRACTICE OF LAW

DR 3-101. Aiding Unauthorized Practice of Law.

(A) A lawyer shall not aid a non-lawyer in the unauthorized practice of law.

(B) A lawyer shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction.

DR 3-102. Dividing Legal Fees with a Non-Lawyer.

(A) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:

(1) An agreement by a lawyer with his firm, partner, or associate may provide for the payment of money; over a reasonable period of time after his death, to his estate or to one or more specified persons.

(2) A lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation which fairly represents the services rendered by the deceased lawyer.

(3) A lawyer or law firm may include non-lawyer employees in a retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

DR 3-103. Forming a Partnership with a Non-Lawyer.

(A) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.

ETHICAL CONSIDERATIONS

EC 3-1 The prohibition against the practice of law by a layman is grounded in the need of the public for integrity and competence of those who undertake to render legal services. Because of the fiduciary and personal character of the lawyer-client relationship and the inherently complex nature of our legal system, the public can better be assured of the requisite responsibility and competence if the practice of law is confined to those who are subject to the requirements and regulations imposed upon members of the legal profession.

EC 3-2 The sensitive variations in the considerations that bear on legal determinations often make it difficult even for a lawyer to exercise appropriate professional judgment, and it is therefore essential that the personal nature of the relationship of client and lawyer be preserved. Competent professional judgment is the product of a trained familiarity with law and legal processes, a disciplined, analytical approach to legal problems, and a firm ethical commitment.

EC 3-3 A non-lawyer who undertakes to handle legal matters is not governed as to integrity or legal competence by the same rules that govern the conduct of a lawyer. A lawyer is not only subject to that regulation but also is committed to high standards of ethical conduct. The public interest is best served in legal matters by a regulated profession committed to such standards. The Disciplinary Rules protect the public in that they prohibit a lawyer from seeking employment by improper overtures, from acting in cases of divided loyalties, and from submitting to the control of others in the exercise of his judgment. Moreover, a person who entrusts legal matters to a lawyer is protected by the attorney-client privilege and by the duty of the lawyer to hold inviolate the confidences and secrets of his client.

EC 3-4 A layman who seeks legal services often is not in a position to judge whether he will receive proper professional attention. The entrustment of a legal matter may well involve the confidences, the reputation, the property, the freedom, or even the life of the client. Proper protection of members of the public demands that no person be permitted to act in the confidential and demanding capacity of a lawyer unless he is subject to the regulations of the legal profession.

EC 3-5 It is neither necessary nor desirable to attempt the formulation of a single, specific definition of what constitutes the practice of law. Functionally, the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

EC 3-6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyer maintains a direct relationship with his client, supervises the delegated work, and has complete professional responsibility for the work product. This delegation enables a lawyer to render legal service more economically and efficiently.

EC 3-7 The prohibition against a non-lawyer practicing law does not prevent a layman from representing himself, for then he is ordinarily exposing only himself to possible injury. The purpose of the legal profession is to make educated legal representation available to the public; but anyone who does not wish to avail himself of such representation is not required to do so. Even so, the legal profession should help members of the public to recognize legal problems and to understand why it may be unwise for them to act for themselves in matters having legal consequences.

EC 3-8 Since a lawyer should not aid or encourage a layman to practice law, he should not practice law in association with a layman or otherwise share legal fees with a layman. This does not mean, however, that the pecuniary value of the interest of a deceased lawyer in his firm or practice may not be paid to his estate or specified persons such as his widow or heirs. In like manner, profit-sharing retirement plans of a lawyer or law firm which include non-lawyer office employees are not improper. These limited exceptions to the rule against sharing legal fees with laymen are permissible since they do not aid or encourage laymen to practice law.

EC 3-9 Regulation of the practice of law is accomplished principally by the respective states. Authority to engage in the practice of law conferred in any jurisdiction is not per se a grant of the right to practice elsewhere, and it is improper for a lawyer to engage in practice where he is not permitted by law or by court order to do so. However, the demands of business and the mobility of our society pose distinct problems in the regulation of the practice of law by states. In furtherance of the public interest, the legal profession should discourage regulation that unreasonably imposes territorial limitations upon the right of a lawyer to handle the legal affairs of his client or upon the opportunity of a client to obtain the services of a lawyer of his choice in all matters including the presentation of a contested matter in a tribunal before which the lawyer is not permanently admitted to practice.

(Added by SCO 128 effective May 6, 1971)

Annotations

Cases

Engaging in a law-related business with nonlawyers violates the Canons of Professional Ethics. In re Cornelius, Op. No. 1019, 520 P2d 76 (Alaska 1974).

CANON 4. A LAWYER SHOULD PRESERVE THE CONFIDENCES AND SECRETS OF A CLIENT

DR 4-101. Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C) and (D), a lawyer shall not knowingly during or after termination of the professional relationship to his client:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

Annotations

Cases

Attorney was involved in a conflict of interest when he represented his wife in a personal injury action against former client arising out of the same automobile accident for which he defended the former client on a drunk driving charge. Burrell v. Disciplinary Bd. of Alaska Bar, Op. No. 2948, 702 P2d 240 (Alaska 1985).

ETHICAL CONSIDERATIONS

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

EC 4-2 The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law. Unless the client otherwise directs, a lawyer may disclose the affairs of his client to partners or associates of his firm. It is a matter of common knowledge that the normal operation of a law office exposes confidential professional information to non-lawyer employees of the office, particularly secretaries and those having access to the files; and this obligates a lawyer to exercise care in selecting and training his employees so that the sanctity of all confidences and secrets of his clients may be preserved. If the obligation extends to two or more clients as to the same information, a lawyer should obtain the permission of all before revealing the information. A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. Thus, in the absence of consent of his client after full disclosure, a lawyer should not associate another lawyer in the handling of a matter; nor should he, in the absence of consent, seek counsel from another lawyer if there is a reasonable possibility that the identity of the client or his confidences or secrets would be revealed to such lawyer. Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients.

EC 4-3 Unless the client otherwise directs, it is not improper for a lawyer to give limited information from his files to an outside agency necessary for statistical, bookkeeping, accounting, data processing, banking, printing, or other legitimate purposes, provided he exercises due care in the selection of the agency and warns the agency that the information must be kept confidential.

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. Likewise, a lawyer should be diligent in his efforts to prevent the misuse of such information by his employees and associates. Care should be exercised by a lawyer to prevent the disclosure of the confidences and secrets of one client to another, and no employment should be accepted that might require such disclosure.

Annotations

Cases

An attorney may not represent a third party against a former client where there exists a substantial possibility that knowledge gained by him in the earlier professional relationship can be used against the former client, or where the subject matter of his present undertaking has a substantial relationship to that of his prior representation. Alcut Corp. v. McGarvey, Op. No. 1544, 573 P2d 473 (Alaska 1978).

EC 4-6 The obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment. Thus an attorney, as successor to another practice, must preserve inviolate the secrets and confidences reflected in the files in the same respect as required by his predecessor. A lawyer should take all reasonable steps, providing safeguards from disclosing the confidences and secrets reflected in the files of his client, following the termination of his practice of the law whether termination is due from disability or retirement.

(Added by SCO 128 effective May 6, 1971)

Annotations

Cases

An attorney may not represent a third party against a former client where there exists a substantial possibility that knowledge gained by him in the earlier professional relationship can be used against the former client, or where the subject matter of his present undertaking has a substantial relationship to that of his prior representation. Alcut Corp. v. McGarvey, Op. No. 1544, 573 P2d 473 (Alaska 1978).

CANON 5. A LAWYER SHOULD EXERCISE INDEPENDENT PROFESSIONAL JUDGMENT ON BEHALF OF A CLIENT

DR 5-101. Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

(1) If the testimony will relate solely to an uncontested matter.

(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

(3) If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or his firm to the client.

(4) As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

Annotations

Cases

Where the issue of whether lessees of store had consented to repossession of store by lessors had been decided in a previous case, making it highly probable that the lessors would be collaterally estopped from relitigating the issue in the present case, attorney who witnessed the repossession could represent the lessees against the lessors in the present case since it was unlikely that the attorney would be called as a witness on the consent issue. Murry v. Feight, Op. No. 3210, 741 P2d 1148 (Alaska 1987).

DR 5-102. Withdrawal as Counsel When the Lawyer becomes a Witness.

(A) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101(B)(1) through (4).

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 5-103. Avoiding Acquisition of Interest in Litigation

(A) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he is conducting for a client, except that he may:

(1) Acquire a lien granted by law to secure his fee or expenses.

(2) Contract with a client for a reasonable contingent fee in a civil case.

(B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses.

DR 5-104. Limiting Business Relations with a Client.

(A) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise his professional judgment therein for the protection of the client, unless the client has consented after full disclosure.

(B) Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

DR 5-105. Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.

(A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, except to the extent permitted under DR 5-105(C).

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

Annotations

Cases

Attorney was involved in a conflict of interest when he represented his wife in a personal injury action against a former client arising out of the same automobile accident for which he defended the former client on a drunk driving charge. Burrell v. Disciplinary Bd. of Alaska Bar, Op. No. 2948, 702 P2d 240 (Alaska 1985).

DR 5-106. Settling Similar Claims of Clients.

(A) A lawyer who represents two or more clients shall not make or participate in the making of an

aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

DR 5-107. Avoiding Influence by Others Than the Client.

(A) Except with the consent of his client after full disclosure, a lawyer shall not:

(1) Accept compensation for his legal services from one other than his client.

(2) Accept from one other than his client any thing of value related to his representation of or his employment by his client.

(B) A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

(C) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) A non-lawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) A non-lawyer is a corporate director or officer thereof; or

(3) A non-lawyer has the right to direct or control the professional judgment of a lawyer.

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Annotations

Cases

Guardian ad litem appointed under AS 09.65.130 is child's attorney with power and responsibility to represent child zealously and to the best of his ability. **Veazey v. Veazey**, Op. No. 1381, 560 P2d 382 (Alaska 1977).

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client. After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-3 The self-interest of a lawyer resulting from his ownership of property in which his client also has an interest or which may affect property of his client may interfere with the exercise of free judgment on behalf of his client. If such interference would occur with respect to a prospective client, a lawyer should decline employment proffered by him. After accepting employment, a lawyer should not acquire property rights that would adversely affect his professional judgment in the representation of his client. Even if the property interests of a lawyer do not presently interfere with the exercise of his independent judgment, but the likelihood of interference can reasonably be foreseen by him, a lawyer should explain the situation to his client and should decline employment or withdraw unless the client consents to the continuance of the relationship after full disclosure. A lawyer should not seek to persuade his client to permit him to invest in an undertaking of his client nor make improper use of his professional relationship to influence his client to invest in an enterprise in which the lawyer is interested.

EC 5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of the employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

EC 5-5 A lawyer should not suggest to his client that a gift be made to himself or for his benefit. If a lawyer accepts a gift from his client, he is peculiarly susceptible to the charge that he unduly influenced or over-reached the client. If a client voluntarily offers to make a gift to his lawyer, the lawyer may accept the gift, but before doing so, he should urge that his client secure disinterested advice from an independent, competent person who is cognizant of all the circumstances. Other than in exceptional circumstances, a lawyer should insist that an instrument in which his client desires to name him beneficially be prepared by another lawyer selected by the client.

EC 5-6 A lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

EC 5-7 The possibility of an adverse effect upon the exercise of free judgment by a lawyer on behalf of his client during litigation generally makes it undesirable for the lawyer to acquire a proprietary interest in the cause of his client or otherwise to become financially interested in the outcome of the litigation. However, it is not improper for a lawyer to protect his right to collect a fee for his services by the assertion of legally permissible liens, even though by doing so he may acquire an interest in the outcome of litigation. Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by a lawyer to his client. Although this assistance is generally not encouraged, there are instances when it is not improper to advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and the cost of obtaining and presenting evidence, provided that the client remains ultimately liable for such expenses.

EC 5-9 Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as a advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility.

The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

EC 5-10 Problems incident to the lawyer-witness relationship arise at different stages; they relate either to whether a lawyer should accept employment or should withdraw from employment. Regardless of when the problem arises, his decision is to be governed by the same basic considerations. It is not objectionable for a lawyer who is a potential witness to be an advocate if it is unlikely that he will be called as a witness because his testimony would be merely cumulative or if his testimony will relate only to an uncontested issue. In the exceptional situation where it will be manifestly unfair to the client for the lawyer to refuse employment or to withdraw when he will likely be a witness on a contested issue, he may serve as advocate even though he may be a witness. In making such decision he should determine the personal or financial sacrifice of the client that may result from his refusal of employment or withdrawal therefrom, the materiality of his testimony, and the effectiveness of his representation in view of his personal involvement. In weighing these factors, it should be clear that refusal or withdrawal will impose an unreasonable hardship upon the client before the lawyer accepts or continues the employment. Where the question arises, doubts should be resolved in favor of the lawyer testifying and against his becoming or continuing as an advocate.

EC 5-11 A lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed. In like manner, his personal interests should not deter him from suggesting that additional counsel be employed; on the contrary, he should be alert to the desirability of recommending additional counsel when, in his judgment, the proper representation of his client requires it. However, a lawyer should advise his client not to employ additional counsel suggested by the client if the lawyer believes that such employment would be a disservice to the client, and he should disclose the reasons for his belief.

EC 5-12 Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action to be taken.

EC 5-13 A lawyer should not maintain membership in or be influenced by any organization of employees that undertakes to prescribe, direct, or suggest when or how he should fulfill his professional obligations to a person or organization that employs him as a lawyer. Although it is not necessarily improper for a lawyer employed by a corporation or similar entity to be a member of an organization of employees, he should be vigilant to safeguard his fidelity as a lawyer to his employer, free from outside influences.

Interests of Multiple Clients

EC 5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.

EC 5-15 If a lawyer is requested to undertake or to continue representation of multiple clients having potentially differing interests, he must weigh carefully the possibility that his judgment may be impaired or his loyalty divided if he accepts or continues the employment. He should resolve all doubts against the propriety of the representation. A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients; and for this reason it is preferable that he refuse the employment initially. On the other hand, there are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client; and if the interests become differing, withdrawal is less likely to have a disruptive effect upon the causes of his clients.

EC 5-16 In those instances in which a lawyer is justified in representing two or more clients having differing interests, it is nevertheless essential that each client be given the opportunity to evaluate his need for representation free of any potential conflict and to obtain other counsel if he so desires. Thus before a lawyer may represent multiple clients, he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If there are present other circumstances that might cause any of the multiple clients to question the undivided loyalty of the lawyer, he should also advise all of the clients of those circumstances.

EC 5-17 Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and beneficiaries of the estate of a decedent. Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chances of adverse effect upon his judgment is not unlikely.

EC 5-18 A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization. Occasionally a lawyer for an entity is requested by a stockholder, director, officer, employee, representative, or other person connected with the entity to represent in in an individual capacity; in such case the lawyer may serve the individual only if the lawyer is convinced that differing interests are not present.

EC 5-19 A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.

EC 5-20 A lawyer is often asked to serve as an impartial arbitrator or mediator in matters which involve present or former clients. He may serve in either capacity if he first discloses such present or former relationships. After a lawyer has undertaken to act as an impartial arbitrator or mediator, he should not thereafter represent in the dispute any of the parties involved.

Desires of Third Persons

EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment. The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client; and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

EC 5-22 Economic, political, or social pressures by third persons are less likely to impinge upon the independent judgment of a lawyer in a matter in which he is compensated directly by his client and his professional work is exclusively with his client. On the other hand, if a lawyer is compensated from a source other than his client, he may feel a sense of responsibility to someone other than his client.

EC 5-23 A person or organization that pays or furnishes lawyers to represent others possesses a potential power to exert strong

pressures against the independent judgment of those lawyers. Some employers may be interested in furthering their own economic, political, or social goals without regard to the professional responsibility of the lawyer to his individual client. Others may be far more concerned with establishment or extension of legal principles than in the immediate protection of the rights of the lawyer's individual client. On some occasions, decisions on priority of work may be made by the employer rather than the lawyer with the result that prosecution of work already undertaken for clients is postponed to their detriment. Similarly, an employer may seek, consciously or unconsciously, to further its own economic interests through the actions of the lawyers employed by it. Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom.

EC 5-24 To assist a lawyer in preserving his professional independence, a number of courses are available to him. For example, a lawyer should not practice with or in the form of a professional legal corporation, even though the corporate form is permitted by law, if any director, officer, or stockholder of it is a non-lawyer. Although a lawyer may be employed by a business corporation with non-lawyers serving as directors or officers, and they necessarily have the right to make decisions of business policy, a lawyer must decline to accept direction of his professional judgment from any layman. Various types of legal aid offices are administered by boards of directors composed of lawyers and laymen. A lawyer should not accept employment from such an organization unless the board sets only broad policies and there is no interference in the relationship of the lawyer and the individual client he serves. Where a lawyer is employed by an organization, a written agreement that defines the relationship between him and the organization and provides for his independence is desirable since it may serve to prevent misunderstanding as to their respective roles. Although other innovations in the means of supplying legal counsel may develop, the responsibility of the lawyer to maintain his professional independence remains constant, and the legal profession must insure that changing circumstances do not result in loss of the professional independence of the lawyer.

(Added by SCO 128 effective May 6, 1971)

CANON 6. A LAWYER SHOULD REPRESENT A CLIENT COMPETENTLY

DR 6-101. Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

Annotations

Cases

Public censure was warranted for attorney who neglected over a period of many years to attend to the necessary legal work connected with seven estates for which he was attorney of record. **In re Collins**, Op. No. 1964, 583 P2d 207 (Alaska 1978).

Public censure was appropriate sanction for gross negligence in responding to an interrogatory and for failing to heed an admonition against commingling of funds. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Grossly negligent misconduct is not within the ambit of the rule prohibiting lawyers from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, but does violate the rule on failing to act competently as well as other disciplinary rules. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Lack of experience in criminal cases will not always justify a court-appointed attorney's refusal to represent an indigent criminal defendant. **Wood v. Superior Court**, Op. No. 2884, 690 P2d 1225 (Alaska 1984).

DR 6-102. Limiting Liability to Client.

(A) A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice.

ETHICAL CONSIDERATIONS

EC 6-1 Because of his vital role in the legal process, a lawyer should act with competence and proper care in representing clients. He should strive to become and remain proficient in his practice and should accept employment only in matters which he is or intends to become competent to handle.

EC 6-2 A lawyer is aided in attaining and maintaining his competence by keeping abreast of current legal literature and developments, participating in continuing legal education programs, concentrating in particular areas of the law, and by utilizing other available means. He has the additional ethical obligation to assist in improving the legal profession, and he may do so by participating in bar activities intended to advance the quality and standards of members of the profession. Of particular importance is the careful training of his younger associates and the giving of sound guidance to all lawyers who consult him. In short, a lawyer should strive at all levels to aid the legal profession in advancing the highest possible standards of integrity and competence and to meet those standards himself.

EC 6-3 While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified. However, he may accept such employment if in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client. Proper preparation and representation may require the association by the lawyer of professionals in other disciplines. A lawyer offered employment in a matter in which he is not and does not expect to become so qualified should either decline the employment or, with the consent of his client, accept the employment and associate a lawyer who is competent in the matter.

EC 6-4 Having undertaken representation, a lawyer should use proper care to safeguard the interests of his client. If a lawyer has accepted employment in a matter beyond his competence but in which he expected to become competent, he should diligently undertake the work and study necessary to qualify himself. In addition to being qualified to handle a particular matter, his obligation to his client requires him to prepare adequately for and give appropriate attention to his legal work.

EC 6-5 A lawyer should have pride in his professional endeavors. His obligation to act competently calls for higher motivation than that arising from fear of civil liability or disciplinary penalty.

EC 6-6 A lawyer should not seek, by contract or other means, to limit his individual liability to his client for his malpractice. A lawyer who handles the affairs of his client properly has no need to attempt to limit his liability for his professional activities and one who does not handle the affairs of his client properly should not be permitted to do so. A lawyer who is a stockholder in or is associated with a professional legal corporation may, however, limit his liability for malpractice of his associates in the corporation, but only to the extent permitted by law.

(Added by SCO 128 effective May 6, 1971)

Annotations

Cases

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

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

CANON 7. A LAWYER SHOULD REPRESENT A CLIENT ZEALOUSLY WITHIN THE BOUNDS OF THE LAW

DR 7-101. Representing a Client Zealously.

(A) A lawyer shall not intentionally:

(1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.

(3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).

(B) In his representation of a client, a lawyer may:

(1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.

(2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

DR 7-102. Representing a Client within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client, when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(2) Knowlingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.

(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

(4) Knowingly use perjured testimony or false evidence.

(5) Knowingly make a false statement of law or fact.

(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

(8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected tribunal and may reveal the fraud to the affected person.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Annotations

Cases

Prosecutor's failure to reveal possible taint of identification procedure was apparently violative of DR 1-102(A)(4) and (5) and DR 7-102(A)(6). Buchanan v. State, Op. No. 1316, 544 P2d 1153 (Alaska 1976).

Where defense counsel informed the judge of his belief that defendant's proposed testimony would be false, the judge's solution as an alternative to withdrawal by the attorney that defendant take the stand and give his testimony in narrative form without assistance from his attorney, did not violate defendant's rights. Coleman v. State, Op. No. 2190, 621 P2d 869 (Alaska 1980).

Failure of trial court to allow defendant's counsel to withdraw was reversible error where there was sufficient evidence to suggest that the attorney client relationship had broken down and where, in trying to extricate himself from the case, the attorney essentially told the judge that his client was going to perjure himself. Newcomb v. State, Op. No. 130, 651 P2d 1176 (Alaska App. 1982).

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

Unverified complaint attached to pleadings constituted "evidence" within the meaning of this rule even though the complaint would not have been admissible at trial under the technical requirements of the Rules of Evidence. Discipline of Walton, Op. No. 2734, 676 P2d 1078 (Alaska 1983).

Discipline of attorney for writing letter to two federal officials accusing certain officials of perjury and cheating and warning that they might find themselves personally and criminally liable in tort did not violate the attorney's right of free speech. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Disciplinary rules under which attorney was cited were not overbroad or void for vagueness. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Statement by attorney in letters to two federal officials during the attorney's representation of clients in a federal quiet title and ejectment action, which accused certain officials of perjury and cheating and warned that they might find themselves criminally or personally liable in tort, were improper and required public censure. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

DR 7-103. Performing the Duties of Public Prosecutor or Other Government Lawyer.

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause.

(B) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

Annotations

Cases

Prosecutor has an obligation to disclose evidence which tends to negate guilt, mitigate the degree of the offense or reduce punishment. Des Jardins v. State, Op. No. 1245, 551 P2d 181 (Alaska 1976).

Failure to refuse to accept or continue employment when interests of another client impaired independent professional judgement, combined with other offenses, justified public censure. Matter of Croddick, Op. No. 1877, 602 P2d 406 (Alaska 1979).

DR 7-104. Communicating with One of Adverse Interest.

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

Annotations

Cases

Any possible violation of the disciplinary rules of the Code of Professional Responsibility by police officers, who knew that defendant had an attorney but nevertheless conducted a noncustodial interview with defendant without first informing his attorney, was so attenuated that the substantial interest in admitting reliable evidence resulting from the interview substantially outweighed the marginal purpose that would be served by suppressing the evidence. Depp v. State, Op. No. 390, 686 P2d 712 (Alaska App. 1984).

DR 7-105. Threatening Criminal Prosecution.

(A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

Annotations

Cases

Disciplinary rules under which attorney was cited were not overbroad or void for vagueness. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Discipline of attorney for writing letters to two federal officials accusing certain officials of perjury and cheating and warning that they might find themselves criminally or personally liable in tort did not violate the attorney's right of free speech. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

The fact that an attorney believes the truth of his allegations does not insulate him from discipline under the rule prohibiting lawyers from threatening to present criminal charges solely to obtain an advantage in a civil matter. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983).

Statements by attorney in letters to two federal officials during the attorney's representation of clients in a federal quiet title and ejectment action, which accused certain officials of perjury and cheating and warned that they might find themselves criminally or personally liable in tort, were improper and required public censure. Discipline of Vollintine, Op. No. 2756, 673 P2d 755 (Alaska 1983)

Dismissal of a case pursuant to the civil compromise statute does not imply that the case was prosecuted "solely to obtain an advantage in a civil matter." State v. Nelles, Op. No. 578, 713 P2d 806 (Alaska App. 1986).

DR 7-106. Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

(B) In presenting a matter to a tribunal, a lawyer shall disclose:

(1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.

(2) Unless privileged or irrelevant, the identities of the clients he represents and of the persons who employed him.

(C) In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

(3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.

(4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

Annotations

Cases

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

DR 7-107. Trial Publicity.

(A) A lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that does more than state without elaboration:

(1) Information contained in a public record.

(2) That the investigation is in progress.

(3) The general scope of the investigation including a description of the offense and, if permitted by law, the identity of the victim.

(4) A request for assistance in apprehending a suspect or assistance in other matters and the information necessary thereto.

(5) A warning to the public of any dangers.

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) The character, reputation, or prior criminal record (including arrests, indictments, or other charges of crime) of the accused.

(2) The possibility of a plea of guilty to the offense charged or to a lesser offense.

(3) The existence or contents of any confession, admission, or statement given by the accused or his refusal or failure to make a statement.

(4) The performance or results of any examinations or tests or the refusal or failure of the accused to submit to examinations or tests.

(5) The identity, testimony, or credibility of a prospective witness.

(6) Any opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case.

(C) DR 7-107(B) does not preclude a lawyer during such period from announcing:

(1) The name, age, residence, occupation, and family status of the accused.

(2) If the accused has not been apprehended, any information necessary to aid in his apprehension or to warn the public of any dangers he may present.

(3) A request for assistance in obtaining evidence.

(4) The identity of the victim of the crime.

(5) The fact, time, and place of arrest, resistance, pursuit, and use of weapons.

(6) The identity of investigating and arresting officers or agencies and the length of the investigation.

(7) At the time of seizure, a description of the physical evidence seized, other than a confession, admission, or statement.

(8) The nature, substance, or text of the charge.

(9) Quotations from or references to public records of the court in the case.

(10) The scheduling or result of any step in the judicial proceedings.

(11) That the accused denies the charges made against him.

(D) During the selection of a jury or the trial of a criminal matter, a lawyer or law firm associated with the prosecution or defense of a criminal matter shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial, except that he may quote from or refer without comment to public records of the court in the case.

(E) After the completion of a trial or disposition without trial of a criminal matter and prior to the imposition of sentence, a lawyer or law firm associated with the prosecution or defense shall not make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by public communication and that is reasonably likely to affect the imposition of sentence.

(F) The foregoing provisions of DR 7-107 also apply to professional disciplinary proceedings and juvenile disciplinary proceedings when pertinent and consistent with other law applicable to such proceedings.

(G) A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication and that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action.

(H) During the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) Physical evidence or the performance or results of any examination or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims, defenses, or positions of an interested person.

(5) Any other matter reasonably likely to interfere with a fair hearing.

(I) The foregoing provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him or from participating in the proceedings of legislative, administrative, or other investigative bodies.

(J) A lawyer shall exercise reasonable care to prevent his employees, associates and clients from making an extrajudicial statement that he would be prohibited from making under DR 7-107.

DR 7-108. Communication with or Investigation of Jurors.

(A) Before the trial of a case a lawyer connected therewith shall not communicate with or cause another to communicate with anyone he knows to be a member of the venire from which the jury will be selected for the trial of the case.

(B) During the trial of a case:

(1) A lawyer connected therewith shall not communicate with or cause another to communicate with any member of the jury.

(2) A lawyer who is not connected therewith shall not communicate with or cause another to communicate with a juror concerning the case.

(C) DR 7-108(A) and (B) do not prohibit a lawyer from necessary communication with veniremen or jurors solely in the course of official proceedings.

(D) After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.

(E) A lawyer shall not conduct or cause, by financial support or otherwise, another to conduct a vexatious or harassing investigation of either a venireman or a juror.

(F) All restrictions imposed by DR 7-108 upon a lawyer also apply to communications with or investigations of members of a family of a venireman or a juror.

(G) A lawyer shall reveal promptly to the court improper conduct by a venireman or a juror, or by another toward a venireman or a juror or a member of his family, of which the lawyer has knowledge.

DR 7-109. Contact with Witnesses.

(A) A lawyer shall not suppress any evidence that he or his client has a legal obligation to reveal or produce.

(B) A lawyer shall not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

(C) A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. But a lawyer may advance, guarantee, or acquiesce in the payment of:

(1) Expenses reasonably incurred by a witness in attending or testifying.

(2) Reasonable compensation to a witness for his loss of time in attending or testifying.

(3) A reasonable fee for the professional services of an expert witness.

DR 7-110. Contact with Officials.

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal which might be reasonably construed as being for the purpose of influencing his official acts.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) As required in the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

ETHICAL CONSIDERATIONS

EC 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law, which includes Disciplinary Rules and enforceable professional regulations. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.

Annotations

Cases

Guardian ad litem appointed under AS 09.65.130 is child's attorney with power and responsibility to represent child zealously and to the best of his ability. Veazey v. Veazey, Op. No. 1381, 560 P2d 382 (Alaska 1977).

EC 7-2 The bounds of the law in a given case are often difficult to ascertain. The language of legislative enactments and judicial opinions may be uncertain as applied to varying factual situations. The limits and specific meaning of apparently relevant law may be made doubtful by changing or developing constitutional interpretations, inadequately expressed statutes or judicial opinions, and changing public and judicial attitudes. Certainty of law ranges from well-settled rules through areas of conflicting authority to areas without precedent.

EC 7-3 Where the bounds of law are uncertain, the action of a lawyer may depend on whether he is serving as advocate or adviser. A lawyer may serve simultaneously as both advocate and adviser, but the two roles are essentially different. In asserting a position on behalf of his client, an advocate for the most part deals with past conduct and must take the facts as he finds them. By contrast, a lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law.

Duty of the Lawyer to a Client

EC 7-4 The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within the bounds of the law, and therefore permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. However, a lawyer is not justified in asserting a position in litigation that is frivolous.

EC 7-5 A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC 7-6 Whether the proposed action of a lawyer is within the bounds of the law may be a perplexing question when his client is contemplating a course of conduct having legal consequences that vary according to the client's intent, motive, or desires at the time of the action. Often a lawyer is asked to assist his client in developing evidence relevant to the state of mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence. In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.

EC 7-7 In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise, the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

EC 7-8 A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.

He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

EC 7-9 In the exercise of his professional judgment on those decisions which are for his determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of his client. However, when an action in the best interest of his client seems to him to be unjust, he may ask his client for permission to forego such action.

EC 7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.

EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or an incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.

EC 7-12 Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf casts additional responsibilities upon his lawyer. Where an incompetent is acting through a guardian or other legal representative, a lawyer must look to such representative for those decisions which are normally the prerogative of the client to make. If a client under disability has no legal representative, his lawyer may be compelled in court proceedings to make decisions on behalf of the client. If the client is capable of understanding the matter in question or of contributing to the advancement of his interests, regardless of whether he is legally disqualified from performing certain acts, the lawyer should obtain from him all possible aid. If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client. But obviously a lawyer cannot perform any act or make any decision which the law requires his client to perform or make, either acting for himself if competent, or by a duly constituted representative if legally incompetent.

EC 7-13 The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. This special duty exists because: (1) the prosecutor represents the sovereign and therefore should use restraint in the discretionary exercise of governmental powers, such as in the selection of cases to prosecute; (2) during trial the prosecutor is not only an advocate but he also may make decisions normally made by an individual client, and those affecting the public interest should be fair to all; and (3) in our system of criminal justice the accused is to be given the benefit of all reasonable doubts. With respect to evidence and witnesses, the prosecutor has responsibilities different from those of a lawyer in private practice; the prosecutor should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Further, a prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecutor's case or aid the accused.

EC 7-14 A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair. A government lawyer not having such discretionary power who believes there is lack of merit in a controversy submitted to him should so advise his superiors and recommend the avoidance of unfair litigation. A government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.

EC 7-15 The nature and purpose of proceedings before administrative agencies vary widely. The proceedings may be legislative or quasi-judicial, or a combination of both. They may be ex parte in character, in which event they may originate either at the instance of the agency or upon motion of an interested party. The scope of an inquiry may be purely investigative or it may be truly adversary looking toward the adjudication of specific rights of a party or of classes of parties. The foregoing are but examples of some of the types of proceedings conducted by administrative agencies. A lawyer appearing before an administrative agency, regardless of the nature of the proceeding it is conducting, has the continuing duty to advance the cause of his client within the bounds of the law. Where the applicable rules of the agency impose specific obligations upon a lawyer, it is his duty to comply therewith, unless the lawyer has a legitimate basis for challenging the validity thereof. In all appearances before administrative agencies, a lawyer should identify himself, his client if identity of his client is not privileged and the representative nature of his appearance. It is not improper, however, for a lawyer to seek from an agency information available to the public without identifying his client.

EC 7-16 The primary business of a legislative body is to enact laws rather than to adjudicate controversies, although on occasion the activities of a legislative body may take on the characteristics of an adversary proceeding, particularly in investigative and impeachment matters. The role of a lawyer supporting or opposing proposed legislation normally is quite different from his role in representing a person under investigation or on trial by a legislative body. When a lawyer appears in connection with proposed legislation, he seeks to affect the lawmaking process, but when he appears on behalf of a client in investigatory or impeachment proceedings, he is concerned with the protection of the rights of his client. In either event, he should identify himself and his client, if identity of his client is not privileged, and should comply with applicable laws and legislative rules.

EC 7-17 The obligation of loyalty to his client applies only to a lawyer in the discharge of his professional duties and implies no obligation to adopt a personal viewpoint favorable to the interests or desires of his client. While a lawyer must act always with circumspection in order that his conduct will not adversely affect the rights of a client in a matter he is then handling, he may take positions on public issues and espouse legal reforms he favors without regard to the individual views of any client.

EC 7-18 The legal system in its broadest sense functions best when persons in need of legal advice or assistance are represented by their own counsel. For this reason a lawyer should not communicate on the subject matter of the representation of his client with a person he knows to be represented in the matter by a lawyer, unless pursuant to law or rule of court or unless he has the consent of the lawyer for that person. If one is not represented by counsel, a lawyer representing another may have to deal directly with the unrepresented person; in such an instance, a lawyer should not undertake to give advice to the person who is attempting to represent himself, except that he may advise him to obtain a lawyer.

Duty of the Lawyer to the Adversary System of Justice

EC 7-19 Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments. The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law.

EC 7-20 In order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently according to procedures that command public confidence and respect. Not only must there be competent, adverse presentation of evidence and issues, but a

tribunal must be aided by rules appropriate to an effective and dignified process. The procedures under which tribunals operate in our adversary system have been prescribed largely by legislative enactments, court rules and decisions, and administrative rules. Through the years certain concepts of proper professional conduct have become rules of law applicable to the adversary adjudicative process. Many of these concepts are the basis for standards of professional conduct set forth in the Disciplinary Rules.

EC 7-21 The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

EC 7-22 Respect for judicial rulings is essential to the proper administration of justice; however, a litigant or his lawyer may, in good faith and within the framework of the law, take steps to test the correctness of a ruling of a tribunal.

EC 7-23 The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it. The adversary system contemplates that each lawyer will present and argue the existing law in the light most favorable to his client. Where a lawyer knows of legal authority in the controlling jurisdiction directly adverse to the position of his client, he should inform the tribunal of its existence unless his adversary has done so; but, having made such disclosure, he may challenge its soundness in whole or in part.

EC 7-24 In order to bring about just and informed decisions, evidentiary and procedural rules have been established by tribunals to permit the inclusion of relevant evidence and argument and the exclusion of all other considerations. The expression by a lawyer of his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused is not a proper subject for argument to the trier of fact. It is improper as to factual matters because admissable evidence possessed by a lawyer should be presented only as sworn testimony. It is improper as to all other matters because, were the rule otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client. However, a lawyer may argue, on his analysis of the evidence, for any position or conclusion with respect to any of the foregoing matters.

EC 7-25 Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.

EC 7-26 The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

EC 7-27 Because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal or produce. In like manner, a lawyer should not advise or cause a person to secrete himself or to leave the jurisdiction of a tribunal for the purpose of making him unavailable as a witness therein.

EC 7-28 Witnesses should always testify truthfully and should be free from any financial inducements that might tempt them to do otherwise. A lawyer should not pay or agree to pay a non-expert witness an amount in excess of reimbursement for expenses and financial loss incident to his being a witness; however, a lawyer may pay or agree to pay an expert witness a reasonable fee for his services as an expert. But in no event should a lawyer pay or agree to pay a contingent fee to any witness. A lawyer should exercise reasonable diligence to see that his client and lay associates conform to these standards.

EC 7-29 To safeguard the impartiality that is essential to the judicial process, veniremen and jurors should be protected against extraneous influences. When impartiality is present, public confidence in the judicial system is enhanced. There should be no extra-judicial communication with veniremen prior to trial or with jurors during trial by or on behalf of a lawyer connected with the case. Furthermore, a lawyer who is not connected with the case should not communicate with or cause another to communicate with a venireman or a juror about the case. After the trial, communication by a lawyer with jurors is permitted so long as he refrains from asking questions or making comments that tend to harass or embarrass the juror or to influence actions of the juror in future cases. Were a lawyer to be prohibited from communicating after trial with a juror, he could not ascertain if the verdict might be subject to legal challenge, in which event the invalidity of a verdict might go undetected. When an extrajudicial communication by a lawyer with a juror is permitted by law, it should be made considerately and with deference to the personal feelings of the juror.

EC 7-30 Vexatious or harassing investigations of veniremen or jurors seriously impair the effectiveness of our jury system. For this reason, a lawyer or anyone on his behalf who conducts an investigation of veniremen jurors should act with circumspection and restraint.

EC 7-31 Communications with or investigations of members of families of veniremen or jurors by a lawyer or by anyone on his behalf are subject to the restrictions imposed upon the lawyer with respect to his communications with or investigations of veniremen and jurors.

EC 7-32 Because of his duty to aid in preserving the integrity of the jury system, a lawyer who learns of improper conduct by or towards a veniremen, a juror, or a member of the family of either should make a prompt report to the court regarding such conduct.

EC 7-33 A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

EC 7-34 The impartiality of a public servant in our legal system may be impaired by the receipt of gifts or loans. A lawyer, therefore, is never justified in making a gift or a loan to a judge, a hearing officer, or an official or employee of a tribunal which might reasonably be construed as being for the purpose of influencing his official actions.

EC 7-35 All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a lawyer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing

counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

EC 7-36 Judicial hearings ought to be conducted through dignified and orderly procedures designed to protect the rights of all parties. Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings. While maintaining his independence, a lawyer should be respectful, courteous, and aboveboard in his relations with a judge or hearing officer before whom he appears. He should avoid undue solicitude for the comfort or convenience of judge or jury and should avoid any other conduct calculated to gain special consideration.

EC 7-37 In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer in his conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

EC 7-38 A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of his client. He should follow local customs of courtesy or practice, unless he gives timely notice to opposing counsel of his intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

EC 7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.

(Added by SCO 128 effective May 6, 1971)

CANON 8. A LAWYER SHOULD ASSIST IN IMPROVING THE LEGAL SYSTEM

DR 8-101. Action as a Public Official.

(A) A lawyer who holds public office shall not:

(1) Use his public position to obtain, or attempt to obtain, a special advantage in legislative matters for himself or for a client under circumstances where he knows or it is obvious that such action is not in the public interest.

(2) Use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client.

(3) Accept any thing of value from any person when the lawyer knows or it is obvious that the offer is for the purpose of influencing his action as a public official.

DR 8-102. Statements Concerning Judges and Other Adjudicatory Officers.

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

ETHICAL CONSIDERATIONS

EC 8-1 Changes in human affairs and imperfections in human institutions make necessary constant efforts to maintain and improve our legal system. This system should function in a manner that commands public respect and fosters the use of legal remedies to achieve redress of grievances. By reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they should participate in proposing and supporting legislation and programs to improve the system, without regard to the general interests or desires of clients or former clients.

EC 8-2 Rules of law are deficient if they are not just, understandable, and responsive to the needs of society. If a lawyer believes that the existence or absence of a rule of law, substantive or procedural, causes or contributes to an unjust result, he should endeavor by lawful means to obtain appropriate changes in the law. He should encourage the simplification of laws and the repeal or amendment of laws that are outmoded. Likewise, legal procedures should be improved whenever experience indicates a change is needed.

EC 8-3 The fair administration of justice requires the availability of competent lawyers. Members of the public should be educated to recognize the existence of legal problems and the resultant need for legal services, and should be provided methods for intelligent selection of counsel. Those persons unable to pay for legal services should be provided needed services. Clients and lawyers should not be penalized by undue geographical restraints upon representation in legal matters, and the bar should address itself to improvements in licensing, reciprocity, and admission procedures consistent with the needs of modern commerce.

EC 8-4 Whenever a lawyer seeks legislative or administrative changes, he should identify the capacity in which he appears, whether on behalf of himself, a client, or the public. A lawyer may advocate such changes on behalf of a client even though he does not agree with them. But when a lawyer purports to act on behalf of the public, he should espouse only those changes which he conscientiously believes to be in the public interest.

EC 8-5 Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-6 Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend

themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

EC 8-7 Since lawyers are a vital part of the legal system, they should be persons of integrity, of professional skill, and of dedication to the improvement of the system. Thus a lawyer should aid in establishing, as well as enforcing, standards of conduct adequate to protect the public by insuring that those who practice law are qualified to do so.

EC 8-8 Lawyers often serve as legislators or as holders of other public offices. This is highly desirable, as lawyers are uniquely qualified to make significant contributions to the improvement of the legal system. A lawyer who is a public officer, whether full or part-time, should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties.

EC 8-9 The advancement of our legal system is of vital importance in maintaining the rule of law and in facilitating orderly changes; therefore, lawyers should encourage, and should aid in making, needed changes and improvements.

(Added by SCO 128 effective May 6, 1971)

CANON 9. A LAWYER SHOULD AVOID EVEN THE APPEARANCE OF PROFESSIONAL IMPROPRIETY

DR 9-101. Avoiding Even the Appearance of Impropriety.

(A) A lawyer shall not accept private employment in a matter upon the merits of which he has acted in a judicial capacity.

(B) A lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee.

(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.

DR 9-102. Presenting Identity of Funds and Property of a Client.

(A) All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be deposited in one or more identifiable insured depository accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein except as follows:

(1) Funds reasonably sufficient to pay services charges may be deposited therein.

(2) Funds belonging in part to a client and in part presently or potentially to the lawyer or law firm must be deposited therein, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.

For purposes of this rule, "insured depository accounts" shall mean government insured accounts at a regulated financial institution on which withdrawals or transfers can be made on demand, subject only to any notice period which the institution is required to reserve by law or regulation.

(B) A lawyer shall

(1) Promptly notify a client of the receipt of his funds, securities, or other properties.

(2) Identify and label securities and properties of a client promptly upon receipt and place them in a safe deposit box or other place of safekeeping as soon as practicable.

(3) Maintain complete records of all funds, securities, and other properties of a client coming into the possession of the lawyer and render appropriate accounts to his client regarding them.

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

(C) Unless an election not to participate is submitted in accordance with the procedure set forth in paragraph (D), a lawyer or law firm shall establish and maintain an interest bearing insured depository account into which must be deposited funds of clients which are nominal in amount or are expected to be held for a short period of time, but only in compliance with the following provisions:

(1) No earnings from such account shall be made available to the lawyer or law firm and the lawyer or law firm shall have no right or claim to such earnings.

(2) Only funds of clients which are nominal in amount or are expected to be held for a short period of time may be deposited in such account. Funds which reasonably may be expected to generate in excess of one hundred dollars interest may not be deposited in such account.

(3) The depository institution shall be directed by the lawyer or law firm establishing such account:

(a) To remit earnings from such account, net of any service charges or fees, as computed in accordance with the institution's standard accounting practice to the Alaska Bar Foundation, Inc., at least quarter-annually; and

(b) To transmit with each remittance of earnings a statement showing the name of the lawyer or law firm on whose account the remittance is sent and the rate of interest applied, with a copy of such statement to such lawyer or law firm.

(4) The lawyer or law firm shall review the account at reasonable intervals to determine if changed circumstances required further action with respect to the funds of any client.

(D) A lawyer or law firm who elects not to maintain the account described in paragraph (C) shall make such election on or before September 1, 1989 on a Notice of Election form provided by the Alaska Bar Association. If a Notice of Election is not submitted, the lawyer or law firm shall maintain the account described in paragraph (C). A lawyer or law firm who wishes to change a previous election may do so at any time by notifying the Alaska Bar Association.

Annotations

Cases

Public censure was appropriate sanction for gross negligence in responding to an interrogatory and for failing to heed an admonition against commingling of funds. **In re Simpson**, Op. No. 2517, 645 P2d 1223 (Alaska 1982).

Under the ABA standards, sanctioning courts must: (1) determine what ethical duty the lawyer violated, the lawyer's mental state, and the extent of the actual or potential injury caused by the lawyer's misconduct; (2) look to the ABA standards to discern what sanction is recommended for the "type" of misconduct in question; and (3) ascertain whether any aggravating or mitigating circumstances exist which warrant increasing or decreasing the otherwise appropriate sanction. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

Lawyer misconduct, which included defrauding a client by fabricating a "settlement agreement" and intentionally representing the same as genuine, abuse of the legal process by forging a judge's signature, and the embezzlement of client funds, warranted disbarment rather than suspension. **Disciplinary Matter Involving Buckalew**, Op. No. 3147, 731 P2d 48 (Alaska 1986).

ETHICAL CONSIDERATIONS

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system. A lawyer should promote public confidence in our system and in the legal profession.

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.

EC 9-3 After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists.

EC 9-4 Because the very essence of the legal system is to provide procedures by which matters can be presented in an impartial manner so that they may be decided solely upon the merits, any statement or suggestion by a lawyer that he can or would attempt to circumvent those procedures is detrimental to the legal system and tends to undermine public confidence in it.

EC 9-5 Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of such funds should be avoided.

EC 9-6 Every lawyer owes a solemn duty to uphold the integrity and honor of his profession; to encourage respect for the law and for the courts and judges thereof; to observe the Code of Professional Responsibility; to act as a member of a learned profession, one dedicated to public service; to cooperate with his brother lawyers in supporting the organized bar through the devoting of his time, efforts, and financial support as his professional standing and ability reasonably permit; to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid not only professional impropriety but also the appearance of impropriety.

Annotations

Cases

An attorney may not represent a third party against a former client where there exists a substantial possibility that knowledge gained by him in the earlier professional relationship can be used against the former client, or where the subject matter of his present undertaking has a substantial relationship to that of his prior representation. **Alent Corp. v. McGarvey**, Op. No. 1544, 573 P2d 473 (Alaska 1978).

EC 9-7 A lawyer should exercise good faith judgment in determining initially whether funds of a client are of such a nominal amount or are expected to be held by the lawyer for such a short period of time that the funds should not be placed in an interest bearing insured depository account for the benefit of the client. In this determination, the lawyer should consider all relevant factors, including without limitation, the cost of establishing and maintaining the account, service charges, accounting fees and tax reporting procedures, the nature of the transaction involved and the likelihood of delay. A determination not to place funds in an account for the benefit of the client should be reviewed at reasonable intervals if the funds remain on hand to determine if changed circumstances require further action with respect to such funds.

(Added by SCO 128 effective May 6, 1971; amended by SCO 782 effective March 15, 1987)

DEFINITIONS*

As used in the Disciplinary Rules of the Code of Professional Responsibility:

(1) "Differing interests" include every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.

(2) "Law firm" includes a professional legal corporation.

(3) "Person" includes a corporation, an association, a trust, a partnership, and any other organization or legal entity.

(4) "Professional legal corporation" means a corporation, or an association treated as a corporation, authorized by law to practice law for profit.

(5) "State" includes the District of Columbia, Puerto Rico, and other federal territories and possessions.

(6) "Tribunal" includes all courts and all other adjudicatory bodies.

(7) "A bar association" includes a bar association of specialists as referred to in DR 2-105(A)(1) or (4).

(8) "Qualified legal assistance organization" means an office or organization of one of the four types listed in DR 2-103(D)(1) through (4), inclusive that meets all the requirements thereof.

(Added by SCO 128 effective May 6, 1971 and amended by SCO 263 effective December 31, 1976)

*"Confidence" and "secret" are defined in DR 4-101(A).

client security fund

The Client Security Fund was established by the Alaska Bar Association to provide a remedy for clients who have lost money or other property as a result of the dishonest conduct of attorneys. The Fund is a remedy of last resort for clients who cannot get reimbursement from other sources, such as insurance or the attorney involved.

purpose of fund

The legal profession depends upon the trust of clients. Very few attorneys breach that trust. Nonetheless, it is important that the profession's reputation for honesty be maintained and protected. The Client Security Fund serves this function by providing reimbursement to clients whose money or property has been wrongfully taken by attorneys admitted to practice law in Alaska.

financing the fund

No tax dollars are used. The Client Security Fund is financed by judges and attorneys licensed to practice law in Alaska.

losses covered by the client security fund

The Client Security Fund Committee, under rules established by the Supreme Court, administers the Fund and it may recommend reimbursement of losses caused by the dishonest conduct of attorneys admitted to the practice of law in Alaska, up to a maximum of $10,000.00 for each claim and $50,000.00 per attorney. Dishonest conduct means the wrongful taking of a client's money or other property. A situation in which an attorney did not complete work for which the client has paid or did not perform to the client's satisfaction does not, alone, constitute a claim. A claim for reimbursement must be filed with the Committee within three years after the client discovers the loss.

The Client Security Fund Committee does not have authority to discipline attorneys for misconduct, resolve fee disputes or determine legal malpractice claims. Fee disputes, complaints of misconduct or malpractice should be pursued by notifying the Alaska Bar Association or by civil lawsuit. In addition to filing a claim with the Client Security Fund Committee, a claimant should report the attorney's conduct to the Alaska Bar Association. A claimant should also report illegal acts, such as theft or embezzlement, to the local District Attorney.

how to file a claim

A claim form and other information and assistance is available by writing the Client Security Fund Committee or calling the Alaska Bar Association. A claimant is not required to be represented by an attorney in order to process a claim with the Fund.

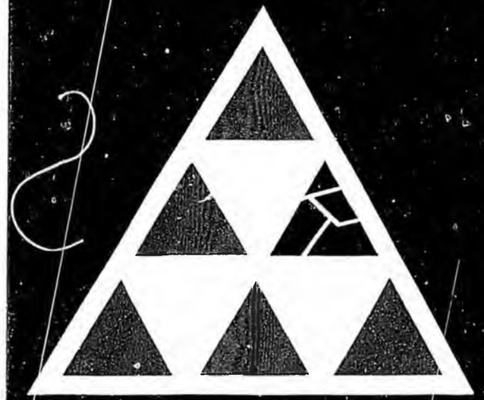
what to expect after a claim is filed

Each application for reimbursement will be reviewed and investigated. Applications which fail to make a case for reimbursement will be rejected. The reasons for the rejection will be set forth in a written report. Applications which are not rejected will be considered by the Client Security Fund Committee. Based upon its consideration, the Committee will make recommendation to the Board of Governors of the Alaska Bar Association. The Board will determine, in its discretion, whether and to what extent to reimburse the applicant. The decision to reimburse the applicant will depend on the amount of money available to the Fund, the number of claimants seeking reimbursement, and the degree of hardship suffered by each claimant.

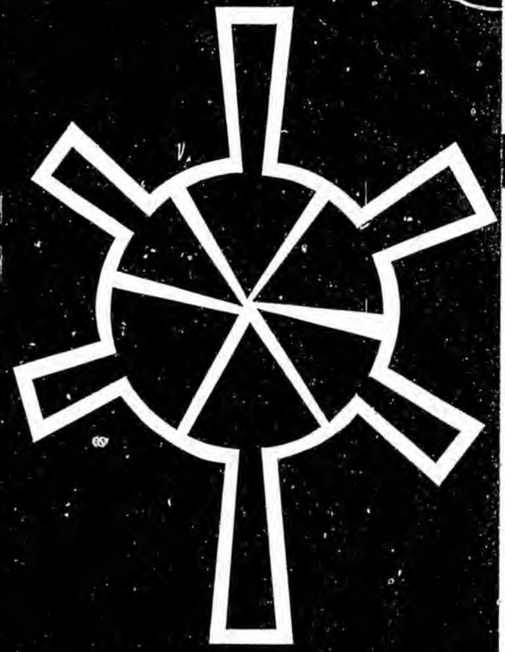
Claims will generally not be awarded until the completion of the disciplinary action against the attorney. It is important, therefore, that a claimant report dishonest conduct to Discipline Counsel immediately and cooperate with any investigation by the Alaska Bar Association.

Direct inquiries to:
Discipline Counsel
Alaska Bar Association
P.O. Box 100279
Anchorage, AK 99510
907-272-7469

client security fund



fee arbitration



what is a fee arbitration?

Fee arbitration is a process which may be used to resolve a dispute over fees with an attorney. The dispute is decided by an impartial panel which renders a final and binding decision based on the facts and evidence presented by the parties.

a public service

The fee arbitration process is a service provided by the Alaska Bar Association without charge to the person or attorney.

disputes subject to fee arbitration

A person may have a fee dispute with an attorney arbitrated. The attorney must be licensed to practice in the State of Alaska or the services must have involved a legal matter conducted in Alaska. The person must make efforts to resolve the dispute directly with the attorney before the arbitration process is commenced. The fee arbitration process cannot be used if the fee was determined by a court decision, by a statute, or by court rule.

requesting a fee arbitration

A person may request a fee arbitration by filling out a form available through the Bar Association. The person must state on the petition form the efforts that he or she has made to resolve the dispute directly with the attorney, describe the dispute as specifically as possible, and state the remedy sought from the attorney.

putting court proceeding "on hold"

A party in a civil court proceeding involving the collection of attorney fees may seek a "stay," which puts the court proceeding on "hold" while a fee arbitration is pending with the Bar Association. In order to obtain a stay, a petition for fee arbitration must be filed with the Bar Association within thirty (30) days of receiving a "Notice of Client's Right to Arbitrate" from the attorney.

assignment of arbitration to hearing panel

If a dispute involves an amount less than $2,000.00, the matter will be heard by a single member of the fee arbitration committee. Otherwise, a panel of three members, one of whom is a non-attorney, is convened from a local standing committee in the community where the legal services were provided. There are local standing committees in Anchorage, Fairbanks, Juneau, and Ketchikan. Special arrangements are made in communities which are not close to one of these.

hearing

Twenty days advance notice of the hearing will be given to the parties. The chairperson of the hearing panel conducts the hearing and decides what testimony and documents may be used as evidence. Relevant and reliable evidence will be admitted. If the client or the attorney fails to appear at the hearing, the hearing panel may proceed in that person's absence. Special procedures may be used by a client or the attorney to submit a written statement in addition to, or instead of, testimony at the hearing; to submit witness affidavits instead of presenting their testimony in person, and to participate by conference call. The cost of the call will generally be paid by the party requesting it.

confidentiality

Fee arbitration proceedings are confidential. Hearings and records relating to the arbitration are only open to the parties to the dispute and not to the public.

decision

The hearing panel will make its decision within thirty days after the close of the hearing. The decision must be agreed to by a majority of the hearing panel members. The panel may decide that an attorney should refund fees already collected; should collect only a reduced fee; or that the fees are reasonable under the circumstances.

fee arbitration binding

All parties are bound by the decision of the fee arbitration panel, unless the decision is set aside by the superior court on appeal, as discussed below. A party may apply to the courts for an order "confirming" the arbitration decision. The decision is confirmed by the court without any further evidenciary proceeding, and may be enforced in the same manner as a court judgment.

appeal

Either party may appeal a decision of the fee arbitration committee within thirty days of the date that the decision is mailed or delivered. There are limited grounds for appeal, which are set out in Alaska Statutes 09.43.120-180. Procedures for appeal are set out in the Rules of Appellate Procedure 601-609.

assistance in filing

The Bar Association is here to provide assistance to persons seeking an opportunity to have their fee dispute arbitrated and is more than happy to provide clients with information and assistance in the processing and handling of their fee dispute.

Contact the:

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

appeal of dismissals

If a complainant disagrees with the dismissal of a grievance, (s)he may appeal the decision by writing a letter to the Bar Association specifically stating the reasons for appeal. The appeal and the file will be reviewed by a member of an Area Discipline Division.

hearings

Discipline hearings are public and are much like a courtroom trial, with witnesses testifying under oath. Complainants are generally called to testify at the hearing. A Hearing Committee of at least one non-attorney and two attorneys considers the evidence and makes a recommendation to the Disciplinary Board.

Three non-attorneys and nine attorneys sit on the Disciplinary Board. The Board reviews the record and considers the Hearing Committee's recommendation. The Board can 1) dismiss the matter if it finds insufficient evidence; 2) issue a public reprimand to the attorney; or 3) recommend that the attorney be disciplined by the Alaska Supreme Court. The Court can impose public censure, probation, suspension from practice for up to five years, or disbarment.

some things a complainant should not expect

You should not expect the Bar Association to provide you with legal advice or services. The Bar Association can only act to enforce the Code of Professional Responsibility and cannot represent you in civil or criminal matters.

You should not expect that your complaint will be decided solely on the basis of your statement of the facts, just as the attorney cannot expect that the matter will be decided solely on the basis of his or her version. The decision will be based on all the relevant evidence.

You should not expect, as a result of your complaint, that you will receive any money or reimbursement for loss.

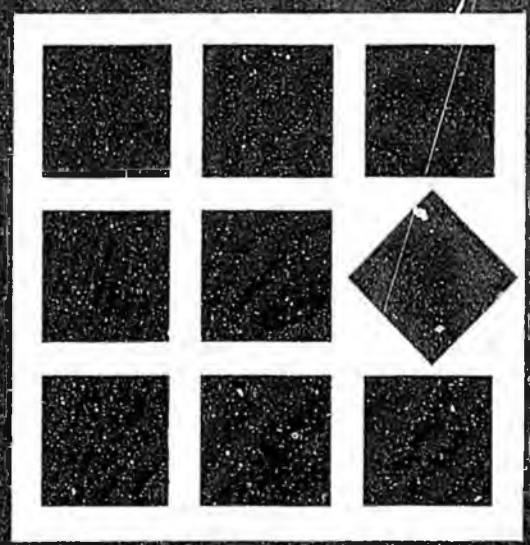
what a complainant can expect

You can expect that every attempt will be made to review your grievance in a manner which is timely and fair both to you and to the attorney.

You can expect to receive written notice of the final decision concerning your grievance, and the reasons for that decision.

Direct inquiries to:
Discipline Counsel
Alaska Bar Association
P.O. Box 100279
Anchorage, AK 99510
907-272-7469

ethical grievances against attorneys



supervision of attorney conduct

All attorneys are governed by rules of ethics known as the Code of Professional Responsibility. An attorney who violates the Code of Professional Responsibility is subject to discipline. The Alaska Supreme Court exercises final authority over attorney conduct in Alaska.

The Disciplinary Board of the Alaska Bar Association has been given the responsibility by the Alaska Supreme Court and the legislature to process ethical grievances against attorneys and to recommend discipline when appropriate. The Disciplinary Board employs Discipline Counsel and staff to investigate and prosecute ethical grievances.

examples of misconduct

The Code of Professional Responsibility covers a wide range of attorney conduct. Examples of misconduct are:

- conduct involving dishonesty, fraud, deceit, or misrepresentation
- revealing client confidences or secrets except under special circumstances
- charging a clearly excessive fee (generally a fee dispute is referred to the Attorney Fee Review Committee)
- withdrawing money from his/her office trust account for personal use unless it is undisputed that the attorney has earned the funds

If you have questions about an attorney's conduct you may call the Alaska Bar Association. The Code of Professional Responsibility is available at any court law library in the State of Alaska.

filing a complaint

Grievances must be written, signed statements, containing a clear explanation of the details of each act of alleged misconduct, including the approximate time and place of each. Copies of letters or other documents relating to the grievance should be included. A grievance must be sent to the Alaska Bar Association, where Discipline Counsel will review it and determine whether it contains sufficient factual allegations which, if true, would constitute ethical misconduct. Attorney Grievance forms, which may be used in filing a grievance, are available from the Alaska Bar Association.

investigation

If review of a grievance indicates that ethical misconduct may have occurred, a copy of the grievance will be sent to the attorney for a response. If the response raises additional questions, the complainant may be asked to submit further comments.

The investigation of a complaint is confidential. All persons involved in the investigation of a complaint, including the complainant, must maintain confidentiality, but they may consult with an attorney. It is contempt of court to violate this confidentiality.

After investigation, Discipline Counsel will make one of the following decisions:

- dismiss the grievance if the evidence does not show unethical conduct
- issue a written private admonition to the attorney
- file a petition for formal hearing

ATTORNEY DISCIPLINE NATIONAL SURVEY AND REPORT

By HALT

1988

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Third Reprinting, September, 1988

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Introduction

More than 70,000 complaints were filed with state attorney discipline agencies in 1986. Less than 2 percent resulted in public discipline.[1] Despite these alarming statistics, officials claim that attorney discipline agencies are effective and that lawyers guilty of violating the states' code of professional responsibility are appropriately disciplined. HALT contends that because the legal profession is self-policing, it is more concerned with protecting the image and economic status of lawyers than with protecting consumers from incompetent or unethical practitioners.

This conclusion is based on data HALT gathered in a state-by-state survey of disciplinary agencies completed by 34 agencies (see Appendix I) and data gathered by others, including the American Bar Association's (ABA) Center for Professional Responsibility.

This report on the status of attorney discipline identifies several national problems consumers encounter with discipline procedures. It is the first report on attorney discipline prepared by an organization of legal consumer advocates.[2] We hope it will answer many questions consumers have about lawyer discipline and be useful to consumer advocates, bar regulators, legislators and state courts as they consider reform of lawyer-discipline systems.

Summary of Findings

HALT found the state of attorney discipline across the country inexcusably irresponsible toward consumers. State agencies serve neither consumers nor the legal profession because of:

Invisibility — Disciplinary agencies do almost nothing to publicize consumers' right to file a complaint about a lawyer. The most common form of such publicity is reactive, an informational brochure sent to those who call the agency and request it.

Secrecy — Every state except Oregon and Washington conducts investigations, dismisses complaints and imposes private reprimands behind closed doors. In all but eight states, disciplinary hearings on complaints are closed to the public.

Leniency — Less than 2 percent of all complaints filed result in any form of public discipline. In some states, sanctions are decreased for lawyers who have stolen client money or been convicted of a felony, using such justifications as financial hardship, personal and emotional problems, inexperience or remorse.

Delay — Seventeen agencies (50 percent of 34 agencies responding) have no deadlines for processing complaints.[3] Some states report delays of eight to ten years in processing complaints.

Unfair and Unresponsive Process — Clients often don't complain about misconduct because they are discouraged by agency brochures' praise of lawyers and because the process is controlled by lawyers, takes place in secret, limits the client's right to present their own case or to appeal decisions, and does not provide compensation for injury.

Lack of Public Participation — The governing boards of agencies are dominated by lawyers usually chosen by or in consultation with state bar officials. Seventeen agencies (45 percent of 38 agencies responding) reported they have no requirement that hearing panel members include nonlawyers. Nonlawyers that do serve on panels are typically recruited through the "grapevine" of lawyers who work with the agency.

I. How the Process Works

Although each state's grievance system operates independently, almost all follow the model described below, with but slight variations. (See Appendix II for details on specific state procedures.)

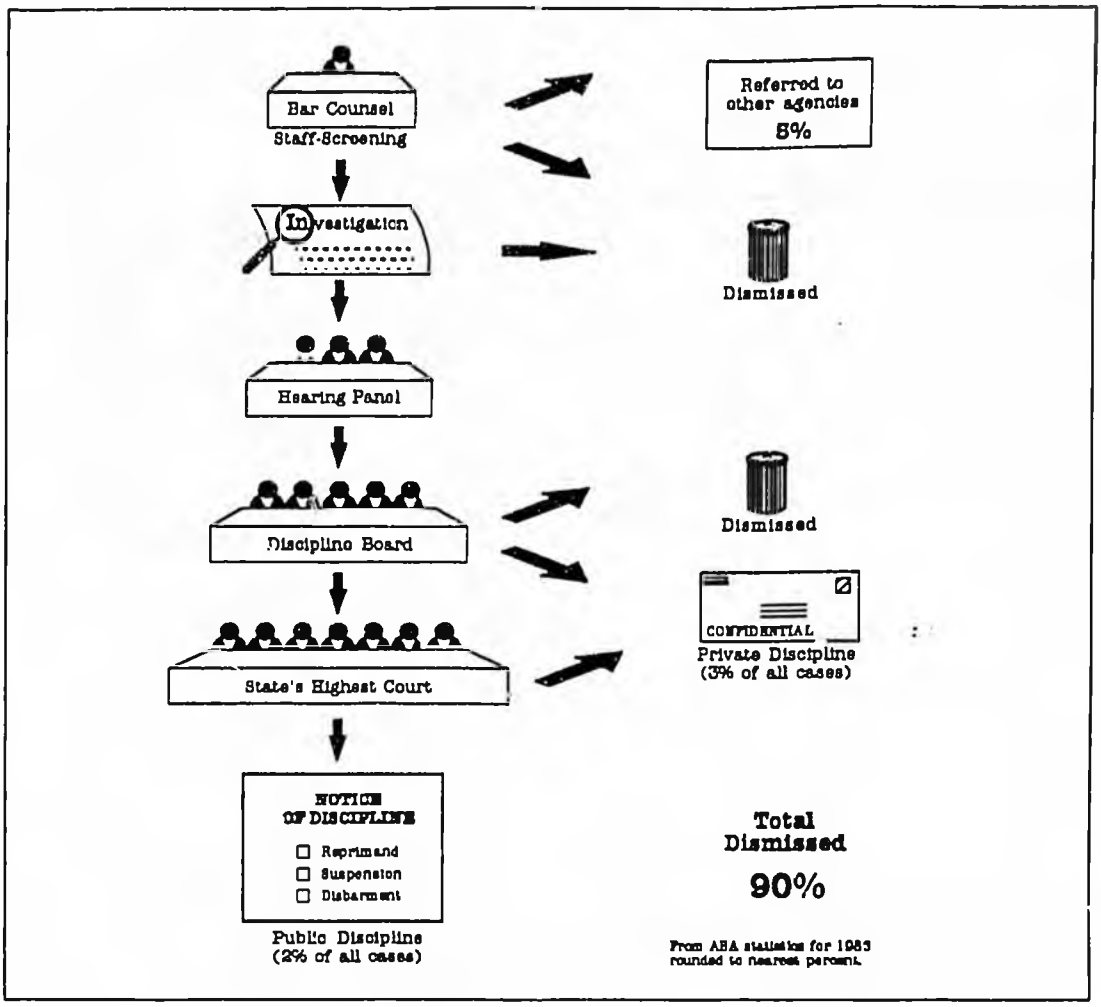
In almost every state, the highest court has oversight of attorney discipline. Actual court control, however, is nominal in most states and usually involves little more than rubber-stamping agency decisions.[4]

The ABA reports that in 33 states the agencies are run by state bar associations.[5] The bar also acts as a trade association charged with protecting the status and economic interests of the legal profession. In the remaining states, although the disciplinary agency is technically independent of the state bar, the state bar has considerable influence over who sits on the disciplinary governing board, who is hired as bar counsel (the agency director, traditionally a lawyer), how complaints are processed and what is considered unethical conduct under the state's code of professional responsibility.[6]

The discipline process begins when someone files a complaint with the bar counsel. Complaints can be initiated by clients, judges, other lawyers or the discipline agency itself. Lawyers and judges are required by their codes of ethics to report unethical or incompetent conduct by lawyers. Nevertheless, almost all complaints are filed by clients.[7]

Complaints are screened by lawyers or the bar counsel's staff to determine whether they allege misconduct under the state's code. Many complaints do not survive this initial screening, but information about dismissals at the screening stage is scant because only Oregon and Washington make such records public.

After a Complaint is Filed



Only complaints that survive initial screening are investigated. The investigation always includes asking the lawyer named in the complaint to respond to the client's claims. Investigations can — but often do not — include gathering documents and conducting interviews. If the bar counsel determines it is more likely than not that the lawyer has violated the ethical code (finds "probable cause"), a panel is appointed to hear the complaint. Only about one of every 10 complaints reach this stage.[8]

The hearing panel usually has three members, most often three lawyers or two lawyers and one nonlawyer. Rules of procedure are applied loosely during hearings,

which are informal, although the lawyer is given many of the due process rights of a criminal defendant. In order for discipline to be imposed, misconduct must be proven, in most states, by evidence that meets the tough "clear and convincing" standard. The lawyer is under no obligation to defend questionable conduct. After the hearing, the panel reports its findings and recommendation to the agency's governing board.

The disciplinary board reviews the recommendation and decides whether to uphold it. The board can dismiss the complaint, issue a private reprimand or recommend public discipline to the court. If a formal charge recommending public discipline is filed with the court, the court appoints a referee to review the recommendation. In some states, the referee holds a hearing during which the bar counsel presents evidence supporting the agency's recommendation and the lawyer has an opportunity to present a defense.

Based on the referee's findings, the court can dismiss the complaint or impose discipline. The typical options for discipline include a public reprimand, a suspension of the lawyer's license to practice for a specified period of time or disbarment, in which case the lawyer loses their license to practice law, although after five years they may usually reapply for their license. In most states the lawyer has the right to appeal the court's decision, in some states the agency may appeal, and in some states the client may appeal.

II. Invisibility

In 1970, the Clark Commission reported that "[m]ost disciplinary agencies deliberately discourage any publication of information concerning their activities, believing that the public image of the profession is damaged by a disclosure that attorney misconduct exists."[9] Little evidence exists to suggest that this attitude has changed.

HALT's survey reveals that the most common way of "informing" the public about the right to file a complaint against a lawyer is through a brochure sent out to people who call or write the agency requesting information. This is done by 25 agencies (65 percent of 38 agencies responding). Agencies also publish notices of public discipline in their state bar's magazine or newspaper, the readership of which is almost exclusively lawyers. Only two agencies (5 percent of 38 agencies responding) list the agency in the Yellow Pages of a telephone directory.

Four states (California, Maryland, Mississippi and West Virginia) have toll-free consumer information numbers.[10] However, Robert Fellmeth, who was appointed to the legislatively-mandated position to watchdog California's discipline system, reported in 1987 that the California number was not published in any of 16 major California telephone directories and the California Bar had made "no proactive effort . . . to inform consumers of the availability of the toll-free number or indeed of any mechanism for redress against dishonest or incompetent attorneys."[11] Worse yet, the persistent few who discovered the toll-free number could expect the line to be busy two-thirds of the time.[12]

Although HALT and others might assert that agencies need to take more initiative to uncover attorney misconduct, all can agree that from a practical standpoint the agencies must rely heavily on clients, who as victims of misconduct, file almost all

complaints.[13] If clients do not know that the disciplinary agencies exist, they cannot complain. As a result:

- ✓ Many consumers, in effect, have no opportunity to complain.
- ✓ Misconduct goes undetected and therefore repeat misconduct is encouraged.
- ✓ The public is misled about the incidence of lawyer misconduct.

Recommendations

Options available for advertising the system are numerous. At a minimum, every agency should be listed in the Yellow Pages as well as in the white pages of local telephone directories. In addition, HALT recommends that agencies:

✓ Regularly send all state and local consumer protection offices as well as public libraries brochures that explain the complaint process.

✓ Regularly report disciplinary actions taken to all state and local consumer protection offices.

✓ Encourage government and private consumer advocacy organizations to refer consumers to the disciplinary agencies.

✓ Advertise regularly in newspapers of major circulation and in consumer publications.

✓ Publish a list of disciplined attorneys in local newspapers and advertise the availability of a comprehensive list of attorneys disciplined in recent years.

✓ Publish and distribute an annual report.

✓ Maintain an active speakers' bureau that includes consumers who have gone through the process, to encourage people to report misconduct and allay fear or confusion about the complaint process. Speakers could address community, student, religious, social and professional groups.

✓ Require lawyers to distribute a brochure on discipline to each client when the attorney is hired.

III. Secrecy

In most states, agencies dispose of complaints in secret. Thirty-five agencies (80 percent of the 44 agencies responding) release no information about a complaint unless public discipline is ordered or a formal charge recommending public discipline is filed with the court. Because less than 4 percent of all complaints in 1986 resulted in filing a formal charge with the court, those 35 agencies made no information public about 96 percent of all the complaints they handled that year.[14]

Regardless how many times a lawyer has been investigated or received a private reprimand, no information about that lawyer's disciplinary record is made public. Agency hearings on complaints are closed to the public in all but five states. Twelve agencies (38 percent of 31 agencies responding) can even exclude complainants from attending parts of the hearing on their complaints.[15]

Every agency except Oregon's and Washington's keeps secret their records of the number and grounds for complaints filed and the findings of any subsequent investigations. In all but those two states, no one is given the right to know how many complaints have been filed against a lawyer, whether a lawyer has ever been privately reprimanded, whether a lawyer is being investigated for misconduct or why the agency has dismissed complaints against a lawyer. In fact, although every agency sends out notices to complainants when their complaints are dismissed, even the complainants themselves are often not informed of the evidence used to support the dismissals and sometimes are not informed that the lawyer was privately reprimanded.

Agencies reason that this secrecy is necessary to protect lawyers from "publicity predicated upon unfounded accusations."[16] HALT finds such reasoning unpersuasive. Concern for falsely accused lawyers does not justify keeping the public in the dark about

complaints, investigations (sometimes lasting years) or the agency's reasons for deciding to dismiss complaints or recommend discipline.[17]

Moreover, this secrecy is not consistent with procedures of other consumer protection agencies, which routinely disclose complaint records. As allegations of misconduct, complaints can provide a barometer of customer satisfaction and forewarn consumers about possible misconduct. However, even if complaints are kept secret because they might include "unfounded accusations," this does not justify keeping private reprimands confidential as well. These cases do not involve "unfounded accusations" because by definition they are cases in which the agency has found misconduct.

Finally, secrecy shields the agency's work from public scrutiny and accountability. Secret lawyer-grievance proceedings are particularly troublesome because lawyers are self-disciplining. As the American Civil Liberties Union of the National Capital Area commented on proposed changes in the District of Columbia's disciplinary rules, "Criminal trials and police trials are open to the public, not simply for the protection of the accused, but, just as essentially, because history teaches that operations that function secretly do not function well."[18]

At bottom, secrecy is anti-consumer. Under secrecy rules, when consumers cannot find out about complaint records, private reprimands or ongoing investigations, they:

✓ Don't have information necessary to make informed hiring decisions.

✓ Don't have information with which to protect themselves from repeat misconduct.

In addition, secrecy:

✓ Eliminates any public relations incentive for lawyers to guard against problems with their "customers."

✓ Shields the agency's process and decisions from public scrutiny and accountability.

Recommendations

HALT recommends that disciplinary agencies:

✓ Disciose the number of complaints filed against a lawyer, the number of complaints still pending, the basis of complaints (theft, neglect, etc.), the investigative findings and the resolution of closed complaints.

✓ Open disciplinary hearings and governing board meetings to the public.

Discipline for Misappropriation or Felony Conviction

Misappropriation

Misappropriation of client funds 1974-1984. Figures are in percent.

Disbarment:

California	60
Florida	70
Illinois	50
New York	60
Texas	100

Indefinite suspension, or suspension for more than 3 years:

California	0
Florida	0
Illinois	0
New York	10.0
Texas	0

Suspension of 6 months to 3 years:

California	21.4
Florida	20.0
Illinois	50.0
New York	20.0
Texas	0

Suspension of less than 6 months:

California	7.1
Florida	0
Illinois	0
New York	0
Texas	0

Reprimand:

California	7.1
Florida	10.0
Illinois	0
New York	10.0
Texas	0

Probation:

California	14.3
Florida	0
Illinois	0
New York	0
Texas	0

Convictions

Disposition of lawyers convicted of felonies, 1974-1984 cases.

Disbarment:

California	61.8
Florida	40.0
Illinois	100.0
New York	84.4
Texas	31.6

Indefinite suspension, or suspension for more than 3 years:

California	16.4
Florida	20.0
Illinois	0
New York	6.6
Texas	52.7

Suspension of 6 months to 3 years:

California	6.4
Florida	20.0
Illinois	.0
New York	4.4
Texas	15.8

Suspension for less than 6 months:

California	1.8
Florida	0
Illinois	0
New York	0
Texas	0

Reprimand:

California	0
Florida	10.0
Illinois	0
New York	4.4
Texas	0

Probation:

California	14.5
Florida	10.0
Illinois	0
New York	0
Texas	0

Source: American Bar Association statistics published by San Francisco Examiner, March 26, 1987.

IV. Leniency

Only 2 percent (about 1,400) of all complaints filed with disciplinary agencies resulted in public discipline in 1986.[19] Another 3 percent (2,100) resulted in private (secret) reprimands. Ninety percent, more than 63,000 complaints, were dismissed without disciplinary action. (Five percent were referred to other agencies.) Moreover, these numbers do not even include inquiries dismissed by the agencies before an official complaint was filed.[20]

The typical justification officials give for these embarrassing numbers is that few lawyers deserve discipline and that when discipline is meted out, it is appropriately severe.[21] Because agencies process complaints in secret and do not issue reports of their findings or decisions, this claim is hard to challenge. However, even the little information that agencies make available does not support their claim. Instead, it suggests that lawyers are judged with extreme leniency.

Lawyers who are publicly disciplined are usually thieves, felons or guilty of repeated misconduct.[22] In fact, even thieves or felons may receive only a public reprimand or temporary suspension as the tables on pages 12 and 14 show. These lawyers are free to continue to take cases.

Almost every disbarred lawyer in the nation may reapply to practice law after a few years. (The ABA recommends five years.)[23] In 1970, the Clark Commission reported that some agencies readmitted lawyers "as a matter of course,"[24] and even today only five agencies (12 percent of 39 agencies reporting) have the option of permanent disbarment. Only six agencies (18 percent of 32 agencies reporting) have any way of checking whether a lawyer continues to practice law in defiance of disbarment.

Public or private reprimands are most agencies' discipline of choice for lawyers found guilty of a history of misconduct that involves several clients or several acts of misconduct.[25] Yet, neither form of reprimand is meaningful to consumers. Neither affects the attorney's right to practice, and in the case of private discipline, (the most common), no one has the right to know about the misconduct or sanction, including prospective clients.

The agency's expectation that a lawyer will reform because of the disgrace of a private or public "shame on you" is contradicted by the number of lawyers found guilty of repeat misconduct. Moreover, regardless whether a lawyer chooses to reform or not, the public has a right to be notified of past misconduct. Shielding the lawyer instead of informing the public clearly favors the interests of lawyers over consumers.

Partial List of Sanctions Imposed for Specific Offenses During 1985

(percentages reflect frequency of offenses for the sanction imposed)

	SUSPENSION	PUBLIC REPRIMAND
General Neglect	*15%*	*24%*
General Misrepresentation to Client	*6%*	*4%*
Commingling	*4%*	*2%*
Conversion	*2%*	*0%* *
Felonies	*5%*	*0%* *
Misappropriation	*2%*	*0%* *

Based on Statistical Report, June, 1985
American Bar Association
Center for Professional Responsibility

* *Percentages so small not representative of whole number.*

In the past five years, concerted media attention on lawyer discipline has exposed dozens of "horror stories" in which egregious lawyer misconduct was followed by dismissal, reprimand or brief suspension.[26] Although such media accounts don't provide careful analysis of an agency's handling of cases across a period of time, the sheer number of such lenient sanctions makes a convincing case.

Complaints result in lenient discipline or no discipline at all for four reasons: valid complaints are dismissed, discipline is reduced because of factors the agency considers to "mitigate" the lawyer's misconduct, lawyers resign while still under disciplinary investigation and complaints are rejected because they fail to allege misconduct under the narrow scope of the professional conduct rules.

Dismissals of Valid Complaints

The Clark Commission reported in 1970 that disciplinary personnel "had a tendency" to dismiss complaints based on "self-serving," "unilateral" statements from the accused lawyer. In 1976, Steele and Nimmer found all but a small fraction of complaints were dismissed after "summary screening" and reported "there is often an underlying perception that the lawyer is 'one of us' and the complainant 'one of them,' an outsider who inevitably must meet a higher burden of proof and credibility."[27]

Based on close scrutiny of hundreds of California files, Bar Monitor Fellmeth noted that "the detection and initial acceptance of [a] case for discipline depends on an aggressive and articulate complaining witness."[28] Worse yet, Fellmeth reported that upon receiving a complaint, the bar sends a letter warning that it will be six months before it can begin working on the case. Some 12 to 18 months later, the bar sends another letter — requesting additional information. If it receives no answer, the case is closed and the investigator notes that the complaining witness lacked sufficient interest to pursue the matter.[29]

ABA statistics show that in 1986, agencies found probable cause in fewer than 10 percent of the cases.[30] This finding is a prerequisite to holding a hearing on the complaint.

HALT believes that valid complaints are often dismissed because of unmanageable backlogs and because screeners adhere to a basic belief that lawyers are rarely incompetent or dishonest and that many complaining clients are "cranks" or "sore losers."[31] It is of little consolation to consumers that the screening personnel who are responsible for such dismissals are often well-intentioned.

Mitigating Factors

Besides dismissing valid complaints, agencies often reduce discipline because of what are called "mitigating factors." The ABA's 1986 "Standards for Imposing Lawyer Sanctions" recommends the following (among others) as justifying a reduction in the severity of discipline:

- ✓ Personal and emotional problems.
- ✓ Full and free disclosure to the disciplinary board.
- ✓ Inexperience in the practice of law.
- ✓ Past good character or reputation.
- ✓ Delay in disciplinary proceedings.
- ✓ Remorse.[32]

From the client's perspective, reducing discipline based on these mitigating factors is baffling.[33] Lawyers who steal from clients, ignore cases or are too inexperienced to handle a case pose an obvious risk to other clients. It would seem to be the agencies' job to make sure this risk is eliminated or minimized, not excused. This kind of leniency is not accorded elsewhere — one can hardly imagine a bank forgiving a teller's theft of thousands of dollars and keeping them on the job based on excuses such as alcoholism, mental disability or willingness to pay it back.[34]

Resignation

A number of lawyers escape investigation and/or public exposure of their misconduct by resigning.

For example, the *Courier-Tribune* of Louisville, Kentucky, reported that 14 of the 16 lawyers who lost their licenses in 1986 were allowed to resign from the bar to keep their misconduct secret from the public.[35] Although some states preserve evidence of misconduct or require the lawyer to admit misconduct before resigning, every state allows lawyers to resign while under investigation and some states allow them to resign even after the agency has decided to seek disbarment. The ABA reported that in 1985, 33 percent of the lawyers who resigned had been charged with theft (called either "commingling" or "misappropriation").[36] Lawyers who resign may reapply at any time for a license to practice law.

Narrow Scope of Rules

Officials explain that part of the reason so many complaints are dismissed is that they do not allege misconduct under the state's ethical rules. This is because ethical rules are so narrowly drawn or interpreted that misconduct which may be grounds for malpractice may well not violate the ethical code.

According to apologists for the legal profession, these rules are and should be narrow because they are intended to maintain "minimum" licensing standards.[37] Disciplinary rules and procedures, they argue, are not designed to punish wrongdoing, to resolve disputes, to warn consumers of an attorney's past misconduct or to compensate consumers when misconduct is uncovered. They are also not intended, in most cases, to address misconduct that involves fees, malpractice or neglect, except when the conduct oversteps the licensing standards.

Authorities justify this limited authority by pointing out that consumers with problems can also turn to fee arbitration, client security trust funds and malpractice suits. Therefore, they contend, the jurisdiction of discipline agencies does not need to be expanded. In fact, each of these alternative forums has serious limitations.[38]

Despite the limitations of these alternatives, however, the legal profession consistently resists establishing new consumer protection forums precisely on the grounds that such forums will duplicate or conflict with the existing discipline mechanisms.[39] In essence, the legal profession argues both that disciplinary agencies should only be required to uphold "minimum" standards and that this gives consumers enough protection.

Conclusion

For consumers the data speaks for itself: one has at best a one in 10 chance at a hearing on a complaint and a less than one in 50 chance that public discipline will be given out. If public discipline is given, it is most likely to be nothing more severe than a reprimand. Further, an attorney who is disbarred may be reinstated within a few years or move to another state to take up practice.

Inappropriate dismissals and lenient sanctions contribute more to making the discipline systems ineffective than any other shortcoming. Specifically, lenient sanctions:

- ✓ Discourage people from complaining.
- ✓ Encourage repeat misconduct.
- ✓ Mislead consumers about a lawyer's record.
- ✓ Mislead consumers about the incidence of lawyer misconduct.

Recommendations

HALT suggests that a coalition of consumer, community and professional responsibility experts assume responsibility for drafting model ethical rules and model rules for agency procedure and a model code of ethics to help eliminate leniency. In the meantime, HALT recommends the following:

Process

Discipline agencies should:

✓ Keep records on standard intake forms of all consumer "inquiries" telephoned in or sent to the agency, even where they do not appear to warrant an investigation. This could be critical to demonstrating a pattern of misconduct. Such records will also provide insight into consumers' needs both from the discipline agency and from the profession.

✓ Provide in-person and over-the-telephone help to clients in framing their allegations of misconduct and advise them throughout the disciplinary process. Such help is essential if those other than the "articulate and aggressive" are to help the agency detect misconduct. This help should be provided by someone other than the complaint investigator, as the functions could conflict.

✓ Implement plain-language standards that state what constitutes grounds for dismissing a complaint, for a finding of probable cause and for imposing discipline. Although HALT does not support some of the rules in the ABA's "Standards for Imposing Lawyer Discipline," we strongly support establishing and publicizing uniform public standards both to minimize subjective bias and to help consumers frame allegations. Minimum standards of competence should be included.

✓ Never dismiss complaints based solely on the responding attorney's answer. The complaining client should be given an opportunity to reply and to dispute the answer. Should the two sides disagree about the facts, the agency should investigate further.

✓ Set up public review systems for complaints the agency plans to dismiss.

✓ Draft brief written decisions in plain language explaining all agency actions, including dismissals, and send copies to both the complainant and the attorney; the decision should also be available to the public.

Sanctions

Disciplinary agencies should:

✓ Eliminate private reprimands as a form of discipline.

✓ Consider instituting fines. Fines are more likely to deter misconduct.

✓ Impose permanent disbarments and rename what is now called disbarment "indefinite suspension" to make it clear that the lawyer has a right to reapply for admission.

✓ Permanently disbar any lawyer found guilty of intentional theft, regardless whether it is called "commingling," "misappropriation," or "conversion" and regardless of "mitigating factors."

✓ Disbar lawyers found guilty of a pattern of neglect and suspend or fine lawyers guilty of "simple" neglect. Disciplinary agencies consistently underrate the seriousness of neglect and thereby the importance of client control over their legal affairs.

✓ Automatically disbar attorneys convicted of a felony or those disbarred in another state.

✓ Limit factors considered to mitigate possible discipline to unintentional misconduct and absence of a prior disciplinary or complaint record.

✓ Adopt rules that allow the agency to order restitution to complainants in cases involving stolen money, unearned fees or incompetent work.