



THE FLORIDA BAR

Florida's Standards for Imposing Lawyer Sanctions

Approved November 1986
by The Florida Bar's
Board of Governors

Updated November 2000

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I. PREFACE

A. Background

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

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

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

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

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

An examination of these cases illustrates the need for a comprehensive system of sanctions. In many cases, different sanctions are imposed for the same acts of misconduct, and the courts rarely provide any explanation for the selection of sanctions. In other cases, the courts may give reasons

for their decisions, but their statements are too general to be useful. In still other cases, the courts may list specific factors to support a certain result, but they do not state whether these factors must be considered in every discipline case, nor do they explain whether these factors are entitled to equal weight.

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

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

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

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

contempt powers and other mechanisms available to the judge. Only if all lawyer misconduct is in fact reported to the appropriate disciplinary agency can the legal profession have confidence that consistent sanctions are imposed for similar misconduct.

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

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

B. Methodology

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

This data was examined to identify the patterns that currently exist among courts imposing sanctions and the policy considerations that guide the courts. In general, the courts were consistent in identifying the following policy considerations: protecting the public, ensuring the administration of justice, and maintaining the integrity of the profession. In the words of the California Supreme Court: "The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the lawyer to continue in that capacity for the protection of the public, the courts, and the legal profession." However, the courts failed to articulate any theoretical framework for use in imposing sanctions.

In attempting to develop such a framework, the Sanctions Committee considered a number of options. The Committee considered the obvious possibility of identifying each and every type of misconduct in which a lawyer could engage, then suggesting either a recommended sanction or

a range of recommended sanctions to deal with that particular misconduct. The Sanctions Committee unanimously rejected that option as being both theoretically simplistic and administratively cumbersome.

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

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

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

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

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

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

II. THEORETICAL FRAMEWORK

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

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

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

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

- (b) the duty of loyalty which (in the terms of the Model Rules and Code of Professional Responsibility) includes the duties to:
 - (i) preserve the property of a client [Rule 1.15/DR9-102],

- (ii) maintain client confidences [Rule 1.6/DR4-101], and
 - (iii) avoid conflicts of interest [Rules 1.7 through 1.13, 2.2, 3.7, 5.4(c) and 6.3/DR5-101 through DR5-105, DR9-101];
- (b) the duty of diligence [Rules 1.2, 1.3, 1.4/DR6-101(A)(3)];
 - (c) the duty of competence [Rule 1.1/DR6-101(A)(1) and (2)];
 - (d) the duty of candor [Rule 8.4(c)/DR1-102(A)(4) and DR7-101(A)(3)].

In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to be able to trust lawyers to protect their property, liberty, and their lives. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice [Rules 8.2, 8.4(b) and (c)/DR1-102(A)(3), (4) and (5), DR8-101 through DR8-103, DR9-101(c)].

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

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

- (a) restrictions on advertising and recommending employment [Rules 7.1 through 7.5/DR2-101 through 2-104];
- (b) fees [Rules 1.5, 5.4 and 5.6/DR2-106, DR2-107, DR3-102];
- (c) assisting unauthorized practice [Rule 5.5/DR3-101 thro DR3-103 through DR3-103];
- (d) accepting, declining, or terminating representation [Rules 1.2, 1.14, 1.16/DR2-110]; and
- (e) maintaining the integrity of the profession [Rules 8.1 and 8.3/DR1-101 and DR1-103].

The mental states used in this model are defined as follows. The most culpable mental state is that of intent, when the lawyer acts with the conscious objective or purpose to accomplish a particular result. The next most culpable mental state is that of knowledge, when the lawyer acts with conscious awareness of the nature or attendant circumstances of his or her conduct both without the conscious objective or purpose to accomplish a particular result. The least culpable mental state is negligence, when a lawyer fails to be aware of a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard of care that a reasonable lawyer would exercise in the situation.

The extent of the injury is defined by the type of duty violated and the extent of actual or potential harm. For example in a conversion case, the injury is determined by examining the extent of the client's actual or potential loss. In a case where lawyer tampers with a witness, the injury is measured by evaluating the level of interference or potential interference with the legal proceedings. In this model, the standards refer to various levels of injury: "serious injury," "injury," and "little or no injury". A reference to "injury" alone indicates any level of injury greater than "little or no" injury.

As an example of how this model works, consider two cases of conversion of a client's property. After concluding that the lawyers engaged in ethical misconduct, it is necessary to determine what duties were breached. In these cases, each lawyer breached the duty of loyalty owed to clients. To assign a sanction, however, it is necessary to go further, and to examine each lawyer's mental state and the extent of the injuries caused by the lawyers' actions.

In the first case, assume that the client gave the lawyer \$100 as an advance against the costs of investigation. The lawyer took the money, deposited it in a personal checking account, and used it for personal expenses. In this case, where the lawyer acted intentionally and the client actually suffered an injury, the most severe sanction--disbarment--would be appropriate.

Contrast this with the case of a second lawyer, whose client delivered \$100 to be held in a trust account. The lawyer, in a hurry to get to court, neglected to inform the secretary what to do with these funds and they were erroneously deposited into the lawyer's general office account. When the lawyer needed additional funds he drew against the general account. The lawyer discovered the mistake, and immediately replaced the money. In this case, where there was no actual injury and a potential for only minor injury, and where the lawyer was merely negligent, a less serious sanction should be imposed. The appropriate sanction would be at most either a public or private reprimand.

In each case, after making the initial determination as to the appropriate sanction, the court would then consider any relevant aggravating or mitigating factors (Standard 9). For example, the presence of aggravating factors, such as vulnerability of the victim or refusal to comply with an order to appear before the disciplinary agency, could increase the appropriate sanction. The presence of mitigating factors, such as absence of prior discipline or inexperience in the practice of law, could make a lesser sanction appropriate.

While there may be particular cases of lawyer misconduct that are not easily categorized, the standards are not designed to propose a specific sanction for each of the myriad of fact patterns in cases of lawyer misconduct. Rather, the standards provide a theoretical framework to guide the courts in imposing sanctions. The ultimate sanction imposed will depend on the presence of any aggravating or mitigating factors in that particular situation. The standards thus are not analogous to criminal determinate sentences, but are guidelines which give courts the flexibility to select the appropriate sanction in each particular case of lawyer misconduct.

The standards do not account for multiple charges of misconduct. The ultimate sanction imposed should at least be consistent with the sanction for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the sanction for the most serious misconduct. Either a pattern of misconduct or multiple instances of misconduct should be considered as aggravating factors (see Standard 9.22).

III. STANDARDS FOR IMPOSING LAWYER SANCTIONS AND BLACK LETTER RULES AND COMMENTARY

The Board of Governors of The Florida Bar adopted an amended version of the ABA Standards for Imposing Lawyer Sanctions and thereby provided a format for Bar counsel, referees and the Supreme Court of Florida to consider each of these questions before recommending or imposing appropriate discipline:

- (1) duties violated;
- (2) the lawyer*s mental state;
- (3) the potential or actual injury caused by the lawyer*s misconduct;
- (4) the existence of aggravating or mitigating circumstances.

The Bar will use these standards to determine recommended discipline to referees and the court and to determine acceptable pleas under Rule 3-7.9.

For reference purposes, a list of the black letter rules is set out below.

A. DEFINITIONS

1. “Injury” is harm to a client, the public, the legal system, or the profession which results from a lawyer*s misconduct. The level of injury can range from “serious” injury to “little or no” injury; a reference to “injury” alone indicates any level of injury greater than “little or no” injury.
2. “Intent” is the conscious objective or purpose to accomplish a particular result.

3. “Knowledge” is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.

4. “Negligence” is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard care that a reasonable lawyer would exercise in the situation.

5. “Potential injury” is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer*s misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer*s misconduct.

A. PURPOSE AND NATURE OF SANCTIONS

1.1 PURPOSE OF LAWYER DISCIPLINE PROCEEDINGS

The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly.

Commentary

While courts express their views on the purpose of lawyer sanctions somewhat differently, an examination of reported cases reveals surprising accord as to the basic purpose of discipline. As identified by the courts, the primary purpose is to protect the public. Second, the courts cite the need to protect the integrity of the legal system, and to insure the administration of justice. Another purpose is to deter further unethical conduct and, where appropriate, to rehabilitate the lawyer. A final purpose of imposing sanctions is to educate other lawyers and the public, thereby deterring unethical behavior among all members of the profession. As the courts have noted, while sanctions imposed on a lawyer obviously have a punitive aspect, nonetheless, it is not the purpose to impose such sanctions for punishment.

To achieve these purposes, sanctions for misconduct must apply to all licensed lawyers. Lawyers who are not actively practicing law, but who are serving in such roles as corporate officers, public officials, or law professors, do not lose their association with the legal profession because of their primary occupation. The public quite properly expects that anyone who is admitted to the practice of law, regardless of daily occupational activities, will conform to the minimum ethical standards of the legal profession. If the lawyer fails to meet these standards, appropriate sanctions should be imposed.

1.2 PUBLIC NATURE OF LAWYER DISCIPLINE PROCEEDINGS

Ultimate disposition of lawyer discipline should be public.

Commentary

Public disclosure of lawyer discipline, although not followed by a majority of jurisdictions, may enhance the public perception of the Bar. However, in the words of one court, ". . . the purpose of bar disciplinary proceedings is not to punish the respondent lawyer but to vindicate in the eyes of the public the overall reputation of the bar." Individual lawyers may prefer to avoid the embarrassment and stigma associated with a public sanction, but the profession as a whole will benefit. The more the public knows about how effectively the disciplinary system works, the more confidence they will have in that system. If there is approval of the system, it is hoped that public confidence in the profession's ability to discipline oneself will be assured.

Public identification of a lawyer who has been sanctioned serves other purposes as well. Where only some of the misconduct is known and more than one lawyer appears to be involved, announcement of the names of those who are sanctioned permits others' names to be cleared. Where the lawyer sanctioned is particularly prominent, public identification demonstrates that the system does not play favorites. Where the lawyer sanctioned may have caused injury to others who did not know they could complain, identification enables other victims to make themselves known.

Public sanctions also serve other members of the legal profession. When all sanctions are public, lawyers themselves can observe whether the system is operating fairly, treating consistently lawyers who are disciplined for similar misconduct. Public sanctions also educate other lawyers, and help deter misconduct by others in the profession. The preventive aspect of discipline cannot be overlooked.

1.3 PURPOSE OF THESE STANDARDS

These standards are designed for use in imposing a sanction or sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Rules Regulating The Florida Bar. Descriptions in these standards of substantive disciplinary offenses are not intended to create grounds for determining culpability independent of those Rules. The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanctions in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; and (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

Commentary

The Rules Regulating The Florida Bar (or other standard under the laws of the particular jurisdiction) establish the ethical standards for lawyers, and lawyers who violate these standards are subject to discipline. When disciplinary proceedings are brought against lawyers alleged to have engaged in ethical misconduct, disciplinary counsel have the burden of proving misconduct by clear

and convincing evidence. Following such a finding, the court or disciplinary agency should impose a sanction.

The Standards for Imposing Lawyer Sanctions are guidelines which are to be used by courts or disciplinary agencies in imposing sanctions following a finding of lawyer misconduct. These standards are not grounds for discipline, but, rather, constitute a model for the courts to follow in deciding what sanction to impose for proven lawyer misconduct. While these standards set forth a comprehensive model to be used in imposing sanctions, they also recognize that sanctions imposed must reflect the circumstances of each individual lawyer, and therefore provide for consideration of aggravating and mitigating circumstances in each case.

The Standards for Imposing Lawyer Sanctions are designed to promote consistency in the imposition of sanctions by identifying the relevant factors that courts should consider and then applying these factors to situations where lawyers have engaged in various types of misconduct. Because the Model Rules of Professional Conduct have been adopted by the American Bar Association as the ethical standards for the legal profession, the language of the Rules is used herein. However, because only a minority of jurisdictions have actually adopted the Rules, these Standards are phrased in terms of the fundamental duties owed to clients, the public, the legal system, and as a professional. This general language should make these standards applicable in all jurisdictions regardless of whether the jurisdiction chooses to adopt the Rules, the former Code of Professional Responsibility, or some combination of these standards.

B. SANCTIONS

2.1 SCOPE

A disciplinary sanction is imposed on a lawyer upon a finding or acknowledgment that the lawyer has engaged in professional misconduct.

Commentary

Sanctions in disciplinary matters are neither criminal nor civil but sui generis and imposed under authority of the state's highest court. Disciplinary sanctions are separate and apart from penalties which may be imposed solely for civil or criminal conduct, or contempt of court. Disciplinary sanctions do not include restrictions upon a lawyer's practice which may be imposed solely as a result of a lawyer's disability. For example, a lawyer who has not engaged in professional misconduct, but whose ability to practice law is impaired, as by alcoholism or mental illness, should be helped to limit his practice or transferred to inactive status; disciplinary sanctions should not be imposed. Disciplinary sanctions do not include penalties that may be imposed on lawyers who violate administrative rules or regulations applicable to members of the bar, such as by failing to pay dues or to attend mandatory continuing legal education programs.

2.2 DISBARMENT

Disbarment terminates the individual's status as a lawyer. Where disbarment is not permanent, procedures should be established for a lawyer who has been disbarred to apply for readmission, provided that:

- (1) no application should be considered for five years from the effective date of disbarment; and
- (2) the petition must show by clear and convincing evidence;
 - (a) successful completion of the bar examination; and
 - (b) rehabilitation and fitness to practice law.

Commentary

Disbarment is the most severe sanction, terminating the lawyer's ability to practice law. Disbarment enforces the purpose of discipline in that the public is protected from further practice by the lawyer; the reputation of the legal profession is protected by the action of the bench and bar in taking appropriate actions against unethical lawyers. Even though disbarment is reserved for the most serious cases, the majority of jurisdictions allow application for readmission after a period of time. For the protection of the public, however, the presumption should be against readmission, and, in order to insure that disbarment is in reality a more serious sanction than suspension, in no event should a lawyer even be considered for readmission until at least five years after the effective date of disbarment. After that time, a lawyer seeking to be readmitted to practice must show by clear and convincing evidence: successful completion of the bar examination, and rehabilitation and fitness to practice law.

Disbarment includes disbarment by consent, resignation in lieu of disbarment, and reciprocal disbarment. Although a lawyer who has been disbarred on consent or who has resigned in lieu of disbarment may not be readmitted any earlier than any other lawyer who has been disbarred, the fact that the lawyer resigned or was disbarred on consent is a factor that can be considered if the lawyer applies for readmission.

2.3 SUSPENSION

Suspension is the removal of a lawyer from the practice of law for a specified minimum period of time. A suspension of ninety (90) days or less shall not require proof of rehabilitation or passage of the bar examination. A suspension of more than ninety (90) days shall require proof of rehabilitation and may require passage of all or part of The Florida Bar examination. No suspension shall be ordered for a specific period of time in excess of three (3) years.

Commentary

Suspension includes suspension by consent, resignation in lieu of suspension and reciprocal suspension. Although jurisdictions impose suspensions for various time periods, the Standards for Lawyer Discipline recommend that suspension be for a definite period of time not to exceed three years. If the conduct is so egregious that a longer suspension seems warranted, the sanction of disbarment should be imposed.

In addition, the Standards draw a distinction between suspensions for ninety (90) days or less, and suspensions for more than ninety (90) days. Standard 6.4 states that a lawyer who has been suspended for ninety (90) days or less should be reinstated automatically (i.e., without establishing rehabilitation). However, a lawyer who has been suspended for more than ninety (90) days should not be reinstated without being required to show by clear and convincing evidence: rehabilitation, compliance with all applicable discipline or disability orders or rules, and fitness to practice law.

While the Standards for Lawyer Discipline currently provide for suspensions of less than six months, short-term suspensions with automatic reinstatement are not an effective means of protecting the public. If a lawyer's misconduct is serious enough to warrant a suspension from practice, the lawyer should not be reinstated until rehabilitation can be established. While it may be possible in some cases for a lawyer to show rehabilitation in less than six months, it is preferable to suspend a lawyer for at least six months in order to insure effective demonstration of rehabilitation. In order to insure that administrative procedures do not extend the period of actual suspension beyond that imposed, however, expedited procedures should be established to reinstate immediately lawyers who show rehabilitation, compliance with rules and fitness to practice.

A six month suspension is also necessary to protect clients. When shorter suspensions are imposed, lawyers can merely delay performing the requested services. If the lawyer eventually completes the work for the client and receives a fee, the suspension has only served to inconvenience the client. In reality a short-term suspension functions as a fine on the lawyer, and fines are prohibited by the Lawyer Standards (see Standard 6.14).

The amount of time for which a lawyer should be suspended, then, should generally be for a minimum of six months. In no case should the time period prior to application for reinstatement be more than three years. The specific period of time for the suspension should be determined after examining any aggravating or mitigating factors in the case. At the end of this time period the lawyer may apply for reinstatement, and the lawyer must show: rehabilitation, compliance with all applicable discipline or disability orders and rules, and fitness to practice law (see Standard 6.4).

2.4 EMERGENCY SUSPENSION

Emergency suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Emergency suspension includes:

- (1) suspension upon conviction of a "serious crime;" or
- (2) suspension when the lawyer's continuing conduct is or is likely to cause immediate and serious injury to a client or the public.

Commentary

The court should place a lawyer on emergency suspension immediately upon proof that the lawyer has been convicted of a "serious crime" or is causing great harm to the public. A "serious crime" is defined as any felony or any lesser crime a necessary element of which, as determined by the statutory or common law definition of such crime, involves interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, theft; or an attempt or a conspiracy or solicitation of another to commit a "serious crime." An emergency suspension is necessary in such cases both to protect members of the public and to maintain public confidence in the legal profession. As explained in the commentary to Standard 6.5, of the Standards for Lawyer Discipline, it is difficult for members of the public to understand why a lawyer who has been convicted of stealing funds from a client can continue to handle client funds. Public confidence in the profession is strengthened when expedited procedures are available in such instances of lawyer misconduct.

Although due process does not require a hearing prior to imposing an emergency suspension following a criminal conviction, an opportunity to show cause as to why it should not be imposed should be available. An emergency suspension remains in effect until it is lifted by the court, or until the court imposes a final disciplinary sanction after compliance with relevant procedural rules.

An emergency suspension is also appropriate when the lawyer's continuing conduct is causing or is likely to cause immediate and serious injury to a client or the public. The commentary to Standard 6.5 cites the example of a lawyer who has displayed a pattern of misconduct, such as ongoing conversion of trust funds, as warranting emergency suspension. Emergency suspension is also appropriate where a lawyer abandons the practice of law.

(As explained above in Section 2.1, cases of lawyer disability are not included in the scope of this report. See Standard 12.1 in the Standards for Lawyer Discipline for a discussion of transfer to disability inactive status.)

2.5 PUBLIC REPRIMAND

Public reprimand is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

Commentary

Publicity enhances the effect of the discipline and emphasizes the concern of the court with all lawyer misconduct, not only serious ethical violations. A public reprimand is appropriate in cases where the lawyer's conduct, although violating ethical standards, is not serious enough to warrant suspension or disbarment. (See Definitions, Standards for Lawyer Discipline.) A public reprimand serves the useful purpose of identifying lawyers who have violated ethical standards, and, if accompanied by a published opinion, educates members of the bar as to these standards.

A public reprimand is not always sufficient to protect the public; it may also be appropriate to attach additional conditions to a public reprimand. When a lawyer lacks competence in one area of practice, for example, the court could impose a public reprimand and also require the lawyer to attend continuing education courses. In a case of neglect, the court could impose a public reprimand and probation, during which period of time the lawyer's diligence in handling client matters could be monitored.

2.6 ADMONISHMENT

Admonishment is the lowest form of discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice.

Commentary

Although admonishment is the least serious of the formal disciplinary sanctions, the public is informed about the lawyers' misconduct, even though the ethical violation results in little or no injury to the client, the public, the legal system or the profession. However, disclosure of such information should help protect the public, while at the same time, avoid damage to a lawyer's reputation when future ethical violations seem unlikely. Public disclosure of an admonishment enhances the preventative nature of lawyer discipline.

2.7 PROBATION

Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone or in conjunction with any other disciplinary measure; probation can also be imposed as a condition of readmission or reinstatement.

Commentary

Probation is a sanction that should be imposed when a lawyer's right to practice law needs to be monitored or limited rather than suspended or revoked. The need for probation can arise under a variety of situations, and it can be imposed either alone or along with any other disciplinary measure. If probation is the sole sanction imposed, it can be either by public reprimand or admonishment, but the sanction should be public reprimand in any case in which the lawyer has violated a duty owed to a client, the public, or the legal system. Probation can also be imposed as a condition of readmission following disbarment or as a condition of reinstatement following a period of suspension from practice.

By imposing probation, the court allows a lawyer to continue to practice, but also requires the lawyer to meet certain conditions that will protect the public and will assist the lawyer to meet ethical obligations. Conditions of probation can include:

- (f) quarterly or semi-annual reports of caseload status, especially appropriate in neglect cases, see The Florida Bar v. Neale, 432 So.2d 50 (Fla. 1980);
- (g) supervision by a local disciplinary committee member, see In re Maragos, 285 N.W.2d 541 (N.D. 1979) and In re Hessberger, 96 Ill. 2d 423, 451 N.E.2d 821 (1983);
- (h) periodic audits of trust accounts, especially appropriate in cases where lawyers improperly handle client funds, see The Florida Bar v. Montgomery, 418 So.2d 267 (Fla. 1982);
- (i) attendance at continuing education programs, especially appropriate in cases of incompetence, see The Florida Bar v. Glick, 383 So.2d 642 (Fla. 1980);
- (j) participation in alcohol or drug abuse programs, especially appropriate where the lawyer's abuse of alcohol or drugs was a significant cause of his misconduct, see Tenner v. State Bar, 28 Cal. 3d 202, 617 P.2d 486f 168 Cal. Rptr, 333 (1980) and In re Heath, 296 Or. 683, 678 P.2d 736 (1984);
- (k) periodic physical or mental examinations, appropriate where the lawyer's physical or mental condition was a significant cause of his misconduct, see In re McCallum, 289 N.W.2d 146 (Minn. 1980) and In re Mudqe, 33 Cal. 3d 152, 654 P.2d 1307j, 187 Cal. Rptr. 79 (1982);
- (l) passing the bar examination or the appropriate professional responsibility examination, see The Florida Bar v. Peterson, 418 So.2d 246 (Fla. 1982) and In re Morales, 35 Cal. 3d 11 671 P.2d 857, 196 Cal. Rptr.-353 (1983);
- (m) limitations on practice, see The Florida Bar v. Neely, 417 So.2d 957 (Fla. 1983); or

- (i) such other conditions as are appropriate for the misconduct.

Probation may be terminated by the court after the respondent has filed an affidavit of compliance with all conditions of probation and the court is satisfied that the need for probation no longer exists. In the event that a lawyer is charged with violating the conditions of probation, a hearing is needed to determine whether a violation has occurred. The disciplinary authority has the burden of establishing any such violation by clear and convincing evidence. Upon a finding that a lawyer has violated probation conditions, the court may extend the probation, impose a more severe sanction, or otherwise handle the matter.

2.8 OTHER SANCTIONS AND REMEDIES

Other sanctions and remedies which may be imposed include:

- (a) restitution;
- (b) assessment of costs;
- (c) limitation upon practice;
- (d) appointment of a receiver;
- (e) requirement that the lawyer take the bar examination or professional responsibility examination;
- (f) requirement that the lawyer attend continuing education courses; and
- (g) other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions.

Commentary

These other sanctions and remedies are those that the court or the board may impose when it is deemed necessary to carry out the goals of the disciplinary system. The court should be creative and flexible in approaching those cases where there is some misconduct but where a severe sanction is not required. In less serious cases of incompetence, for example, a sanction requiring the lawyer to attend continuing legal education courses or to limit the lawyer's practice to handling certain types of cases may better protect the public than a period of suspension from practice. Fines are not an appropriate sanction (see Standard 6.14, Lawyer Standards).

2.9 RECIPROCAL DISCIPLINE

Reciprocal discipline is the imposition of a disciplinary sanction on a lawyer who has been disciplined in another jurisdiction.

Commentary

Public confidence in the profession is enhanced when lawyers who are admitted in more than one jurisdiction are prevented from avoiding the effect of discipline in one jurisdiction by practicing in another. Standard 10.2 of the Standards for Lawyer Discipline provides that a certified copy of the findings of fact in the disciplinary proceeding in the other jurisdiction should constitute conclusive evidence that the respondent committed the misconduct. Reciprocal discipline can be imposed without a hearing, but the court should provide the lawyer with an opportunity to raise a due process challenge or to show that a sanction different from the sanction imposed in the other jurisdiction is warranted. In order to facilitate the imposition of reciprocal discipline, bar counsel or other appropriate authority in each state should report all cases of public discipline to the ABA National Discipline Data Bank.

2.10 READMISSION AND REINSTATEMENT

Procedures have been established to allow a disbarred lawyer to apply for readmission. Procedures have been established to allow a suspended lawyer to apply for reinstatement.

Commentary

Readmission occurs when a disbarred lawyer is returned to practice. Since the purpose of lawyer discipline is not punishment, readmission may be appropriate. However, in no event should a lawyer ever be considered for readmission until at least five years after the effective date of disbarment. After that time, a lawyer seeking to be readmitted to practice must show by clear and convincing evidence: rehabilitation, compliance with all applicable discipline or disability orders or rules, and fitness to practice law.

Reinstatement occurs when a suspended lawyer is returned to practice. Since the purpose of lawyer discipline is not punishment, reinstatement is appropriate when a lawyer can show rehabilitation. Application for reinstatement should not be permitted until expiration of the ordered period of suspension and generally not until at least six months after the effective date of suspension. A lawyer should not be reinstated unless he can show by clear and convincing evidence: rehabilitation, compliance with all applicable discipline or disability orders and rules and fitness to practice law (see Standard 6.4).

Conditional readmission and conditional reinstatement can occur when appropriate. Conditions that can be imposed include probation (see Standard 2.7) or other sanctions or remedies (see Standard 2.8).

C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

3.0 GENERALLY

In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:

- (a) the duty violated;
- (b) the lawyer's mental state;
- (c) the potential or actual injury caused by the lawyer's misconduct; and
- (d) the existence of aggravating or mitigating factors.

Commentary

This system for determining an initial sanction upon a finding of lawyer misconduct requires courts to examine four factors: the nature of the duty violated, the lawyer's mental state, the actual or potential injury resulting from the lawyer's misconduct, and the existence of aggravating or mitigating factors. As explained above (see Theoretical Framework, p. 5), a lawyer's misconduct may be a violation of a duty owed to a client, the public, the legal system, or the profession. The lawyer's mental state may be one of intent, knowledge, or negligence. The injury resulting from the lawyer's misconduct need not be actually realized; in order to protect the public, the court should also examine the potential for injury caused by the lawyer's misconduct. In a case where a lawyer intentionally converts client funds, for example, disbarment can be imposed even where there is no actual injury to any client (see 4.11). In other situations, the standards make distinctions between various levels of actual or potential injury; disbarment may be reserved for cases of serious or potentially serious injury, while admonition may be imposed only in cases where there is little or no actual or potential injury. In any case, however, the court may then take account of any particular aggravating or mitigating factors (see Standard 9.0 for a list of these factors).

4.0 VIOLATIONS OF DUTIES OWED TO CLIENTS

Introduction

This duty arises out of the nature of the basic relationship between the lawyer and the client. The lawyer is not required to accept all clients, but, having agreed to perform services for a client, the lawyer has duties that arise under ethical rules, agency law, and under the terms of the contractual relationship with the individual client. The lawyer must preserve the property of a client, maintain client confidences, and avoid conflicts which will impair the lawyer's independent judgment. In addition, the lawyer must be competent to perform the services requested by the client. The lawyer must also be candid with the client during the course of the professional relationship.

4.1 FAILURE TO PRESERVE THE CLIENT'S PROPERTY

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

- 4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury.

Commentary

Some courts have held that disbarment is always the appropriate discipline when a lawyer knowingly converts client funds. For example, in the case of In re Wilson, 81 N.J. 451, 409 A.2d 1153 (1979), the Supreme Court of New Jersey discussed the rationale for imposing disbarment as a sanction on lawyers who misappropriate client funds:

Like many rules governing the behavior of lawyers, this one has its roots in the confidence and trust which clients place in their attorneys. Having sought his advice and relying on his expertise, the client entrusts the lawyer with the transaction including the handling of the client's funds.

Whether it be a real estate closing, the establishment of a trust, the purchase of a business, the investment of funds, the receipt of proceeds of litigation, or any one of a multitude of other situations, it is common-place that the work of lawyers involves possession of their client's funds Whatever the need may be for the lawyer's handling of client's money, the client permits it because he trusts the lawyer [T]here are few more egregious acts of professional misconduct of which an attorney can be guilty than the misappropriation of a client's funds held in trust. [citing In re Beckman, 79 N.J. 402, 404-05, 400 A.2d 792f 793 (1979)] Recognition of the nature and gravity of the offense suggests only one result - disbarment (81 N.J. at 454-55, 409 A.2d at 1154-55).

California has held that disbarment is appropriate even absent knowing conversion when a lawyer is grossly negligent in dealing with client property. As the California Supreme Court observed, "[e]ven if [the attorney's] conduct were not willful and dishonest, gross carelessness and negligence constitute a violation of an attorney's oath faithfully to discharge his duties and involve moral turpitude," Chefsky v. State Bar, 36 Cal-3d 116, at 123, 680 P.2d 82 (1984).

Most courts, however, reserve disbarment for cases in which the lawyer uses the client's funds for the lawyer's own benefit. In Carter v. Ross, 461 A.2d 675 (R.I. 1983), for example, the lawyer took money from an estate and used it to pay office and personal expenses. The Rhode

Island Supreme Court cited the Wilson case and imposed disbarment: "We, like our New Jersey colleagues, are convinced that continuing public confidence in the judicial system and the bar as a whole requires that the strictest discipline be imposed in misappropriation cases" (461 A.2d at 676). Similarly, in In re Freeman, 647 P.2d 820 (Kan, App. 1982), a lawyer was disbarred who caused checks from an insurance company to be issued to fictitious payees, and then converted that money for his own use. In these types of cases, where the lawyer's lack of integrity is clear, only the most compelling mitigating circumstances should justify a lesser sanction than disbarment.

In such cases, it may not even seem necessary to consider whether there is any injury to a client. Even though there will always be a potential injury to a client in such cases, the injury factor should still be considered. First, consideration of the extent of actual or potential injury can be important when it is especially serious: injury should be proved up at the disciplinary proceeding in order to make a record in the event that a lawyer applies for readmission. Second, even in jurisdictions where disbarment is permanent, consideration of injury reinforces the concept that a basic purpose of lawyer discipline is protection of the public. As the New York Supreme Court explained in a case where it imposed disbarment on a lawyer who misappropriated more than \$31,000 from a client-decedent's estate by forging the administrator's signature on checks: "This result is called for by the duty to protect the public and to vindicate the public's trust in lawyers as custodians of clients' funds" (In re Marks, 72 A.D.2d 399, 401F 424 N.Y.S.2d 229, 230 (1980)). (Note: Lawyers who convert the property of persons other than their clients are covered by Standard 5.11.)

- 4.12 Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

Commentary

Suspension should be reserved for lawyers who engage in misconduct that does not amount to misappropriation or conversion. The most common cases involve lawyers who commingle client funds with their own, or fail to remit client funds promptly. While the court in In re Wilson, 81 N.J. 451, 409 A.2d 1153 (1979), defined misappropriation to include "any unauthorized use by the lawyer of clients' funds entrusted to him, . . . whether or not he derives any personal gain or benefit therefrom" (81 N.J. at 455, n.1., 409 A.2d at 1155, n.1), most courts do not impose disbarment on lawyers who merely commingle funds. As the Washington Supreme Court concluded, "We do not now nor have we ever held that trust account violations per se result in disbarment" (In re Salvesen, 94 Wash.2d 73, 79, 614 P.2d 1264, 1266 (1980)).

For example, in State v. Chartier, 234 Kan. 834, 676 P.2d 740 (1984), the lawyer commingled a client's funds, and failed to notify a client of receipt of garnishment proceeds. The court imposed an indefinite suspension, stating that the lawyer "knew, or should have known through the exercise of reasonable diligence" that the garnishment funds collected exceeded the amounts actually due (234 Kan, at 836, 676 P.2d at 742). Similarly, in Disciplinary Board of the Supreme Court v. Banks, 641 S.W.2d 501 (Tenn. 1982), the court imposed a one year suspension where the lawyer took the client's money to invest but did not pay her interest on a regular basis or

pay over the client's money upon her demand. The court noted that the lawyer did not intend to convert the client's funds to his own use: "At all times he acknowledged his responsibility for them and his indebtedness to her" (641 S.W.2d at 504). Because lawyers who commingle client's funds with their own subject the client's funds to the claims of creditors, commingling is a serious violation for which a period of suspension is appropriate even in cases when the client does not suffer a loss. As explained by the Illinois Supreme Court: "It is the risk of the loss of the funds while they are in the attorney's possession, and not only their actual loss, which the rule is designed to eliminate..." In re Bizar, 97 Ill. 2d 127, 454 N.E.2d 271 (1983).

- 4.13 Public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

Commentary

Public reprimand should be reserved for lawyers who are merely negligent in dealing with client property, and who cause little or no injury or potential injury to a client. Suspension or disbarment as applicable under Standards 4.11 and 4.12 and the commentary thereto is appropriate for lawyers who are grossly negligent. For example, lawyers who are grossly negligent in failing to establish proper accounting procedures should be suspended; public reprimand is appropriate for lawyers who simply fail to follow their established procedures. Public reprimand is also appropriate when a lawyer is negligent in training or supervising his or her office staff concerning proper procedures in handling client funds.

The courts have typically imposed public reprimands in cases when lawyers fail to maintain adequate trust accounting procedures, or neglect to return the client's property promptly. In The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981), a public reprimand was imposed on a lawyer who failed to repay a loan made to him by a client for two years and who failed to keep adequate records of his trust accounting procedures. Similarly, in Carter v. Gallucci, 457 A.2d 269 (R.I. 1983), because of inadequate records, a lawyer failed to pay real estate taxes out of funds disbursed to him. He did subsequently pay the taxes, and the court imposed a public reprimand.

- 4.14 Admonishment is appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client or where there is a technical violation of trust account rules or where there is an unintentional mishandling of client property.

Commentary

Admonishment should be reserved for cases where the lawyer's negligence poses injury or potential injury to a client. An admonishment would be appropriate, for example, when a lawyer's sloppy bookkeeping practices make it difficult to determine the state of a client trust account, but where all client funds are actually properly maintained. Imposing an admonishment in such a case should serve as a warning to the lawyer to improve his or her accounting procedures, thus preventing any actual injury to any client.

4.2 FAILURE TO PRESERVE THE CLIENT'S CONFIDENCES

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving improper revelation of information relating to representation of a client:

- 4.21 Disbarment is appropriate when a lawyer, with the intent to benefit the lawyer or another, intentionally reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.

Commentary

Disbarment is warranted in situations when a lawyer intentionally abuses the client's trust by using the professional relationship to gain information which benefits the lawyer or another, and which causes injury or potential injury to a client. Because the violation of a client's confidence poses such a serious threat to the lawyer-client relationship, disbarment should be imposed whenever the lawyer acts with the intent to benefit the lawyer or another. Neither a "serious" injury nor a "potentially serious" injury to a client need be proved; any injury to a client will be sufficient to impose disbarment. An example of a case where disbarment is appropriate occurred in *In re Pool*, No. 83-37 BD, Sup. J. Ct., Suff. Cty., Mass. (1984), where a defendant's lawyer gave a federal prosecutor information about the location of a safety deposit box containing incriminating evidence in order to gain access to obtain funds to cover the costs of investigation. In the words of the court, "[t]he disclosure of confidential information by a defense attorney to a prosecutor, without the client's consent, is a serious violation of the defense attorney's obligations" (*Id.* at 4). (Note: This situation should be distinguished from the situation where a lawyer is acting under a good faith belief that there is no choice but to reveal a client's confidence, as in a case where a lawyer is called to testify as to the whereabouts of the client in a divorce proceeding and the lawyer's answer involves facts learned in the lawyer-client relationship. Here, the lawyer's good faith belief that the law require disclosure of the information would be a mitigating factor, see Standard 9,32(b)).

- 4.22 Suspension is appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.

Commentary

Suspension is appropriate when the lawyer is not intentionally using the professional relationship to benefit himself or another, but nevertheless knowingly breaches a client's confidence such that the client suffers injury or potential injury. An appropriate case for a suspension would involve a lawyer who knowingly revealed confidential information to the opposing party in litigation, with the result that the client's position was weakened.

- 4.23 Public reprimand is appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.

Commentary

Public Reprimand should be imposed when a lawyer negligently breaches a client's confidence. Even when the client is not actually harmed, the potential for harm to the client and damage to the professional relationship is so significant that a public sanction should be imposed. In the words of one court: "This element of trust is the very essence of the attorney-client relationship" [Matter of Roache, 446 N.E.2d 1302, 1303 (Ind. 1983)]. An appropriate case for a public reprimand would involve a lawyer who negligently leaves a client's documents in a conference room following a meeting, or who discusses a client matter in a public place.

- 4.24 Admonishment is appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.

Commentary

Maintaining a client's confidence is so fundamental to the professional relationship that it is inappropriate to impose an admonishment. At a minimum, a public reprimand should be imposed (see Standard 4.23).

4.3 FAILURE TO AVOID CONFLICTS OF INTEREST

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving conflicts of interest:

- 4.31 Disbarment is appropriate when a lawyer, without the informed consent of the client(s):
- (i) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or
 - (ii) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or
 - (c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

Commentary

The courts generally disbar lawyers who intentionally exploit the lawyer-client relationship by acquiring an ownership, possessory, security or other pecuniary interest adverse to a client without the client's understanding or consent. For example, in Matter of Easler, 269 S.E.2d 765 (S.C. 1980), a lawyer who engaged in a fraudulent scheme to obtain the client's property at a price well below market value was disbarred. The court noted that "in his attempt to acquire their property for his personal gain," the lawyer falsely notarized one of the clients' signature, and took advantage of the "domestic and financial difficulties the McFarlins [the clients] were undergoing" (269 S.E.2d at 766). In In re Wolf, 82 N.J. 326, 413 A.2d 317 (1980), a widow retained the lawyer who had represented her husband during his lifetime to handle her husband's estate. When she asked the lawyer to suggest an investment for a portion of her inheritance, he suggested that she invest in property which was owned by a company in which he was a stockholder and officer. Knowing that his client was naive and inexperienced in business matters, he directed her to invest her money in property worth only half of what he represented to her, and did not inform her as to the status of the mortgage, the title, or unpaid real estate taxes. Later on, he failed to notify her of a foreclosure action on the property or to defend the action on her behalf. In the words of the court, "It is clear that he exploited his client for his own financial benefit. It was unthinkable in the first place for the respondent to have suggested such an investment, but, having done so, it was unconscionable for him to have continued to represent the widow. He should have insisted that she retain independent counsel or refused to consummate the transaction. Undoubtedly, independent counsel would never have allowed the widow to make this investment" (413 A.2d at 321). (Note: the lawyer, who was disbarred, also attempted to commit fraud on the court in order to secure a larger fee.) Similarly, in In re Hills, 296 Or. 526, 678 P.2d 262 (1984), the lawyer entered into a loan transaction with clients in which he intentionally misrepresented that funds were available to pay the note. He also entered into a partnership agreement with another client in which he misrepresented that the client

would be a limited partner but, in fact, made the client a general partner. In neither of these cases did the lawyer advise the clients to seek independent legal counsel.

Disbarment is also appropriate in cases of multiple representation when a lawyer knowingly engages in conduct with the intent to benefit the lawyer or another. As one court has explained, "Although many ingredients go into the recipe for a successful lawyer-client relationship, one ingredient is indispensable: individual loyalty. The relationship cannot properly exist absent the lawyer's uncompromised commitment to the client's cause. DR5-105 aims to insure undivided loyalty in its absence, the lawyer cannot serve. The rule also seeks to maintain or increase public confidence in public institutions, for the appearance of impropriety that sometimes exists when a lawyer represents multiple clients . . . erodes public confidence in the legal profession." In re Jans, 295 Or. 289, 666 P.2d 830, 832 (1983). In In re Keast, 497 P.2d 103 (Mont. 1972), a lawyer represented a client charged with procuring girls for immoral purposes. Although the lawyer was named as one of the individuals for whom the girls were procured, he served as defense counsel in his client's criminal case. While this case was pending, the lawyer also filed an action for divorce against the client on behalf of the client's wife. The court imposed disbarment. In Stanley v. Board of Professional Responsibility, 640 S.W.2d 210 (Tenn. 1982), a lawyer was disbarred who represented both the victim and the defendant in a criminal matter. After learning about the crime from the victim, the lawyer misled the defendant into employing him when the lawyer knew that the victim no longer wished to prosecute. In the words of the court, "Stanley [the lawyer] deceived an immature youth and his naive parents. He compounded the deception with his lack of understanding of the proper role of a lawyer -- which does not include a self-appointed role as a paraclete, comforter, helper, or hand-holder, under the guise of legal services and at a lawyer's compensation rate" (640 S.W.2d at 213). (Note: the lawyer also was involved in another conflict of interest by entering into usurious loan transactions with two other clients.)

Finally, disbarment is appropriate when a lawyer knowingly uses information relating to representation of a former client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client. Although such cases are rare, disbarment is warranted when there is such an intentional abuse of the lawyer-client relationship.

- 4.32 Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.

Commentary

Conflicts can take the form of a conflict between the lawyer and his or her client, between current clients, or between a former client and a present client. In the case of conflicts between a lawyer and a present client, suspension is appropriate when the lawyer knows that his or her interests may be or are likely to be adverse to that of the client, but does not fully disclose the conflict, and causes injury or potential injury to a client. For example, in In re Boyer, 295 Or. 624, 669 P.2d 326 (1983), the lawyer represented a client for a number of years, rendering both financial and legal advice. When another of his clients wanted to borrow money, the lawyer arranged for the first client

to make a loan, and he prepared the note and a mortgage to secure the note, but the lawyer did not tell the first client either that such a loan might be usurious, and thus unenforceable, or that he had received a finder's fee from the second client for his efforts. The Oregon Supreme Court found that the lawyer violated DR5-101(A) in his representation of the first client, and suspended him for seven months. [Note: the court also found a violation of DR5-105(B).] Similarly, in Joseph E. Chabat, DP-161/80, DP 74/81 (Michigan Attorney Discipline Board, 1980), a lawyer in a divorce action was suspended for nine months when he lent himself money from the sale of a client's house and failed to advise the client to seek independent representation in regard to the loan.

Suspension is also appropriate when a lawyer knows of a conflict among several clients, but does not fully disclose the possible effect of the multiple representation, and causes injury or potential injury to one or more of the clients. For example, in State v. Callahan, 232 Kan. 136, 652 P.2d 708 (1982), the lawyer represented both the vendors and the purchaser in a land sale transaction. The lawyer failed to warn the vendors that they did not have a perfected security interest and failed to make full disclosure to the vendors of his close business and professional associations with the purchaser. The Supreme Court of Kansas imposed an indefinite suspension. Similarly, in Matter of Krakauer, 81 N.J. 32f404 A.2d 1137 (1979), the New Jersey Supreme Court imposed a one year suspension on a lawyer who represented both sides in a real estate transaction (and who also attempted to retain an unearned commission and called for a title search which was not ordered by the client).

Finally, suspension is appropriate when a lawyer knows or should know that the interests of a client are materially adverse to the interests of a former client in a substantially related matter, and causes injury or potential injury to the former or the subsequent client. For example, in In re LaPinska, 72 Ill.2d 461, 381 N.E.2d 700 (1978), the lawyer represented a contractor to secure title papers for a residence being sold. The lawyer, a city attorney, then represented the city in a suit brought by the purchasers of the residence against the contractor regarding a zoning violation of the property. When the purchasers complained about the leniency of the fine imposed on the contractor, the lawyer agreed to represent them in a civil suit against the contractor. Despite the fact that the lawyer had acted openly, and all the affected parties were aware of the dual representation, the Illinois Supreme Court suspended the lawyer for one year. Similarly, In re Odendahl, M.R. 2787 (Ill. 1982), the Illinois Supreme Court suspended a lawyer for one year when, while a state's attorney, he represented individuals in nine divorce proceedings in which support payments were due. In one case, he represented the wife to obtain the divorce, and then the husband, in a petition to reduce the support payments. In another case, he prosecuted a defendant for disorderly conduct and then filed an answer for him in a divorce suit by his wife. The court noted that four of these cases occurred after motions to disqualify had been filed against the lawyer and that he knew or should have known of the impropriety of his conduct.

- 4.33 Public reprimand is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Commentary

The courts generally impose a public reprimand when a lawyer engages in a single instance of misconduct involving a conflict of interest when the lawyer has merely been negligent and there is no overreaching or serious injury to a client. For example, in State v. Swoyer, 228 Kan, 799, 619 P.2d 1166 (1980), a public censure was imposed on a lawyer who was representing a client who owned his own business, and who also advised the client's former employee to sue the client for back wages. Although the lawyer stated that he was simply carrying out his client's wishes by attempting to secure payment for the employee, and that he merely advised her to file suit herself, the court found an ethical violation worthy of censure (public reprimand) since her petition was actually typed in the lawyer's office and filed by the lawyer. In a multiple representation situation, the court in Gendron v. State Bar of California, 35 Cal,3d 409, 673 P.2d 260, 197 Cal. 3d 409, 673 P.2d 260, 197 Cal. Rptr. 590, (1983), imposed a public reprimand on a public defender who neglected to obtain written waiver of conflict forms from three defendants who were jointly charged with robbery. In Matter of Palmieri, 76 N.J. 51, 385 A.2d 856 (1978), a public reprimand was imposed on a lawyer who represented the seller of a supermarket when, with the buyers unable to hire a lawyer and upon the insistence of the seller, he also represented the buyers. Although the lawyer made full disclosure of the relevant facts and pitfalls of multiple representation, he later filed suit against the buyers and eventually had to withdraw when he was required to be a witness concerning the nature of the agreement between the parties.

Courts also impose public reprimands in cases of subsequent representation. For example, in In re Drendel, M.R. 1708 (Ill. 1975), a lawyer represented a client in a divorce suit against his wife, but the parties reconciled before the hearing and the case was dismissed. About eighteen months later, he represented the wife in a divorce action against the husband, but this suit was also dismissed. Similarly, in In re Lewis, M.R. 2766 (Ill. 1982), the lawyer represented the executor of a will and later, while employed in another office, represented a client who was the devisee of the residence property who filed a petition alleging misconduct by the executor. The court ordered the lawyer censured [publicly reprimanded], noting no evidence of secrecy, fraud, or financial benefit to the lawyer.

- 4.34 Admonishment is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes little or no injury or potential injury to a client.

4.4 LACK OF DILIGENCE

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

4.41 Disbarment is appropriate when:

- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
- (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
- (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a client.

Commentary

Lack of diligence can take a variety of forms. Some lawyers simply abandon their practices, leaving clients completely unaware that they have no legal representation and often leaving clients without any legal remedy. Other lawyers knowingly fail to perform services for a client, or engage in a pattern of misconduct, demonstrating by their behavior that they either cannot or will not conform to the required ethical standards.

Disbarment is appropriate in each of these situations. For example, in The Florida Bar v. Lehman, 417 So.2d 648 (Fla. 1982), a lawyer abandoned his practice and kept approximately 450 pending client matters. The clients suffered serious injuries; one client's statute of limitations ran, and many of the clients never recovered money paid to the lawyer as fees. See also: In re Cullinam, M.R. 2963 (Ill. 1983) (with other charges). In a case demonstrating a pattern of neglect, State v. Dixon, 233 Kan. 465, 664 P.2d 286, (1983), a lawyer was disbarred after having been disciplined for thirteen counts of neglect of probate cases, with each case involving a long period of neglect (Sixteen years, twenty-eight years, etc.). The court noted that, although there was no evidence of dishonesty on the part of the lawyer, disbarment was appropriate because "the extent of the neglect is extreme and had reached proportions never before considered by this court" (233 Kan. at 470, 644 P,2d at 289). See also; The Florida Bar v. Mitchell, 285 So.2d 96 (Fla.1980).

4.42 Suspension is appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or

- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

Commentary

Suspension should be imposed when a lawyer knows that he is not performing the services requested by the client, but does nothing to remedy the situation, or when a lawyer engages in a pattern of neglect, with the result that the lawyer causes injury or potential injury to a client. Most cases involve lawyers who do not communicate with their clients. For example, in In re Earl J. Taylor, 666 Ill.2d 567, 363 N.E.2d 845 (1977), a lawyer was suspended for one year when he failed to appear at a criminal hearing 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 Public reprimand is 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 public 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.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 Admonishment is 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, and 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 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 \$3,000.00.

- 4.52 Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence, 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 superseded. 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 Public reprimand is 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 the lawyer is competent to handle a legal matter and causes injury or potential injury to a client.

Commentary

Most courts impose public 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 public reprimand.

While public reprimand alone can be appropriate, a combination of public 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 The Florida Bar v. Glick, 383 So.2d 642 (Fla. 1980), the court imposed a public 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 Admonishment is appropriate when a lawyer engages in an isolated instance of negligence in determining whether the lawyer is competent to handle a legal matter, and causes little or no injury to a client.

4.6 LACK OF CANDOR

Absent aggravating or mitigating circumstances, and 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 appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the 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 regardless of injury or potential injury to a client. (For a discussion of lack of candor before a court, see Standard 6.1.) For example, 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 a \$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 \$9,500.00.

- 4.62 Suspension is 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 Public reprimand is 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

Public 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 reproof (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 Admonishment is appropriate when a lawyer negligently fails to provide a client with accurate or complete information, and causes little or no actual or potential injury to the client.

5.0 VIOLATIONS OF DUTIES OWED TO THE PUBLIC

5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY

Absent aggravating or mitigating circumstances, and 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 appropriate when:

- (a) a lawyer is convicted of a felony under applicable law; or
- (b) 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
- (c) a lawyer engages in the sale, distribution or importation of controlled substances; or
- (d) a lawyer engages in the intentional killing of another; or
- (e) a lawyer attempts or conspires or solicits another to commit any of the offenses listed in sections (a)-(d); or
- (f) 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 appropriate when a lawyer knowingly engages in criminal conduct which is not included within 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 law. 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.

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 16f 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 Public reprimand is 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 public 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 public 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 censure [public 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 Admonishment is 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, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official:

- 5.21 Disbarment is 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 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 improperly, 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 Public reprimand is 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. Socolofsky, 233 Kan. 1020, 666 P.2d 725 (1983), the court imposed a public censure [public 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 Admonishment is appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process.

6.0 VIOLATIONS OF DUTIES OWED TO THE LEGAL SYSTEM

6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION

Absent aggravating or mitigating circumstances, and 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 appropriate when a lawyer:
- (a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
 - (b) 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 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 41. 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 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.

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. For example, in In re Nigohosian, 88 N.J. 308, 442 A.2d 1007 (1982) the court superceded 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 Public reprimand is 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.

Commentary

Public Reprimand is appropriate when a lawyer is merely negligent. For example, in Gilbert E. Meltry, 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 acknowledgment in his presence). The court noted that "his actions were not grounded on any intent of self-benefit, nor was anyone 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 Admonishment is appropriate when a lawyer is negligent 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, and 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 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 opposing 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).

- and 6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule, causes injury or potential injury to a client or a party, or causes 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 Public reprimand is 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 public 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 public reprimand. In The Florida Bar v. Rosenberg, 387 So.2d 935 (Fla. 1980), the court imposed a public 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 public 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 [public reprimand] on a lawyer who, because of poor office procedures, neglected to respond to a letter from the Alaska Bar Association .

- 6.24 Admonishment is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes little or no 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, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving attempts to influence a witness, judge, juror, prospective juror or other official by means prohibited by law:

6.31 Disbarment is appropriate when a lawyer:

- (a) intentionally directly or indirectly tampers with a witness; or
- (b) makes an unauthorized ex parte communication with a judge or juror with intent to affect the outcome of the 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 1 (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 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.

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 Public reprimand is 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 public reprimands on lawyers who engage in improper communications. For example, in In re McCaffrey, 549 P.2d 666 (Or. 1976), the court imposed a public 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 Admonishment is appropriate when a lawyer negligently engages in an improper communication 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 OTHER DUTIES OWED AS A PROFESSIONAL

Absent aggravating or mitigating circumstances, and 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, unlicensed practice of law, improper withdrawal from representation, or failure to report professional misconduct.

- 7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional 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 as professional 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 Mitani, 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 appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional 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 as a professional 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 Public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Commentary

Public Reprimand is the appropriate sanction in most cases of a violation of a duty owed as a professional. 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 [public reprimand] on a

lawyer who failed to divulge the identity of another lawyer when matters had been forwarded and subsequently neglected.

Courts typically impose public reprimands when lawyers engage in a single instance of charging an excessive or improper fee. See In the Matter of Donald L., 1 , 444 N.E.2d 849 (Ind. 1983), the court imposed a public reprimand where the lawyer entered into an agreement for a contingent fee in a criminal case; Russell Jr. , DP 63 (Mich. Atty. Dis. Brd., 1983), where a lawyer charged an excessive fee by improperly adding investigation costs; and The Florida Bar v. Saqrans, 388 So.2d 1040 (Fla. 1980), where the lawyer improperly split fees with a chiropractor.

Courts also impose public 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 reprimand (public reprimand) on a lawyer who neglected properly to instruct his employees regarding what acts constitute solicitation.

- 7.4 Admonishment is appropriate when a lawyer is negligent in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system.

8.0 PRIOR DISCIPLINE ORDERS

Absent aggravating or mitigating circumstances, and 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 appropriate when a lawyer:
- (a) intentionally violates the terms of a prior disciplinary order and such violation causes 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 engages in further similar acts of misconduct.

Commentary

Disbarment is warranted when a lawyer who has previously been disciplined intentionally violates the terms of that order and, as a result, causes 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 401f 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 engages in the same or similar misconduct. For example, in Benson v. State Bar, 13 Cal.3d 581, 531 P.2d 1081, 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 appropriate when a lawyer has been publicly reprimanded for the same or similar conduct and engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

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 Public reprimand is 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 admonishment for the same or similar misconduct and engages in further similar acts of misconduct.

Commentary

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

- 8.4 Admonishment is 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

Admonishment 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; provided that after 7 or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct shall not be considered as an aggravating factor;
- (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;
- (k) obstruction of fee arbitration awards by refusing or intentionally failing to comply with a final award.

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. Broadsky, 318 N.W.2d 180 (Iowa 1982); (f) lack candor during the disciplinary process: In re Stillo, 68 Ill.2d 49f 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) unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay;
- (j) interim rehabilitation;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses;
- (n) prompt compliance with a fee arbitration award.

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 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.

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 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 (180), 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, 628 S.E.2d 155 (Fa. 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 impairment: 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 Il.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;
- (g) an award has been entered in a fee arbitration proceeding.

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 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 1 141 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. Kennel, 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)).

10.0 STANDARDS FOR IMPOSING LAWYER SANCTIONS IN DRUG CASES

The following standard is to be used in the disposition of disciplinary cases involving “personal use and/or possession for personal use of controlled substances,” *when no criminal conviction is obtained*. Standard 5.1 would remain in effect for felony convictions, sale or distribution violations and other criminal convictions.

- 10.1 Upon the initial contact between The Florida Bar and an accused attorney involving a disciplinary matter, the accused attorney will be advised of the existence of F.L.A., Inc., and informed that good faith, ongoing, supervised rehabilitation with F.L.A., Inc., (when appropriate) or a treatment program approved by F.L.A., Inc., (when appropriate) in an attempt at rehabilitation both prior to and subsequent to the case being forwarded to the grievance committee for investigation may be viewed as mitigation.
- 10.2 Absent aggravating or mitigating circumstances, a 91-day suspension followed by probation is appropriate when a lawyer engages in misdemeanor conduct involving controlled substances, regardless of the jurisdiction where such conduct occurs and regardless of whether or not the lawyer is formally prosecuted or convicted concerning said conduct.
- 10.3 Absent the existence of aggravating factors, the appropriate discipline for an attorney found guilty of felonious conduct as defined by Florida state law involving the personal use and/or possession of a controlled substance who has sought and obtained assistance from F.L.A., Inc., or a treatment program approved by F.L.A., Inc., as described in paragraph one above, would be as follows:
 - (a) a suspension from the practice of law for a period of 91 days or 90 days if rehabilitation has been proven; and
 - (b) a three-year period of probation, subject to possible early termination or extension of said probation, with a condition that the attorney enter into a rehabilitation contract with F.L.A., Inc., prior to reinstatement.
- 10.4 Reinstatement after the 91-day suspension imposed under either paragraph two or three above would take place on an expedited basis with a hearing before a referee.

The provisions of discipline enumerated in paragraphs two and three above would not be applicable to:

- (a) an accused attorney who has allegedly violated other disciplinary rules, *i.e.*, theft of trust funds;
- (b) an accused attorney involved in conduct covered by Standard 5.11; and/or
- (c) an accused attorney where aggravating factors as defined below are found to exist.

Commentary

A lawyer whose ability to practice law may be impaired by alcohol or drug abuse should have a rehabilitative program available in which to seek treatment. The Florida Bar's program offering rehabilitative services is Florida Lawyers Assistance, Inc, (F.L.A., Inc.) A lawyer with an impairment problem may seek, voluntary assistance by F.L.A., Inc., and this information will be kept confidential if the lawyer was not otherwise in the discipline system. However, if an accused attorney enters the discipline system in a case involving personal use and/or possession for personal use of a controlled substance, when no criminal conviction is obtained, The Florida Bar will advise the accused attorney of the existence of F.L.A., Inc. When appropriate, an attempt at rehabilitation may be viewed as mitigation. A lawyer engaging in a misdemeanor or felonious conduct, involving controlled substances, will be suspended from the practice of law. The length of the suspension may be influenced by mitigating and/or aggravating factors. However, a suspension may not be applicable to an accused attorney who has either allegedly violated other Rules Regulating The Florida Bar, such as theft of trust funds, or if the attorney was involved in conduct covered by Standard 5.11.

11.0 MITIGATING FACTORS

- 11.1 In addition to those matters of mitigation listed in Standard 9.32, good faith, ongoing supervised rehabilitation by the attorney, through F.L.A., Inc., and any treatment program(s) approved by F.L.A., Inc., whether or not the referral to said program(s) was initially made by F.L.A., Inc., occurring both before and after disciplinary proceedings have commenced may be considered as mitigation.

Commentary

The Florida Bar encourages all impaired attorneys to participate in F.L.A., Inc.'s supervised rehabilitation program or any treatment program(s) approved by F.L.A., Inc. The Florida Bar views such participation, occurring both before and after disciplinary proceedings have commenced, as mitigation.

12.0 AGGRAVATING FACTORS

- 12.1 In addition to those matters of aggravation listed in Standard 9.22, the following factors may be considered in aggravation:

- (a) Involvement of client in the misconduct, irrespective of actual harm to the client;
- (b) Actual harm to clients or third parties;
- (c) Refusal or failure by the attorney to obtain, in good faith, ongoing, supervised rehabilitation (where appropriate), even after investigation by the Bar and prior to hearing before the referee or entry of the consent judgment.

Commentary

The Florida Bar's commitment to rehabilitation is reflected in that the attorney's failure or refusal to participate in rehabilitation may be considered as aggravation. An aggravating factor may also include conduct by an attorney which results in actual harm to clients or third parties. Moreover, a client's involvement in the misconduct may be considered as aggravation whether or not the client was actually harmed.

13.0 STANDARDS FOR IMPOSING LAWYER SANCTIONS IN ADVERTISING AND SOLICITATION RULE VIOLATIONS

The following standard is to be used in the disposition of disciplinary cases involving violations of rules relating to lawyer advertising and solicitation. This standard is not intended to replace or alter the provisions of any other portions of the Florida Standards for Imposing Lawyer Sanctions. These standards are intended as a guide for bar counsel, the board of governors, referees, and the court in determining a recommendation or imposition of appropriate discipline. While the provisions of these standards shall be consulted in each applicable case, and should be applied consistently, these standards should not be viewed as a type of sentencing guideline from which no departure is authorized.

For purposes of these standards "negligently fails to file" includes only those circumstances in which the lawyer engaging in the activity has not previously filed an advertising or direct mail communication as required by applicable rules and is unaware of that requirement. All other circumstances described in these standards shall be considered as knowing action or knowing failure to act.

For purposes of this standard "solicitation" shall have the same meaning as "solicit" as that term is defined in the Rules Regulating The Florida Bar. The term also includes these actions when engaged in by an agent of the lawyer.

For purposes of this standard “ direct mail communication” shall include written or electronic communications as described in the Rules Regulating The Florida Bar.

Advertisements

Absent mitigating or aggravating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving an advertisement that violates applicable rules:

13.1 Diversion to a practice and professionalism program or minor misconduct is appropriate:

- (a) when a lawyer fails to file an advertisement for review that is otherwise in compliance with applicable rules;
- (b) when a lawyer negligently fails to include the disclosure statement required for all non-exempt public print media advertisements and no other violation of applicable rules is involved;

(c) when a lawyer fails to include one or more of the following in an advertisement, provided that no other violation of applicable rules is involved:

(1) the name of at least 1 lawyer responsible for the content of the advertisement; or

(2) the location of 1 or more bona fide offices of the lawyer or lawyers who will actually perform the services that are the subject of the advertisement; or

(3) the required information in all applicable languages.

(d) when an advertisement:

(1) contains an illustration that is not objectively relevant to the need for legal services in specific matters, provided the illustration does not involve fraud, deceit, or misrepresentation;

(2) contains a verbal or visual description, depiction, or portrayal that is not objectively relevant to the selection of an attorney, provided that the description, depiction, or portrayal does not involve fraud, deceit, misrepresentation or manipulation; or

(3) contains a statement concerning fees for legal services but does not disclose the responsibility for costs associated with legal services;

(4) contains a statement that characterizes the quality of legal services, except for information on request.

(e) when an advertisement in the electronic media, provided no other violation of applicable rules exists:

(1) is articulated in more than one human voice; or

(2) contains prohibited background sound; or

(3) uses the voice or image of a person other than a lawyer who is a member of the firm whose services are advertised; or

(4) contains a prohibited background or location for the advertisement.

(f) when an advertisement:

(1) contains information concerning an area practice in which the lawyer does not currently engage in the practice of law;

(2) states or implies that the lawyer is a specialist, unless the lawyer is certified by The Florida Bar or an organization whose certification program has been accredited by the ABA;

(3) fails to contain an indication that the matter will be referred to another lawyer or law firm if that is the case;

(4) sets forth a fee schedule that the lawyer fails to honor for at least one year for yellow pages and other advertisements that are published annually and at least 90 days for other advertisements, unless the advertisement specifies a shorter period of time;

(5) contains a law firm name that is prohibited by the Rules Regulating The Florida Bar;

(6) contains a trade name that does not appear on the lawyer's letterhead, business cards, office sign, and fee contracts or does not appear with the lawyer's signature on pleadings and other documents;

(7) is paid for, in whole or in part, by a lawyer who is not in a firm whose services are being advertised;

(8) contains a statement concerning past success or otherwise creates an unjust expectation as to results that may be obtained;

(9) contains statements comparing the services of the advertising lawyer to the services of other lawyers, unless the comparison may be factually substantiated;

- (10) contains a testimonial;
 - (11) contains statements or claims that are potentially false and misleading;
 - (12) contains statements or claims that are unsubstantiated; or
 - (13) fails to disclose material information that is necessary to prevent the advertisement from being actually or potentially false or misleading.
- (g) when a lawyer negligently fails to file an advertisement for review and the advertisement contains a violation that does not constitute fraud, deceit, or misrepresentation.
- (h) when another violation of applicable rules is involved that does not constitute fraud, deceit, or misrepresentation and a lawyer negligently fails to include the disclosure statement required for all non-exempt public print media advertisements.

13.2 Public Reprimand is appropriate:

(a) when a lawyer knowingly fails to include the disclosure statement required for all non-exempt public print media advertisements, provided that no violation of applicable rules constituting fraud, deceit, or misrepresentation is also involved.

(b) when a lawyer knowingly fails to file multiple advertisements for review and the advertisements are otherwise in compliance with the applicable rules.

(c) when a lawyer negligently fails to file an advertisement or for review and the advertisement involves fraud, deceit, or misrepresentation, but does not result in actual injury.

(d) when another violation of applicable rules involving fraud, deceit or misrepresentation exists and the advertisement in the electronic media:

(1) is articulated in more than one human voice; or

(2) contains prohibited background sound; or

(3) uses the voice or image of a person other than a lawyer who is a member of the firm whose services are advertised; or

(4) contains a prohibited background or location for the advertisement.

13.3 Suspension is appropriate:

(a) when a lawyer negligently fails to file an advertisement for review and the advertisement involves fraud, deceit, or misrepresentation, and results in potential for or actual injury.

(b) when another violation of applicable rules is involved that constitutes fraud, deceit, or misrepresentation and a lawyer negligently fails to include the disclosure statement required for all non-exempt public print media advertisements.

(c) when an advertisement:

(1) contains a material misrepresentation or omission of facts necessary to avoid a material misrepresentation;

(2) contains statements or implications that the lawyer may achieve results by means of violation of the Rules Regulating The Florida Bar;

(3) contains statements that are directly or impliedly false or misleading;

or

(4) contains unfair or deceptive statements or claims.

13.4 Rehabilitation Suspension is appropriate:

(a) when a lawyer knowingly fails to file an advertisement for review and the advertisement involves fraud, deceit, or misrepresentation that results in actual injury.

(b) when another violation of applicable rules is involved that constitutes fraud, deceit, or misrepresentation and a lawyer knowingly fails to include the disclosure statement required for all non-exempt public print media advertisements.

Direct Mail Communications

13.5 Diversion to a practice and professionalism enhancement program or minor misconduct is appropriate:

(a) when a lawyer fails to file a direct mail communication that is otherwise in compliance with applicable rules.

(b) when a lawyer fails to include in a direct mail communication, provided that no other violation of applicable rules is involved:

- (1) the name of at least 1 lawyer responsible for the content of the direct mail communication;
- (2) the location of 1 or more bonafide offices of the lawyer or lawyers who will actually perform the services that are the subject of the direct mail communication;
- (3) the required information in all applicable languages;
- (4) the word “advertisement” in red ink on the first page of the direct mail communication, except for electronic mail communications;
- (5) the word “advertisement” in red ink in the lower left-hand corner of the envelope containing the direct mail communication, except for electronic mail communications;
- (6) the words “legal advertisement” as the subject line of an electronic mail communication;
- (7) a written statement detailing the background, training and experience of the lawyer or law firm;

(8) information outlining the specific experience of the advertising lawyer or law firm in the area of law being advertised;

(9) the word "SAMPLE" in red ink in type size 1 size larger than the largest type used in the contract if a contract is enclosed;

(10) the words "DO NOT SIGN" on the signature line of a contract for legal services if a contract is enclosed;

(11) as the first sentence of the direct mail communication; "If you have already retained a lawyer for this matter, please disregard this letter" if the direct mail communication is prompted by a specific occurrence; or

(12) a statement advising the recipient how the lawyer obtained the information prompting the direct mail communication if the direct mail communication is prompted by a specific occurrence.

(c) when a lawyer negligently fails to file a direct mail communication that violates applicable rules, but does not constitute fraud, deceit, or misrepresentation.

(d) when a direct mail communication:

(1) contains an illustration that is not objectively relevant to the need for legal services in specific matters, provided the illustration does not involve fraud, deceit, or misrepresentation;

(2) contains a verbal or visual description, depiction, or portrayal that is not objectively relevant to the selection of an attorney, provided that the description, depiction, or portrayal does not involve fraud, deceit, misrepresentation or manipulation; or

(3) contains a statement concerning fees for legal services but does not disclose the responsibility for costs associated with legal services;

(4) contains a statement that characterizes the quality of legal service;

(5) contains information concerning an area practice in which the lawyer does not currently engage in the practice of law;

(6) states or implies that the lawyer is a specialist, unless the lawyer is certified by The Florida Bar or an organization whose certification program has been accredited by the ABA;

(7) fails to contain an indication that the matter will be referred to another lawyer or law firm if that is the case;

(8) sets forth a fee schedule that the lawyer fails to honor for at least 90 days unless the direct mail communication specifies a shorter period of time;

(9) contains a law firm name that is prohibited by the Rules Regulating The Florida Bar;

(10) contains a trade name that does not appear on the lawyer's letterhead, business cards, office sign, and fee contracts or does not appear with the lawyer's signature on pleadings and other documents;

(11) is paid for, in whole or in part, by a lawyer who is not in a firm whose services are being advertised;

(12) contains a statement concerning past success or otherwise creates an unjust expectation as to results that may be obtained;

(13) contains statements comparing the services of the advertising lawyer to the services of other lawyers, unless the comparison may be factually substantiated;

(14) contains a testimonial;

(15) contains statements or claims that are potentially false and

misleading;

(16) contains statements or claims that are unsubstantiated; or

(17) fails to disclose material information that is necessary to prevent the advertisement from being actually or potentially false or misleading.

(e) when a lawyer knowingly fails to include the disclosure statement required for

all non-exempt public print media direct mail communications, provided that no other violation of applicable rules is involved.

(f) when a lawyer, provided that no other violation of applicable rules is involved:

- (1) sends a direct mail communication concerning a personal injury, wrongful death, accident or disaster within 30 days of the incident; or
- (2) sends a direct mail communication when the lawyer knows that the recipient does not want to receive direct mail communications from the lawyer; or
- (3) sends a direct mail communication when the lawyer knows or reasonably should know that the recipient is unlikely to use reasonable judgment in employing a lawyer because of the person's physical, emotional or mental state; or
- (4) sends a direct mail communication by registered mail or other restricted delivery; or
- (5) states or implies that the direct mail communication has received approval from The Florida Bar; or
- (6) sends a direct mail communication that resembles legal pleadings or legal documents, except for electronic mail communications; or
- (7) reveals the nature of the prospective client's legal problem on the outside of a direct mail communication if prompted by a specific occurrence, except for electronic mail communications.

13.6 Public reprimand is appropriate:

(a) when a lawyer fails to include 2 or more of the following required information, provided no other violation of applicable rules is involved:

- (1) the name of at least 1 lawyer responsible for the content of the direct mail communication; or
- (2) the location of 1 or more bonafide offices of the lawyer or lawyers who will actually perform the services that are the subject of the direct mail communication; or
- (3) the required information in all applicable languages; or
- (4) the word “advertisement” in red ink on the first page of the direct mail communication; or
- (5) the word “advertisement” in red ink in the lower left-hand corner of the envelope containing the direct mail communication; or
- (6) a written statement detailing the background, training and experience of the lawyer or law firm; or
- (7) information outlining the specific experience of the advertising lawyer or law firm in the area of law being advertised; or
- (8) the word “SAMPLE” in red ink in type size 1 size larger than the largest type used in the contract if a contract is enclosed; or
- (9) the words “DO NOT SIGN” on the signature line of a contract for legal services if a contract is enclosed; or
- (10) as the first sentence of the direct mail communication; “If you have already retained a lawyer for this matter, please disregard this letter” if the direct mail communication is prompted by a specific occurrence; or
- (11) an indication that the matter will be referred to another lawyer or law firm if that is the case; or
- (12) a statement advising the recipient how the lawyer obtained the information prompting the direct mail communication if the direct mail communication is prompted by a specific occurrence.

(b) when a lawyer knowingly fails to file a direct mail communication that contains violation of applicable rules that does not constitute fraud, deceit, or misrepresentation.

(c) when a lawyer negligently fails to file a direct mail communication for review and the direct mail communication involves fraud, deceit, or misrepresentation, but does not result in actual injury.

(d) when a direct mail communication:

- (1) contains a material misrepresentation or omission of facts necessary to avoid a material misrepresentation;
- (2) contains statements or implications that the lawyer may achieve results by means of violation of the Rules Regulating The Florida Bar;
- (3) contains statements that are directly or impliedly false or misleading;
- (4) contains unfair or deceptive statements or claims.

13.7 Suspension is appropriate:

(a) when a lawyer knowingly fails to file multiple direct mail communications (for this standard “multiple” shall include the same direct mail communication sent to more than one party) for review and the direct mail communications are otherwise in compliance with the applicable rules.

(b) when a lawyer negligently fails to file a direct mail communication for review, the direct mail communication involves fraud, deceit, or misrepresentation, and results in actual injury.

13.8 Rehabilitation suspension is appropriate:

(a) when a lawyer negligently fails to file a direct mail communication for review and the direct mail communication involves fraud, deceit, or misrepresentation that results in actual injury.

Solicitation Violations

Absent mitigating or aggravating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases of solicitation:

13.9 Diversion is appropriate:

(a) when a lawyer negligently fails to adequately supervise employees or agents who engage in solicitation that does not involve fraud, deceit or misrepresentation, and results in no actual injury.

13.10 Public reprimand is appropriate:

(a) when a lawyer is negligent in supervising employees or agents who engage in solicitation involving fraud, deceit, or misrepresentation regardless of whether actual injury occurs.

(b) when a lawyer knowingly and personally engages in solicitation that does not involve fraud, deceit, or misrepresentation or through an employee or agent, and results in no actual injury.

13.11 Suspension is appropriate:

(a) when a lawyer knowingly engages in solicitation that does not involve fraud, deceit, or misrepresentation, that involves another violation of the Rules Regulating The Florida Bar, but results in no actual injury.

13.12 Rehabilitation suspension is appropriate:

(a) when a lawyer engages in solicitation that involves fraud, deceit, or misrepresentation, or another violation of the Rules Regulating The Florida Bar, and results in actual injury.

INFORMATION ON REQUEST

Absent mitigating and aggravating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate for information provided to a prospective client on that person's request:

13.13 Diversion to a practice and professionalism enhancement program or minor misconduct is appropriate:

(a) when information provided on request:

- (1) fails to disclose the name of at least 1 lawyer responsible for the content;
- (2) fails to disclose the location of 1 or more bonafide office locations of lawyer or law firm;
- (3) fails to disclose all jurisdictions in which the lawyers or members of the law firm are licensed to practice in a website or homepage sponsored by the lawyer or law firm;
- (4) contains an illustration that is not objectively relevant to the need for legal services in specific matters, provided the illustration does not involve fraud, deceit, or misrepresentation;

- (5) contains a verbal or visual description, depiction, or portrayal that is not objectively relevant to the selection of an attorney, provided that the description, depiction, or portrayal does not involve fraud, deceit, misrepresentation or manipulation; or
- (6) contains a statement concerning fees for legal services but does not disclose the responsibility for costs associated with legal services;
- (7) contains an illustration that is not objectively relevant to the need for legal services in specific matters, provided the illustration does not involve fraud, deceit, or misrepresentation;
- (8) contains a verbal or visual description, depiction, or portrayal that is not objectively relevant to the selection of an attorney, provided that the description, depiction, or portrayal does not involve fraud, deceit, misrepresentation or manipulation;
- (9) contains a statement concerning fees for legal services but does not disclose the responsibility for costs associated with legal service;
- (10) contains information concerning an area practice in which the lawyer does not currently engage in the practice of law;
- (11) states or implies that the lawyer is a specialist, unless the lawyer is certified by The Florida Bar or an organization whose certification program has been accredited by the ABA;
- (12) fails to contain an indication that the matter will be referred to another lawyer or law firm if that is the case;

(13) sets forth a fee schedule that the lawyer fails to honor for at least one year for yellow pages and other advertisements that are published annually and at least 90 days for other advertisements and direct mail communications, unless the advertisement specifies a shorter period of time;

(14) contains a law firm name that is prohibited by the Rules Regulating The Florida Bar;

(15) contains a trade name that does not appear on the lawyer's letterhead, business cards, office sign, and fee contracts or does not appear with the lawyer's signature on pleadings and other documents;

(16) is paid for, in whole or in part, by a lawyer who is not in a firm whose services are being advertised;

(17) creates an unjustified expectation as to results that may be obtained;

(18) contains statements comparing the services of the advertising lawyer to the services of other lawyers, unless the comparison may be factually substantiated;

(19) contains a testimonial;

(20) contains statements or claims that are potentially false and misleading;

(21) contains statements or claims that are unsubstantiated; or

(22) fails to disclose material information that is necessary to prevent the advertisement from being actually or potentially false or misleading.

13.14 Public Reprimand is appropriate:

(a) when information on request involves a violation that constitutes fraud, deceit, or misrepresentation, and negligently:

- (1) fails to disclose the name of at least 1 lawyer responsible for the content;
- (2) fails to disclose the location of 1 or more bonafide office locations of lawyer or law firm;
- (3) fails to disclose all jurisdictions in which the lawyers or members of the law firm are licensed to practice in a website or home page sponsored by the lawyer or law firm.

(b) when information on request:

- (1) contains a material misrepresentation or omission of facts necessary to avoid a material misrepresentation;
- (2) contains statements or implications that the lawyer may achieve results by means of violation of the Rules Regulating The Florida Bar;
- (3) contains statements that are directly or impliedly false or misleading;
- (4) contains unfair or deceptive statements or claims.

13.15 Suspension is appropriate:

(a) when information on request involves a violation that constitutes fraud, deceit, or misrepresentation, and knowingly:

- (1) fails to disclose the name of at least 1 lawyer responsible for the content;
- (2) fails to disclose the location of 1 or more bonafide office locations of lawyer or law firm; or
- (3) fails to disclose all jurisdictions in which the lawyers or members of the law firm are licensed to practice in a website or home page sponsored by the lawyer or law firm.

FORFEITURE OF FEES

13.19 In addition to any sanction provided by these standards, the fee obtained from legal representation secured by use of an advertisement or direct mail communication that contains any knowing violation of applicable rules, other than knowing failure to file, or involves fraud, deceit, or misrepresentation may be forfeited as provided in the Rules Regulating The Florida Bar.

13.20 In addition to any sanction provided by these standards, the fee obtained from legal representation secured by direct solicitation, personally or by an agent, may be forfeited as provided in the Rules Regulating The Florida Bar.

MITIGATION AND AGGRAVATION

13.21 Mitigating and aggravating factors, as provided elsewhere in the Florida Standards For Imposing Lawyer Sanctions, are applicable to matters involving sanctions imposed for lawyer advertising and solicitation rule violations. In addition to those factors the following may be considered in mitigation:

(a) the respondent had a good faith claim or belief that the advertisement or direct mail communication was exempt from the filing requirements;

(b) no prior guidance in the form of a court order or opinion interpreting the applicable advertising or solicitation rules was available when the respondent disseminated the advertisement or direct mail communication in question and ethics counsel was unable to render an opinion.

(c) the respondent sought guidance from The Florida Bar and followed the advice given in respect of advertising, direct mail communications, or solicitation, even though such advice may have ceased to be accurate or may have been erroneous at the time it was given.