J. CLIFFORD CHEATWOOD INN OF COURT

ETHICS AND PREFESSIONALISM OF JUDGES AND LAWYERS IN THEIR PERSONAL LIVES

Presented By: The Honorable Mary S. Scriven's Pupillage
Mark Buell
Lawrence Rayburn
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Effective: [See Text Amendments]

Code of Federal Regulations Currentness
Title 16. Commercial Practices
Chapter I. Federal Trade Commission
Subchapter B. Guides and Trade Practice Rules
Part 239. Guides for the Advertising of Warranties and Guarantees (Refs & Annos)

§ 239.3 "Satisfaction Guarantees" and similar representations in advertising; disclosure in advertising that mentions "satisfaction guarantees" or similar representations.

(a) A seller or manufacturer should use the terms "Satisfaction Guarantee," "Money Back Guarantee," "Free Trial Offer," or similar representations in advertising only if the seller or manufacturer, as the case may be, refunds the full purchase price of the advertised product at the purchaser's request.

(b) An advertisement that mentions a "Satisfaction Guarantee" or a similar representation should disclose, with such clarity and prominence as will be noticed and understood by prospective purchasers, any material limitations or conditions that apply to the "Satisfaction Guarantee" or similar representation.

Examples: These examples are for both print and broadcast advertising. These examples are illustrative, not exhaustive.

Example A: (In an advertisement mentioning a satisfaction guarantee that is conditioned upon return of the unused portion within 30 days) "We guarantee your satisfaction. If not completely satisfied with Acme Spot Remover, return the unused portion within 30 days for a full refund."

Example B: (In an advertisement mentioning a money back guarantee that is conditioned upon return of the product in its original packaging) "Money Back Guarantee! Just return the ABC watch in its original package and ABC will fully refund your money."

SOURCE: 32 FR 15541, Nov. 8, 1967; 50 FR 18470, May 1, 1985, unless otherwise noted.

AUTHORITY: Secs. 5, 6, 38 Stat. 719, as amended, 721; 15 U.S.C. 45, 46, unless otherwise noted.

16 C. F. R. § 239.3, **16 CFR § 239.3**

Current through September 13, 2007; 72 FR 52461

END OF DOCUMENT

C

Formerly cited as DC ST 1981 § 28-3901

District of Columbia Official Code 2001 Edition Currentness
Division V. Local Business Affairs
Title 28. Commercial Instruments and Transactions. (Refs & Annos)
Subtitle II. Other Commercial Transactions.
Chapter 39. Consumer Protection Procedures.

§ 28-3901. Definitions and purposes.

(a) As used in this chapter, the term-

(1) "person" means an individual, firm, corporation, partnership, cooperative, association, or any other organization, legal entity, or group of individuals however organized;

(2) "consumer" means a person who does or would purchase, lease (from), or receive consumer goods or services, including a co-obligor or surety, or a person who does or would provide the economic demand for a trade practice; as an adjective, "consumer" describes anything, without exception, which is primarily for personal, household, or family use;

(3) "merchant" means a person, whether organized or operating for profit or for a nonprofit purpose, who in the ordinary course of business does or would sell, lease (to), or transfer, either directly or indirectly, consumer goods or services, or a person who in the ordinary course of business does or would supply the goods or services which are or would be the subject matter of a trade practice;

(4) "complainant" means one or more consumers who took part in a trade practice, or one or more persons acting on behalf of (not the legal representative or other counsel of) such consumers, or the successors or assigns of such consumers or persons, once such consumers or persons complain to the Department about the trade practice;

(5) "respondent" means one or more merchants alleged by a complainant to have taken part in or carried out a trade practice, or the successors or assigns of such merchants, and includes other persons who may be deemed legally responsible for the trade practice;

(6) "trade practice" means any act which does or would create, alter, repair, furnish, make available, provide information about, or, directly or indirectly, solicit or offer for or effectuate, a sale, lease or transfer, of consumer goods or services;

(7) "goods and services" means any and all parts of the economic output of society, at any stage or related or necessary point in the economic process, and includes consumer credit, franchises, business opportunities, real estate transactions, and consumer services of all types;

(8) "Department" means the Department of Consumer and Regulatory Affairs;

(9) "Director" means the Director of the Department of Consumer and Regulatory Affairs;

(10) "Chief of the Office of Compliance" means the senior administrative officer of the Department's Office of

Compliance who is delegated the responsibility of carrying out certain duties specified under section 28-3905;

(11) "Office of Adjudication" means the Department's Office of Adjudication which is responsible for carrying out certain duties specified under section 28-3905;

(12) "Office of Consumer Protection" means the Department's Office of Consumer Protection which is responsible for carrying out the statutory requirements set forth in § 28-3906; and

(13) "Committee" means the Advisory Committee on Consumer Protection which is responsible for carrying out the statutory requirements set forth in section 28-3907.

(b) The purposes of this chapter are to:

(1) assure that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices;

(2) promote, through effective enforcement, fair business practices throughout the community; and

(3) educate consumers to demand high standards and seek proper redress of grievances.

(c) This chapter shall be construed and applied liberally to promote its purpose.

CREDIT(S)

(July 22, 1976, D.C. Law 1-76, § 2, 23 DCR 1185; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Mar. 8, 1991, D.C. Law 8-234, § 2(b), 38 DCR 296; Feb. 5, 1994, D.C. Law 10-68, § 27(b), 40 DCR 6311; Apr. 9, 1997, D.C. Law 11-255, § 27(u), 44 DCR 1271; Oct. 19, 2000, D.C. Law 13-172, § 1402(b), 47 DCR 6308; Oct. 20, 2005, D.C. Law 16-33, § 2032(b), 52 DCR 7503; June 12, 2007, D.C. Law 17-4, § 2(a), 54 DCR 4085.)

HISTORICAL AND STATUTORY NOTES

Prior Codifications

1981 Ed., § 28-3901.

1973 Ed., T. 28, Appx., § 2.

Effect of Amendments

D.C. Law 13-172 in subsec. (b)(1) inserted "and deter the continuing use of such practices" following "practices" in subsec. (b)(1) and added subsec. (c) providing for liberal construction of the chapter.

D.C. Law 16-33 rewrote subsec. (a)(12), which had read:

"(12) 'Office of Consumer Education and Information' means the Department's Office of Consumer Education and Information which is responsible for carrying out the statutory requirements set forth in section 28-3906; and"

D.C. Law 17-4 rewrote subsec. (a)(3), which had read as follows:

C

Formerly cited as DC ST 1981 § 28-3904

District of Columbia Official Code 2001 Edition Currentness
Division V. Local Business Affairs
Title 28. Commercial Instruments and Transactions. (Refs & Annos)
Subtitle II. Other Commercial Transactions.
Chapter 39. Consumer Protection Procedures.

§ 28-3904. Unlawful trade practices.

It shall be a violation of this chapter, whether or not any consumer is in fact misled, deceived or damaged thereby, for any person to:

(a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have;

(b) represent that the person has a sponsorship, approval, status, affiliation, certification, or connection that the person does not have;

(c) represent that goods are original or new if in fact they are deteriorated, altered, reconditioned, reclaimed, or second hand, or have been used;

(d) represent that goods or services are of particular standard, quality, grade, style, or model, if in fact they are of another;

(e) misrepresent as to a material fact which has a tendency to mislead;

(f) fail to state a material fact if such failure tends to mislead;

(g) disparage the goods, services, or business of another by false or misleading representations of material facts;

(h) advertise or offer goods or services without the intent to sell them or without the intent to sell them as advertised or offered;

(i) advertise or offer goods or services without supplying reasonably expected public demand, unless the advertisement or offer discloses a limitation of quantity or other qualifying condition which has no tendency to mislead;

(j) make false or misleading representations of fact concerning the reasons for, existence of, or amounts of price reductions, or the price in comparison to price of competitors or one's own price at a past or future time;

(k) falsely state that services, replacements, or repairs are needed;

(l) falsely state the reasons for offering or supplying goods or services at sale or discount prices;

(m) harass, or threaten a consumer with any act other than legal process, either by telephone, cards, or letters;

(n) cease work on, or return after ceasing work on, an electrical or mechanical apparatus, appliance, chattel or other goods, or merchandise, in other than the condition contracted for, or to impose a separate charge to reassemble or restore such an object to such a condition without notification of such charge prior to beginning work on or receiving such object;

(o) replace parts or components in an electrical or mechanical apparatus, appliance, chattel or other goods, or merchandise when such parts or components are not defective, unless requested by the consumer;

(p) falsely state or represent that repairs, alterations, modifications, or servicing have been made and receiving remuneration therefor when they have not been made;

(q) fail to supply to a consumer a copy of a sales or service contract, lease, promissory note, trust agreement, or other evidence of indebtedness which the consumer may execute;

(r) make or enforce unconscionable terms or provisions of sales or leases; in applying this subsection, consideration shall be given to the following, and other factors:

(1) knowledge by the person at the time credit sales are consummated that there was no reasonable probability of payment in full of the obligation by the consumer;

(2) knowledge by the person at the time of the sale or lease of the inability of the consumer to receive substantial benefits from the property or services sold or leased;

(3) gross disparity between the price of the property or services sold or leased and the value of the property or services measured by the price at which similar property or services are readily obtainable in transactions by like buyers or lessees;

(4) that the person contracted for or received separate charges for insurance with respect to credit sales with the effect of making the sales, considered as a whole, unconscionable; and

(5) that the person has knowingly taken advantage of the inability of the consumer reasonably to protect his interests by reasons of age, physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of the agreement, or similar factors;

(s) pass off goods or services as those of another;

(t) use deceptive representations or designations of geographic origin in connection with goods or services;

(u) represent that the subject of a transaction has been supplied in accordance with a previous representation when it has not;

(v) misrepresent the authority of a salesman, representative or agent to negotiate the final terms of a transaction;

(w) offer for sale or distribute any consumer product which is not in conformity with an applicable consumer product safety standard or has been ruled a banned hazardous product under the federal Consumer Product Safety Act (15 U.S.C. §§ 2051-83), without holding a certificate issued in accordance with section 14(a) of that Act to the effect that such consumer product conforms to all applicable consumer product safety rules (unless the certificate holder knows that such consumer product does not conform), or without relying in good faith on the representation of the manufacturer or a distributor of such product that the product is not subject

to a consumer product safety rule issued under that Act;

(x) sell consumer goods in a condition or manner not consistent with that warranted by operation of sections 28:2-312 through 318 of the District of Columbia Official Code, or by operation or requirement of federal law;

(y) violate any provision of the District of Columbia Consumer LayAway Plan Act (section 28-3818);

(z) violate any provision of the Rental Housing Locator Consumer Protection Act of 1979 (section 28-3819) or, if a rental housing locator, to refuse or fail to honor any obligation under a rental housing locator contract;

(z-1) violate any provision of Chapter 46 of this title;

(aa) violate any provision of sections 32-404, 32-405, 32-406, and 32-407;

(bb) refuse to provide the repairs, refunds, or replacement motor vehicles or fails to provide the disclosures of defects or damages required by the Automobile Consumer Protection Act of 1984;

(cc) violate any provision of the Real Property Credit Line Deed of Trust Act of 1987; or

(dd) violate any provision of title 16 of the District of Columbia Municipal Regulations.

(ee) violate any provision of the Public Insurance Adjuster Act of 2002, passed on 2nd reading on December 3, 2002 (Enrolled version of Bill 14-476).

CREDIT(S)

(July 22, 1976, D.C. Law 1-76, § 5, 23 DCR 1185; Oct. 4, 1978, D.C. Law 2-115, § 3, 25 DCR 1997; June 21, 1980, D.C. Law 3-71, § 3(a), 27 DCR 1891; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Mar. 13, 1985, D.C. Law 5-136, § 16, 31 DCR 5727; Mar. 14, 1985, D.C. Law 5-162, § 9(a), 32 DCR 160; Jan. 28, 1988, D.C. Law 7-67, § 5, 34 DCR 7441; Mar. 8, 1991, D.C. Law 8-234, § 2(e), 38 DCR 296; Mar. 8, 1991, D.C. Law 8-236, § 9, 38 DCR 306; Feb. 5, 1994, D.C. Law 10-68, § 27(e), 40 DCR 6311; July 25, 1995, D.C. Law 11-30, § 7(h), 42 DCR 1547; Apr. 9, 1997, D.C. Law 11-255, § 27(x), 44 DCR 1271; Mar. 27, 2003, D.C. Law 14- 256, § 11(b), 50 DCR 238; Mar. 13, 2004, D.C. Law 15-105, § 63, 51 DCR 881.)

HISTORICAL AND STATUTORY NOTES

Prior Codifications

1981 Ed., § 28-3904.

1973 Ed., T. 28, Appx., § 5.

Effect of Amendments

D.C. Law 14-256 added subsec. (ee).

D.C. Law 15-105, in subsec. (ee), validated a previously made technical correction.

Legislative History of Laws

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

ROY L. PEARSON, JR.	:	
	:	
Plaintiff,	:	**Docket No. 05 CA 4302 B**
	:	**Calendar 7**
v.	:	**Judge Bartnoff**
	:	
SOO CHUNG, et al.	:	
	:	
Defendants.	:	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case has its origin in a dispute between plaintiff Roy Pearson and defendants Soo Chung, Jin Nam Chung and Ki Y. Chung over a pair of allegedly missing pants. The defendants own Custom Cleaners, a dry cleaning store on Bladensburg Road, NE, within walking distance of the plaintiff's home. Mr. Pearson claims that he took his pants to Custom Cleaners for alterations in May 2005, that the defendants lost his pants, and that they then attempted to substitute another pair of pants for his. The defendants deny the plaintiff's allegations, and they insist that the pants they attempted to return to him—which he has refused to accept—are the pants that he brought in to be altered.

Mr. Pearson also claims that a "Satisfaction Guaranteed" sign that, until recently, was displayed in Custom Cleaners was an unconditional warranty that required the defendants to honor any claim by any customer, without limitation, based on the customer's determination of whatever would make that customer "satisfied." According to the plaintiff, the defendants did not honor and had no intention of honoring that purported unconditional guarantee of satisfaction to their customers, which he contends is an unfair trade practice under the Consumer Protection Procedures Act, D.C. Code § 28-3901 et seq. ("CPPA"), on several grounds.

In Count One of his Amended Complaint, the plaintiff alleges, based on the "Satisfaction Guaranteed" sign and on his claims regarding his pants, that each of the three defendants is liable to him for seven different violations of the CPPA, for every day Custom Cleaners was open over a period of several years.[1] He also alleges common law fraud, based on the "Satisfaction Guaranteed" sign (Count Two).[2] In addition, the Amended Complaint asserts a claim for conversion or negligence, relating to the pants (Count Three), and a claim for injunctive relief under the CPPA, regarding the "Satisfaction Guaranteed" and "Same Day Service" signs (Count Four). The plaintiff is seeking statutory, compensatory and punitive damages. He also is seeking attorney's fees, to which he claims to be entitled under the CPPA because he is an attorney who is representing himself in this action. He has presented various calculations of damages that go as high as $67 million.

The defendants strongly dispute the plaintiff's claims regarding the reasonable interpretation of the "Satisfaction Guaranteed" sign, both as a legal and factual matter. They

[1] By its terms, Count One of the Amended Complaint refers only to the "Satisfaction Guaranteed" sign, and not to a "Same Day Service" sign that also was displayed at Custom Cleaners. Nonetheless, the plaintiff in his Pretrial Statement and his Trial Brief claims damages under the CPPA regarding the "Same Day Service" sign. The defendants objected to the plaintiff's introduction at trial of evidence regarding the "Same Day Service" sign, since it was not the subject of Count One of the Complaint, but the Court did not preclude the plaintiff from doing so, given the pretrial submissions and the relief requested in Count Four, which does specifically refer to that sign. At the close of the plaintiff's case, the Court granted judgment for defendants on any and all claims relating to the "Same Day Service" sign. The plaintiff presented no evidence that the defendants did not make same day service available, nor did the plaintiff present any evidence that he himself ever had requested same day service. The only testimony presented about same day service was from one of the plaintiff's witnesses, who apparently requested and did receive same day service from Custom Cleaners.

[2] The Amended Complaint also alleges common law fraud based on another sign, which stated "All Work Done on Premises." The Court (Hon. Neal E. Kravitz) granted summary judgment to the defendants on that aspect of the fraud claim, in an Order entered May 16, 2006. Pretrial discovery in this case confirmed that all work was done on the Custom Cleaners premises. None of the other Counts of the Complaint include a claim for relief based on the "All Work Done on Premises" sign.

deny that the plaintiff is entitled to any relief at all in this case. They have advised the Court, through counsel, that they intend to request an award of attorney's fees after the Court issues its Findings, on the ground that the plaintiff has engaged in bad faith and vexatious litigation.[3]

A non-jury trial was held in this case on June 12 and 13, 2007. In a trial brief filed May 31, 2007, the plaintiff withdrew certain of his claims and made statements that led to some uncertainly about precisely what claims were being pursued. The plaintiff clearly had withdrawn his claim of an unfair trade practice under D.C. Code § 28-3904(s) (to "pass off goods or services as those of another"), which related specifically to his claims regarding the pants, under Count One. The Court also found that he had withdrawn the claim for conversion or negligent bailment (Count Three), which also related to the pants.[4] In addition, the plaintiff stated in his Trial Brief

[3] Defendants' counsel also noted at the outset of the trial that based on the plaintiff's Trial Brief, the defendants have given the plaintiff notice of their intention to file a motion for sanctions, pursuant to Rule 11 of the Superior Court Rules of Civil Procedure. Under that rule, if a party believes that the opposing party has made a submission to the court for an improper purpose (such as harassment or delay) or that the submission is not legally supportable, the moving party may seek sanctions, including attorney's fees. Rule 11(c)(1)(A) provides that the motion for sanctions may not be filed until the party against whom sanctions are being sought has been served with the motion and given an opportunity to correct or withdraw the challenged submission. That "safe harbor" provision provides for a 21-day period between service and filing of the motion, unless the court prescribes some other period. The plaintiff's Trial Brief was filed 11 days before trial was set to begin. The defendants advised the Court as a preliminary matter on the day of trial that they had served their Rule 11 motion but not yet filed it, because of the time requirements of the Rule, and they asked the Court to shorten the time for the plaintiff to reconsider his position. The plaintiff stated that he wanted to have the time afforded by the Rule to consider the defendants' motion, but he also agreed with the Court that the trial should not be delayed, and he confirmed to the Court on the record that he did not want to withdraw any of his claims. The defendants stated that they will be filing the motion for sanctions after the trial.

[4] At the outset of the trial, the plaintiff suggested that he had not withdrawn the conversion/negligence claim, but only that he might elect to withdraw it, in favor of the common law fraud claim. He also stated that it was very likely that he would make that election. The defendants objected that in the Table of Contents of his Trial Brief, the plaintiff had not stated that he might elect to withdraw the conversion/negligence claim, but that it had been "withdrawn by election." The Court further noted that in the body of the Trial Brief, the section on "Conversion/ Bailment Negligence" was blank, with the word "WITHDRAWN" in large letters

that "Plaintiff is not suing for lost pants," which raised a question about whether the incident regarding the pants remained in issue at all. The plaintiff insisted that although he was no longer seeking relief regarding the pants as such, the pants incident is evidence to support his claims of unfair trade practices under the CPPA, regarding the "Satisfaction Guaranteed" sign. On that basis, the Court permitted evidence regarding the pants to be admitted.

In his written submissions and throughout the trial, the plaintiff referred to himself as a private attorney general, even though all the claims in his Amended Complaint relate only to him and he is seeking relief solely on his own behalf. On October 31, 2006, when this case had been pending for nearly a year and a half, the defendant sought to amend and supplement the Complaint to assert claims as a private attorney general on behalf of potentially thousands of other consumers. At that point, discovery had been closed for seven months, the Court had ruled on the parties' respective motions for summary judgment, the parties had been through court-ordered mediation, and a pretrial conference had been set. Judge Kravitz denied the motion in an Order entered November 20, 2006.[5] During the trial, the Court reminded the plaintiff on numerous occasions that his claims in this case involve himself alone.

I.

At trial, the plaintiff presented the testimony of nine witnesses: Nora Faison, Lisa White-Hudgens, Rhonda Dorsey, Grace L. Hewell, Betty Green, Jumoke Tyehimba, Samuel Adinew,

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vertically down the page. In the circumstances, the Court found that the plaintiff had made his election and that the conversion/ negligence claim had been withdrawn.

[5] In that Order, Judge Kravitz found that the proposed amendment would dramatically expand the scope of this case and would be highly prejudicial to the defendants, who would be required to incur substantial additional legal fees for reopened discovery and likely inevitable additional motions practice. Judge Kravitz also noted that the case already had been "delayed unnecessarily by the plaintiff's disproportionate approach to the discovery process and by the plaintiff's active but largely unsuccessful motions practice," and he raised "significant concerns that the plaintiff [was] acting in bad faith and with an intent to delay the proceedings."

Louis Burnett, and the plaintiff himself. The defendants presented three witnesses: Saymendy Lloyd, Robert King, and defendant Soo Chung. The plaintiff offered more than 100 exhibits, of which 66 were admitted into evidence; the defendants offered four exhibits, all of which were admitted into evidence.

Based on the testimony presented, the evidence admitted, and the entire record, the Court makes the following findings:

1. Plaintiff Roy Pearson is a lawyer. He received his law degree from Northwestern University Law School in 1975 and then was a teaching fellow at Georgetown Law Center for two years. In 1978, he became a staff attorney at Neighborhood Legal Services in the District of Columbia, where he worked for the next 25 years. After six years as a staff attorney, Mr. Pearson became a consumer law specialist in the law reform unit, and in 1989, he was named Assistant Director for Legal Operations. He left Neighborhood Legal Services in 2002. He did some consulting work for Legal Services thereafter, but he essentially was unemployed until the spring of 2005. After he left Legal Services, he received unemployment benefits from the District of Columbia. In April 2005, he was appointed to be a District of Columbia Administrative Law Judge.

2. In February 2003, shortly after Mr. Pearson left Legal Services, his wife filed for divorce in the Circuit Court of Fairfax County, Virginia. Mr. Pearson represented himself in the divorce proceedings, and he contested certain of his wife's claims regarding their separation. According to Mr. Pearson, he spent much of the next year and a half on the divorce case. The trial court in Fairfax County made specific findings that the litigation was disproportionately long, despite the relative simplicity of the case, and that Mr. Pearson "in good part is responsible for excessive driving up of everything that went on here" and created "unnecessary litigation."

Mr. Pearson therefore was ordered to pay $12,000 of his wife's attorney's fees. Mr. Pearson appealed, and the Virginia Court of Appeals affirmed the trial court's finding.[6]

3. Defendant Soo Chung moved to the United States from South Korea with her husband, defendant Jin Nam Chung, and their two sons in May 1992. She had been a housewife in Korea, and she also had owned a small clothing store with her younger sister. Her husband had worked in a hotel, and he also had worked with his father in a coal factory. When the family moved to the United States, Ms. Chung initially worked as a seamstress, and Mr. Chung worked at a dry cleaning business owned by Ms. Chung's younger brother. The Chungs purchased Happy Cleaners on Seventh Street, NW in 1995, and they purchased Custom Cleaners on Bladensburg Road, NE in 2000. Custom Cleaners is owned jointly by Soo Chung, Jin Nam Chung, and one of their sons, Ki Y. Chung. In the early 1990's, the Chungs also purchased another dry cleaning store, Fabricare, which they sold in June 2006. Both Happy Cleaners and Fabricare are "pick-up stores," where customers drop off and pick up their clothes, but which do not have dry cleaning or laundry machines. Custom Cleaners does have machines, and Ms. Chung described it as a "factory," in contrast to a "pick-up store." At Custom Cleaners, Ms. Chung usually works behind the counter and deals with the customers. She also does alterations and bagging. Her husband does the laundry, dry cleaning and bagging. Their sons help in the store from time to time and perform a variety of tasks, including working behind the counter, bagging, and helping their father with the laundry and dry cleaning.

[6] This Court permitted the defendants to introduce the Virginia Court of Appeals opinion in the divorce case, over the plaintiff's objection, because of the Virginia court's findings regarding the conduct of that litigation, given the plaintiff's claims for attorney's fees here. The defendants have questioned the plaintiff's entitlement to attorney's fees, as well as his conduct of this litigation. The plaintiff was not permitted to relitigate the merits of the Virginia court's findings at the trial of this case, but he made it clear that he continues to dispute them.

4. The "Satisfaction Guaranteed" sign was in the Custom Cleaners store when the defendants purchased the business, as were the "Same Day Service" and "All Work Done on Premises" signs. Those signs recently were removed. The "Same Day Service" sign was displayed over the counter, and the plaintiff presented evidence that it was not readily visible from outside the store.

5. Mr. Pearson moved to the Ft. Lincoln neighborhood in the District of Columbia in October 1999 and then began to patronize Custom Cleaners, which is within walking distance of his home. He does not own a car. Mr. Pearson testified that he had a good relationship with Soo Chung, who usually was working behind the counter when he came into the store.

6. In July 2002, Mr. Pearson brought a pair of pants to Custom Cleaners—he cannot recall whether for cleaning or alteration-- and the pants were missing when he came to pick them up. Mr. Pearson was waited on at that time by Jai Chung, a son of Soo Chung and Jin Nam Chung, who is not a defendant in this case and is not an owner of Custom Cleaners. Mr. Pearson does not recall whether Jai Chung asked him what he would accept as compensation for the lost pants or if Mr. Pearson initially made a proposal, but he told Mr. Chung that it would cost $150 to replace the pants, and they agreed that Custom Cleaners would compensate him in that amount. Mr. Pearson returned a few days later, and although Jai Chung suggested that the compensation should be only $80 because the pants were not new, Mr. Pearson insisted that they had agreed to compensation of $150. Jai Chung then presented him with a check that already had been made out for $150. Custom Cleaners did not require Mr. Pearson to document the

replacement value of the lost pants, and Mr. Pearson agrees that he was compensated fully for them.[7]

7. Mr. Pearson testified that about a week after he received compensation for the lost pants in 2002, he brought some clothes into Custom Cleaners, and Soo Chung told him that her family had met and decided that they did not want to continue to accept his business.[8] Mr. Pearson then advised her that he believed it was unlawful for Custom Cleaners to refuse to continue to do business with him, in light of the "Satisfaction Guaranteed" sign. According to Mr. Pearson, he attempted to explain that although the defendants could elect not to do business with someone, they could not lawfully do so if their action was taken in the aftermath of a customer complaint that had been satisfied. Otherwise, according to Mr. Pearson, the guarantee of satisfaction was in effect a guarantee of satisfaction only once, which the merchant had a duty to disclose. Ms. Chung did not engage with him at that time or discuss the matter further.

8. Mr. Pearson then wrote a letter to Custom Cleaners, advising the Chungs of his position that what Custom Cleaners had done was an unfair trade practice under the CPPA, because they were adding a condition after-the-fact to their guarantee of satisfaction. He left the letter for the Chungs at Custom Cleaners (he no longer has a copy), and a few days later, he

[7] Plaintiff's Exhibits 1(E)-(F) are the plaintiff's contemporaneous day timer entries in July-August 2002. Those entries reflect that on Tuesday, July 23, 2002, Jai Chung agreed that Mr. Pearson would be paid $150 if the pants were not located by Friday and that Mr. Pearson picked up the check on Saturday, July 27 and deposited it on Monday, July 29, 2002. Soo Chung testified that she believes Custom Cleaners later found the pants, but Mr. Pearson claimed never to have been told that.

[8] The day timer (Plaintiff's Exhibit 1(G)) reflects that Mr. Pearson was refused service on August 6, 2002.

received a telephone call on their behalf from a woman named Amanda Chun.[9] Mr. Pearson does not fully remember that conversation, but he testified that Ms. Chun asked him what the problem was and he explained his position. He recalls that she said something to the effect that since he had not been satisfied with Custom Cleaners' services, he should take his business elsewhere. He did not hear again from Amanda Chun, but about a week later, he brought some clothes into Custom Cleaners, was waited on by Soo Chung, and she accepted his order without comment. He continued to patronize Custom Cleaners, without further incident, for almost three years.

9. Mr. Pearson has an adult son, Jumoke Tyehimba, who was called as a witness by the plaintiff. Mr. Tyehimba testified that between March 2004 and February 2005, he was employed at the Park Hyatt Hotel as a sales and catering coordinator and was required to wear a suit or jacket and tie to work. He could not afford to buy suits at that time, but he and his father are about the same size, and from time to time he borrowed his father's clothes. Mr. Tyehimba testified that in March 2004, he borrowed four suits from his father, one of which had blue and red (burgundy) pinstripes, and kept them for about a year. He then left the Park Hyatt for another job, where he received a substantial raise, and he therefore had his father's suits cleaned and returned them to him in March 2005. Mr. Tyehimba testified that he likes cuffs on his pants, but his father does not, and none of the suit pants he borrowed had cuffs.

10. Mr. Pearson was offered and accepted a position as a District of Columbia Administrative Law Judge in mid-April 2005, and he began work on May 2, 2005. As of 2005, there was a dress code that required the Administrative Law Judges to wear business suits every

[9] According to the day timer (Plaintiff's Exhibit 1(G)-(H)), Mr. Pearson delivered his letter to Custom Cleaners on Saturday, August 10, 2002, and his conversation with Amanda Chun took place on August 14, 2002. In addition to writing his letter to the Chungs, Mr. Pearson prepared a draft Complaint against them, which was never filed.

day. Mr. Pearson for many years has worn a particular style of Hickey Freeman suit, the "Boardroom" model, which he has found to be the only style of suit that fits him well. (Hickey Freeman now has replaced the "Boardroom" with a model called the "Madison.") It is important to Mr. Pearson to be well-dressed and to wear suits of excellent quality. The retail price of his preferred style of suit in 2005 ranged from $1095 to $1295, without tax, depending on the fabric.

11. As of April 2005, Mr. Pearson owned five Hickey Freeman suits of the Boardroom style, four of which he had lent to his son and had been returned. Mr. Pearson had gained some weight in the three years since he had worn suits regularly, and he therefore decided to have the pants of each suit let out a few inches. He testified that at the time, his financial situation was "ruinous"—he had just been ordered to pay $12,000 in attorney's fees to his ex-wife, he had very limited funds, and he was at or close to the limit on his credit cards. Although the new job would pay him quite well, he was under serious short-term financial pressure just before the job began. For that reason, he did not have all his suit pants altered at one time, but instead, beginning in mid- April 2005, he brought in two pairs of suit pants to Custom Cleaners to be altered, and then another pair a few days later, and then another. (It cost $10.50 to alter each pair.) At some point during that period, he also brought in a pair of gray slacks, which did not belong to a suit, and which he said he did not need immediately. He brought in the final pair of suit pants to be altered on Tuesday, May 3, 2005, and requested that the pants be ready on Thursday, May 5, so that he could wear that suit to work on Friday, May 6. The plaintiff testified that those pants belonged to his blue and burgundy pinstriped suit.

12. Soo Chung initially gave Mr. Pearson a claim ticket that reflected that the pants would be ready on Friday, May 6, 2005 at 5:00 p.m. He pointed out to her that he wanted the pants on Thursday, and she then crossed out "FRI" on the receipt, by hand, and wrote in

"Thur. 4:00." When Mr. Pearson came to Custom Cleaners on May 5 for the pants, they were not ready, and Ms. Chung eventually told Mr. Pearson that they mistakenly had been taken to another store. Mr. Pearson testified that he reminded her that he needed the pants to wear the next day and she said she would have the pants for him at 7:30 the next morning, but when he went to Custom Cleaners on the morning of May 6, the pants still had not been located. Ms. Chung asked Mr. Pearson to return the next day, which he did. The parties' versions of events differ from that point. Mr. Pearson testified that the pants were not at the store on Saturday, May 7, and that Ms. Chung asked him to speak with someone (he thought she was identified as Soo Chung's sister) over the telephone. Based on that conversation, he went home and brought back his suit jacket, to help Ms. Chung identify his pants. According to Mr. Pearson, he had brought the claim check to the store, and he realized when he returned home to get the jacket that Ms. Chung had the claim check. He says that when he returned to the store with the jacket, he asked for the claim check, and Ms. Chung told him that she had given it back to him. In order to motivate Ms. Chung to find his missing suit pants, Mr. Pearson also told her that the loss of the pants effectively amounted to the loss of the suit, which it would cost at least $1000 to replace..

13. Mr. Pearson testified that Ms. Chung then promised to continue to search for his pants. She did have the gray slacks that he had brought in for alterations, and she offered those pants to him, but she first insisted on measuring the inseam and waist. He attempted to pay for the gray slacks with his credit card, but he was over his limit, and he therefore left the pants at the cleaner. He eventually picked them up on May 14, 2005.

14. According to Mr. Pearson, Ms. Chung had said that she would call him, but she did not. He therefore went to Custom Cleaners on the following Saturday afternoon, May 14, 2005.

When he arrived, Ms. Chung, without comment, gave him a pair of gray pants with cuffs that were on a hanger. He testified that those pants obviously did not match his suit jacket, which was still hanging in the store, but Ms. Chung nonetheless insisted that the pants were his. Mr. Pearson determined that there was no point in discussing the matter further, and he left. He hen realized that he had left a carrying case with papers at Custom Cleaners, and he returned to the store to retrieve it and had a further conversation with Soo Chung. He testified that she continued to state that the pants were his.

15. Mr. Pearson attempted to determine whether it would be possible to replace the pants. He called Samuel Adinew, a salesman at Nordstrom's, who was able to identify the fabric number from a label inside the pocket of the suit jacket. Mr. Adinew called Hickey Freeman on Mr. Pearson's behalf, and he learned that the fabric was no longer available. The pants therefore could not be replaced.

16. Mr. Pearson then wrote a letter to Soo Chung and to Ki Chung,[10] in which he stated his version of what had happened to his suit pants and demanded that they deliver a check for $1,150 to him at his home by June 4, 2005, to compensate him for the lost pants and to fulfill their promise of "Satisfaction Guaranteed." He further stated in the letter that if Custom Cleaners did not honor the guarantee by making the payment he demanded, he would pursue legal remedies against them for multiple violations of the CPPA and for fraudulent conduct and would seek no less than $50,000 in compensatory, treble and punitive damages, and attorney's

[10] The record reflects that Mr. Pearson initially did not have the defendants' correct names. The letter to Ms. Chung was addressed to "Jin N Soo Y (a/k/a Soo Chung)," and that name also was used in the initial Complaint filed in this case, which named two defendants. With the defendants' consent, the plaintiff was permitted to amend the Complaint in July 2005 to reflect that there were three owners of Custom Cleaners and to include their correct names.

fees. A copy of portions of the CPPA also was attached to the letter. The Chungs did not respond, and Mr. Pearson then filed this suit against them on June 7, 2005.

17. Soo Chung testified that she recalls Mr. Pearson bringing in the pants in dispute (Defendants' Exhibit 2), as well as another pair of gray slacks on May 3, 2005. She also recalls that he asked that the suit pants be altered first. She specifically recognized Defendants' Exhibit 2 as the pants belonging to Mr. Pearson because his pants have three belt inserts, which is unusual. The number on the ticket attached to the pants (182) is the same as the number on the tag attached to the claim ticket. Ms. Chung had no doubt that the pants she altered and attempted to return to Mr. Pearson are the same pants he brought in for alteration on May 3, 2005.

18. Ms. Chung also testified that she remembers that the printed ticket stated that the suit pants would be ready on Friday and that she changed it to Thursday, at Mr. Pearson's request. She did the alterations, but the pants were delivered to another store in error, and she therefore did not have them when he came in on May 5, 2005.[11] She testified that the pants were delivered back to Custom Cleaners on the evening of May 6, that Mr. Pearson came in for them on May 7, and that he then said they were not his and would not accept them. She was very sure that they were Mr. Pearson's pants, and she therefore arranged for an acquaintance, Mrs. Park, who owns another dry cleaning store and who is much more fluent in English than Ms. Chung, to speak with Mr. Pearson on the telephone when he arrived at Custom Cleaners and ask him to bring in the suit jacket. Mr. Pearson did bring in the jacket, but he continued to insist that the pants were not his, even after she showed him that the pants were the same size as the other slacks he had brought in for alterations. (Those slacks also were ready on May 6, but Mr. Pearson could not

[11] She also stated that it was quite possible that she then asked Mr. Pearson to come in the next morning, as he claims, and that the pants had not yet been delivered back to Custom Cleaners at that time. She said it can take some time to locate a missing item from another store.

pay for them at that time.) Ms. Chung further testified that Mr. Pearson had his customer receipt when he came in initially for the pants, but he did not have it when he returned. She denied that she had kept it.

19. Ms. Chung and her family received Mr. Pearson's demand letter. They did not pay him the amount he demanded, because they were confident that they had the pants he had brought to them for alteration.

20. Ms. Chung also testified that no one other than Mr. Pearson ever has complained about the "Satisfaction Guaranteed" sign or suggested that it was misleading in any way. She further testified that she did not think the sign was misleading, but that it was removed to avoid further potential litigation, given her family's suffering as the result of this case. She understands "Satisfaction Guaranteed" to have the common sense meaning that if a customer has a problem, Custom Cleaners will do its best to fix the problem—for example, to redo an alteration or to dry clean an item again—and if the problem cannot be fixed, Custom Cleaners will compensate the customer for the value of the clothing.

21. Mr. Pearson called four witnesses to testify about their dissatisfaction with Custom Cleaners.[12] Each of them had a problem with clothing that was brought in to be dry cleaned in

[12] The defendants objected to the testimony of other customers, on the grounds that this case involves only Mr. Pearson and his own claims about one pair of pants. The Court generally agreed with that position, but the testimony of other customers arguably was relevant to the issue of the defendants' intent to honor the "Satisfaction Guaranteed" sign, as well as to the plaintiff's claims for punitive damages. The Court therefore permitted some testimony from other customers. The plaintiff had listed 26 such witnesses in his Pretrial Statement, but at the pretrial conference, the Court limited him to four, given that the testimony was duplicative, which the plaintiff could not dispute. The Court granted the plaintiff's request that he be permitted to identify seven of the 26 customer witnesses, although he was limited to calling only four, in case one or more of the designated witnesses became unavailable. He filed a timely designation in accordance with the Court's order, but he also sought to introduce written statements of the 22 witnesses who were not called. The defendants objected that the plaintiff was attempting to

2004 or 2005. One witness claimed that lace on a sleeve of a dress had been damaged; another claimed a sweater had been lost; another claimed a white suit had been discolored; and another claimed some pants had been washed and ruined. In two of those instances, the defendants disputed the customer's claim, and the customer never did anything to follow up or pursue the claim further. In the case of the allegedly missing sweater, the customer did not have a claim receipt, and the defendants questioned whether the item had been brought in at all. It may be that those situations could have been better handled by the defendants, but the Court does not find that they in any way establish that the defendants had no intention of attempting to satisfy their customers.

22. The final dissatisfied customer called as a witness by the plaintiff is an elderly woman who used Custom Cleaners only once. She claimed that a man who was one of the owners chased her out of the store when she complained about the condition of her pants, but she admitted that he may not have understood her and that she ran out of the store and never returned. She also admitted that she may not have understood what the man behind the counter was saying to her. It appears that she misread the situation and did not communicate her concerns adequately to the defendants, and she misunderstood the defendants' attempt to communicate with her. No conclusion regarding the defendants' response to customer complaints can be drawn from that incident.

23. None of the customer witnesses who testified for the plaintiff adopted his expansive interpretation that "Satisfaction Guaranteed" means that the defendants must give the customer whatever he or she demands, without regard to the facts or the reasonableness of the customer's

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circumvent the Court's pretrial ruling limiting duplicative testimony and that the statements were inadmissible on hearsay grounds. The Court agreed with the defendants and denied the request.

claims. Each of them testified that she would expect the cleaner to pay for the value of the lost or damaged clothing, if the item could not be repaired.[13]

24. When a customer brings in clothing to Custom Cleaners, whether for laundry, dry cleaning or alterations, the customer is given a claim ticket. The ticket is printed by a machine, and there are preprinted statements regarding conditions of service on the back of the ticket. Ms. Chung testified that Custom Cleaners did not draft those conditions and has never used or attempted to enforce them, and no testimony was presented to the contrary.

II.

There is no dispute that the plaintiff is a "consumer" and the defendants, through Custom Cleaners, are a "merchant," for purposes of the CPPA, D.C. Code §§ 28-3901(a)(2) and (3). The plaintiff contends that the defendants' display of the "Satisfaction Guaranteed" sign constituted an unfair trade practice under six different provisions of D.C. Code § 28-3904. That statute provides, in pertinent part, as follows:

> It shall be a violation of this chapter, whether or not any consumer is in fact misled, deceived, or damaged thereby, for any person to:
>
> (a) represent that goods or services have a source, sponsorship, approval, certification, accessories, characteristics, ingredients, uses, benefits, or quantities that they do not have; . . .
>
> (d) represent that goods or services are of particular standard, quality, grade, style or model, if in fact they are of another;
>
> (e) misrepresent as to a material fact which has a tendency to mislead;
>
> (f) fail to state a material fact if such failure tends to mislead; . . .

[13] One of the witnesses gave somewhat contradictory testimony. She claimed she brought in a white suit to be dry cleaned, but that the suit the defendants returned to her was a cream color. She testified at one point that she would have been satisfied if she had been compensated for the value of the suit, which she had purchased for $198, but at another point she stated that she should receive $500, because of her "inconvenience." She did not explain the basis for that claim, other than that she felt she had not been treated well by Custom Cleaners.

(h) advertise or offer goods or services without the intent to sell them or without the intend to sell them as advertised or offered; . . .

(u) represent that the subject of a transaction has been supplied in accordance with a previous representation when it has not . . . .

The CPPA itself does not specify the burden of proof required to establish a violation of the statute. The plaintiff argues that the applicable burden of proof is the civil "preponderance of the evidence" test, as to each of the unfair trade practices he is claiming. To the extent that an unfair trade practice under the statute is premised on a common law cause of action, the District of Columbia Court of Appeals has held that the burden of proof is the same as the burden of proof applicable to the common law claim. *Osbourne v. Capital City Mortgage Corporation*, 727 A. 2d 322, 325-326 (D.C. 1999). In particular, with regard to a claim of intentional misrepresentation, the Court of Appeals held in *Osbourne* that the higher clear and convincing evidence standard applicable at common law also applies to a claim of intentional misrepresentation under the CPPA, D.C. Code § 28-3904(e).

The plaintiff contends that *Osbourne* was overruled by the 2000 Amendments to the CPPA, based on a provision that was added to § 28-3901 that the statue is to "be construed and applied liberally to promote its purpose." Section 28-3901(c). But that general provision does not address burden of proof, and the plaintiff conceded at trial that there is no mention of burden of proof in the legislative history of the 2000 Amendments. It is a longstanding principle that "no statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express." *Monroe v. Foreman*, 540 A. 2d 736, 739 (D.C. 1988) (internal citations omitted). The Court

finds no merit in the plaintiff's claim that the 2000 Amendments to the CPPA somehow overruled the Court of Appeals decision in *Osbourne.*[14]

To the extent that the plaintiff is claiming that the defendants' conduct constituted intentional misrepresentation-- either by an affirmative misrepresentation that has a tendency to mislead or by a failure to state a material fact if such failure tends to mislead-- those claims must be proven by clear, convincing and unequivocal evidence. As a practical matter, however, the Court finds that the plaintiff has not proved those or any of his other claims even by the lower preponderance of the evidence standard.

With regard to the alleged missing pants, the plaintiff has not met his burden of proving that the pants the defendants attempted to return to him were not the pants he brought in for alterations. At best, the evidence on that subject is in equipoise. The Court agrees with the plaintiff that the pants in the defendants' possession do not appear to match the jacket to his burgundy and blue pinstriped suit. The Court also will accept that Mr. Pearson does not like cuffs on his pants. The plaintiff may well believe that he brought the pants to his burgundy and blue pinstriped suit to the defendants, but there also is strong evidence that he did not. The Court found Soo Chung to be very credible, and her explanation that she recognized the disputed pants as belonging to Mr. Pearson because of the unusual belt inserts was much more credible than his speculation that she took a pair of unclaimed pants from the back of the store and altered them to

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[14] To the contrary, in *Caulfield v. Stark*, 893 A. 2d 970, 976 (D.C. 2006), the Court of Appeals referred with approval to the holding in *Osbourne* that the clear and convincing evidence standard applies to claims of intentional misrepresentation under the CPPA. Although that case was decided after the 2000 Amendments, the cause of action arose before the amendments took effect, and the amendments are not retroactive. But there is no suggestion in *Caulfield* that the Court believed the amendments had any bearing on the burden of proof for misrepresentation claims under the CPPA. *Osbourne* concerned an affirmative misrepresentation, but given that misrepresentation at common law includes both affirmative statements and a failure to disclose a material fact, the ruling in *Osbourne* is applicable to CPPA claims under both §§ 28-3904(e) and (f).

match his measurements. Mr. Pearson only recently had received four suits back from his son, he brought in several pairs of pants over a period of less than two weeks for alterations, and it certainly is plausible that the pants on the hanger with his blue and burgundy pinstriped suit jacket were not the pants that matched the jacket, even if Mr. Pearson assumed that they were. The Court need not determine what did happen; what it must do is to determine if Mr. Pearson proved that the defendants intentionally misled him and otherwise are liable to him under the CPPA based on the pants. The Court finds that he has not made that proof.

The plaintiff's claims regarding the "Satisfaction Guaranteed" sign are premised on his interpretation that the sign is an unconditional and unlimited warranty of satisfaction to the customer, as determined solely by the customer, without regard to the facts or to any notion of reasonableness. The plaintiff confirmed at trial that in his view, if a customer brings in an item of clothing to be dry cleaned, and the dry cleaner remembers the item, and the customer then claims that the item is not his when the dry cleaner presents it back to the customer after it has been cleaned, the cleaner must pay the customer whatever the customer claims the item is worth if there is a "Satisfaction Guaranteed" sign in the store, even if the dry cleaner knows the customer is mistaken or lying.

Nothing in the law supports that position. To the contrary, a claim of an unfair trade practice properly is considered in terms of how the practice would be viewed and understood by a reasonable consumer. *Alicke v. MCI Communications Corp*., 111 F.3d 909 (D.C. Cir. 1997) (practice of rounding up telephone bills to the next full minute could not mislead a reasonable consumer and therefore could not be a material misrepresentation or omission). *See also Rossman v. Fleet Bank Nat'l Assn*, 280 F. 3d 384 (3rd Cir. 2002) (duration of advertised offer of credit card with "no annual fee" properly determined based on assumptions that would be made

by a reasonable person; one year is a reasonable assumption). A reasonable consumer would not interpret "Satisfaction Guaranteed" to mean that a merchant is required to satisfy a customer's unreasonable demands or to accede to demands that the merchant has reasonable grounds to dispute.

To the extent that the plaintiff's claims of unfair trade practices are based on his contention that the "Satisfaction Guaranteed" sign required the defendants to accede to his demands regarding his allegedly missing pants, despite the defendants' reasonable belief that they had produced the same pants that he had brought in for alterations, those claims must fail. Similarly, the defendants' acknowledgement that they did not interpret "Satisfaction Guaranteed" to require them to meet any customer's unreasonable demand does not constitute an unfair trade practice under any of the provisions of the CPPA invoked by the plaintiff.

The plaintiff also argues that the conditions on the back of the claim ticket that the defendants give to their customers are unlawful limitations on the otherwise unlimited guarantee of satisfaction announced by the sign in the store. In support of that argument, the plaintiff relies on Federal Trade Commission ("FTC") regulations regarding "Satisfaction Guarantees" and similar representations in advertising, 16 C.F.R. 239.3. The FTC regulations provide that "[a]n advertisement that mentions a 'Satisfaction Guarantee' or a similar representation should disclose, with such clarity and prominence as will be noticed and understood by prospective purchasers, any material limitations or conditions that apply to the 'Satisfaction Guarantee' or similar representations." 16 C.F.R. 239.3(b). By their terms, the regulations apply to print and broadcast advertising, and they include two examples: (1) that if a guarantee is time-limited, the time limits should be included in the advertisement, and (2) if a money-back guarantee requires

that the product be returned in the original packaging, the packaging requirement should be included in the advertisement itself.

The FTC regulations on print and broadcast advertising do not appear to be directly applicable to a determination whether a sign in the defendants' store constitutes a violation of the CPPA. The concern underlying the regulations is that customers not be lured into a store based on advertised promises that turn out to be limited by additional conditions that are not revealed until the customer comes into the store. That concern about a "bait- and-switch" does not apply to a sign that is only displayed inside the store itself. In addition, however, the Court does not find that the terms on the reverse side of the claim ticket-- even if they were enforced by the defendants, which they are not—are properly considered to be conditions on an otherwise unlimited guarantee of customer satisfaction. At best, the reverse side of the claim ticket sets out the terms of the services and bailment provided by Custom Cleaners to its customers, and not limitations on any guarantee of satisfaction.[15]

The FTC regulations for the advertising of warranties and guarantees also provide that a "seller or manufacturer should use the terms 'Satisfaction Guarantee,' "Money Back Guarantee,'

[15] The plaintiff's reliance on *Montgomery Ward & Co. v. F.T.C.*, 379 F.2d 666 (7th Cir. 1967) to support his argument is misplaced. That case involved newspaper advertisements that were found to be deceptive, because of discrepancies between the guarantees in the advertisements (such as a guarantee of rebuilt engines for 90 days or 4000 miles) and the written guarantee certificates actually provided with the advertised products, which imposed additional restrictions (such as limiting the guarantee to 30 days if the assembly was used in a truck or commercial vehicle). The company claimed that it was prepared to honor the original guarantees in the newspaper advertisements and to disregard the additional restrictions in the guarantee certificates, and there was no evidence that the advertised guarantees had not been honored or that any customer even had made a claim. Nevertheless, the Court was concerned that a customer would have no reason to know that the additional restrictions in the guarantee certificates would not be given effect, and it therefore upheld the FTC's finding that the newspaper advertisements were deceptive. That situation is quite different from a "Satisfaction Guaranteed" sign in a dry cleaning store and terms of service and bailment included on the claim ticket.

'Free Trial Offer,' or similar representations in advertising only if the seller or manufacturer, as the case may be, refunds the full purchase price of the advertised product at the purchaser's request." 16 CFR 239.3(a). By its terms, that regulation is inapplicable to this case. But it provides some guidance on the reasonable interpretation of the "Satisfaction Guaranteed" sign, which also was espoused by every witness at trial who was asked about the sign, with the exception of the plaintiff: that if there is a problem with dry cleaning, laundry or alterations, the cleaner should try to fix it, and if the problem cannot be fixed, the cleaner should make reasonable compensation to the customer for the value of the damaged item. The Court does not find that the evidence presented by the plaintiff in any way establishes that the defendants had no intention of honoring that guarantee. To the contrary, the evidence presented by Mr. Pearson regarding his experience in 2002 demonstrates that they did. When a pair of his pants could not be located at that time, Custom Cleaners compensated Mr. Pearson fully for the value of the pants, based on his representations regarding value, without even requiring any further documentation.

It would have been perfectly appropriate for the defendants to have insisted in 2002 that Mr. Pearson document the value of the missing pants before they paid him $150, but they determined at that time that it was not necessary for him to do so. The fact that they did dispute his claims in 2005, when he asserted that they had lost a pair of his pants and they believed they had not, does not constitute a violation of the promise of "Satisfaction Guaranteed" or a violation of any provision of the CPPA.

III.

Based on the foregoing, the Court finds that the plaintiff is not entitled to any relief whatsoever on his claims under the CPPA, Counts One and Four of his Amended Complaint.

The Court's analysis of the plaintiff's CPPA claims applies as well to his claims of common law fraud in Count Two of the Amended Complaint. The plaintiff acknowledges that he is required to prove those claims by clear, convincing and unequivocal evidence. He has not proven those claims by a preponderance of the evidence, let alone by that higher standard.

Judgment therefore will be awarded to the defendants, as well as their costs. A separate judgment is being entered, together with these findings. The issue of the defendants' claim for attorney's fees against the plaintiff will be addressed after the defendant's motions for sanctions and for attorney's fees have been filed and briefed by the parties.

Judge Judith Bartnoff
Signed in Chambers

____June 25, 2007_____
Date

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

ROY L. PEARSON, JR.	:	
	:	
Plaintiff,	:	**Docket No. 05 CA 4302 B**
	:	**Calendar 7**
v.	:	**Judge Bartnoff**
	:	
SOO CHUNG, et al.	:	
	:	
Defendants.	:	

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered this date, it is by the Court this **25th day of June 2007**

ORDERED, ADJUDGED AND DECREED:

1. That judgment be and it hereby is entered in favor of defendants Soo Chung, Jin Nam Chung and Ki Y. Chung and against plaintiff Roy L. Pearson, Jr. on Counts One, Two and Four of the Amended Complaint.[1]

2. That plaintiff Roy L. Pearson, Jr. takes nothing from the defendants, and defendants Soo Chung, Jin Nam Chung and Ki Y. Chung are awarded the costs of this action against the plaintiff Roy L. Pearson, Jr.

Judge Judith Bartnoff
Signed in Chambers

[1] Count Three was withdrawn prior to trial.

Copies to

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Other Case Summaries

1. Judge sues advisor over being a judge
Former District Court Judge Terry Christie sued his former accountant, claiming that due to his bad advice he stopped practicing as a barrister to become a judge, and, as a result, lost more than a million dollars in income in the ten years he was on the bench. Christie claims that he suffered a loss of least $172,000 a year by accepting the judicial appointment. The Court of Appeal that heard the case held that Christie would have accepted the appointment regardless of the advice he was given by his accountant, and dismissed his case.

2. Law student sues law school
After a first year law student flunked out of St. Thomas University School of Law, he sued the school, claiming that it was a conspiracy of the law school to admit students it knew would flunk out. The complaint sought compensatory damages for tuition, room, and board, as well as for lost wages and embarrassment. The complaint also sought an injunction for a review of the student's grades, specifically his C in contracts.

3. Lawyer defends "dine and dasher"
Ralph Paul refused to pay his $46.00 tab after eating at Angellino's Italian Restaurant in Palm Harbor because he claimed the dish was short on shrimp and scallops. Paul was then charged with a misdemeanor. At the jury trial, Paul's lawyer argued that it was Paul's "code of honor" that prevented him from paying his tab: "There are people who are willing to compromise, who are willing to settle. That's not Ralph Paul." The jury acquitted Paul of all charges within 30 minutes.

1 of 1 DOCUMENT

*** Statutes and Constitution are current with Legislation through the ***
*** 2007A and 2007B Special Sessions and Chapter 261 ***
*** of the 2007 Regular Session ***
*** Annotations Current through July 25, 2007 ***

TITLE 6. CIVIL PRACTICE AND PROCEDURE (Chs. 45-88)
CHAPTER 57. COURT COSTS

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Stat. § 57.105 (2007)

§ 57.105. Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

However, the losing party's attorney is not personally responsible if he or she has acted in good faith, based on the representations of his or her client as to the existence of those material facts. If the court awards attorney's fees to a claimant pursuant to this subsection, the court shall also award prejudgment interest.

(2) Paragraph (1)(b) does not apply if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, as it applied to the material facts, with a reasonable expectation of success.

(3) At any time in any civil proceeding or action in which the moving party proves by a preponderance of the evidence that any action taken by the opposing party, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, was taken primarily for the purpose of unreasonable delay, the court shall award damages to the moving party for its reasonable expenses incurred in obtaining the order, which may include attorney's fees, and other loss resulting from the improper delay.

(4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to *s. 120.68*. If the losing party is an agency as defined in *s. 120.52(1)*, the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

(6) The provisions of this section are supplemental to other sanctions or remedies available under law or under court rules.

(7) If a contract contains a provision allowing attorney's fees to a party when he or she is required to take any action to enforce the contract, the court may also allow reasonable attorney's fees to the other party when that party prevails in any action, whether as plaintiff or defendant, with respect to the contract. This subsection applies to any contract entered into on or after October 1, 1988.

HISTORY: s. 1, ch. 78-275; s. 61, ch. 86-160; ss. 1, 2, ch. 88-160; s. 1, ch. 90-300; s. 316, ch. 95-147; s. 4, ch. 99-225; s. 1, ch. 2002-77; s. 9, ch. 2003-94.

1 of 1 DOCUMENT

*** CURRENT THROUGH CHANGES RECEIVED JULY, 2007 ***

FEDERAL RULES OF CIVIL PROCEDURE
III. PLEADINGS AND MOTIONS

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Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions [Caution: For amendment effective December 1, 2007, see prospective amendment note below.]

(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--
(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;
(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and
(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
(1) *How Initiated.*
(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

1 of 1 DOCUMENT

*** THIS DOCUMENT REFLECTS CHANGES RECEIVED BY SEPTEMBER 4, 2007 ***
*** ANNOTATIONS CURRENT THROUGH JULY 25, 2007 ***

Rules of The United States District Court for The Middle District of Florida
Chapter TWO. ATTORNEYS

USDC M.D. Fla. Local Rule 2.04 (2007)

Review Court Orders which may amend this Rule.

Rule 2.04. Discipline

(a) Any member of the bar of this Court, admitted generally under Rule 2.01 or specially under Rule 2.02, may, after hearing and for good cause shown, be disbarred, suspended, reprimanded or subjected to such other discipline as the Court may deem proper.

(b) Whenever it appears to the Court that any member of its bar, admitted generally under Rule 2.01 or then appearing specially under Rule 2.02, has been disbarred or suspended from practice by the Supreme Court of Florida, or by any other court of competent jurisdiction, as the case might be, or has been disbarred on consent or resigned from the bar of any other court while an investigation into allegations of misconduct is pending, or has been convicted of a felony in any court, such disbarment, suspension, resignation, or conviction shall, twenty (20) days thereafter, operate as an automatic suspension of such attorney's right to practice in this Court; provided, however, the attorney may file, within such twenty (20) day period, a petition, with a copy served upon the United States Attorney, seeking relief from the operation of this rule, and if a timely petition is filed, suspension shall be stayed until the petition is determined. If such petition is filed by an attorney who has been admitted to practice generally under Rule 2.01 of these rules, it shall be heard and determined by the Chief Judge of the Court sitting with any two or more of other judges of the District as the Chief Judge shall designate. If such petition is filed by an attorney who has been admitted to practice specially under Rule 2.02 of these rules, it shall be heard and determined by the judge assigned to the case in which such special appearance has been made.

(c) Any attorney admitted to practice before this Court, upon being subjected to public discipline by any other Court of the United States or the District of Columbia, or by a court of any state, territory, commonwealth, or possession of the United States, including any attorney who is disbarred on consent or resigns from any bar while an investigation into allegations of misconduct is pending, shall promptly inform the Clerk of this Court of such action.

(d) The professional conduct of all members of the bar of this Court, admitted generally under Rule 2.01 or specially under Rule 2.02, shall be governed by the Model Rules of Professional Conduct of the American Bar Association as modified and adopted by the Supreme Court of Florida to govern the professional behavior of the members of The Florida Bar.

(e) The Court may appoint a Grievance Committee in each Division of the Court to conduct investigations of alleged misconduct on the part of any member of its bar, whether admitted generally under Rule 2.01 or specially under Rule 2.02. Each Grievance Committee shall consist of not less than five members of the bar of this Court regularly practicing in that Division, three of whom shall constitute a quorum. Appointments shall be for three (3) years. The Court shall designate the Chairman of the Committee in each Division, but each Committee shall otherwise organize itself as it sees fit. All proceedings before the Committees may be conducted informally, but shall remain confidential unless otherwise ordered by the Court. Each Committee shall function as follows:

(1) Any matter or question touching upon the professional behavior of a member of the bar may be referred at any time to the Chairman of the appropriate Committee by any judge of the Court. The Chairman of the Committee will promptly designate himself, or some other member, to investigate the matter and make a preliminary report to the Committee as a whole for the Committee's determination as to whether (i) the inquiry should be terminated because the question raised is unsupported or insubstantial; or (ii) the question raised justifies further inquiry but should be referred to the appropriate grievance committee of The Florida Bar; or (iii) the question raised justifies further inquiry and should be pursued by the Committee due to distinctly Federal features or other appropriate reason. The Chairman of the Committee shall then report the Committee's preliminary recommendation to the referring judge and shall follow his direction.

(2) If a Committee is directed by the referring judge to pursue its inquiry, it shall proceed with dispatch to make such further investigation as it deems necessary to make a final report to the Court as to whether there is, or is not, probable cause to believe that the subject member of the bar has been guilty of unprofessional or unethical conduct justifying disciplinary action by the Court. If the Committee makes a report of probable cause, such report shall then be transmitted to the United States Attorney (or, if the United States Attorney be disqualified by interest, to another member of the bar appointed by the Chief Judge for that purpose) who shall file and serve a petition for an order to show cause upon the accused attorney. Such petition, and all further proceedings thereon, shall be heard and determined by the Chief Judge of the District sitting together with any two or more judges of the District as the Chief Judge shall designate.

(f) It shall be the duty of every member of the bar of the Court, admitted generally under Rule 2.01 or specially under Rule 2.02, to respond to and cooperate fully with any Grievance Committee of the Court during the course of any investigation being conducted pursuant to subsection (d) of this rule; provided, however, no attorney shall be entitled as of right to notice of the pendency of any such investigation unless and until he is named in a petition to show cause filed pursuant to subsection (e)(2) of this rule.

(g) Nothing in this rule shall be construed as providing an exclusive procedure for the discipline of members of the bar in appropriate cases, nor as a limitation upon the power of the Court to punish for contempt in appropriate cases.

(h) Attorneys and litigants should conduct themselves with civility and in a spirit of cooperation in order to reduce unnecessary cost and delay.

Code of Judicial Conduct

Adopted September 29, 1994, effective January 1, 1995 (643 So. 2d 1037)
As amended through January 5, 2006 (SC05-281)

Preamble

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

The Code of Judicial Conduct establishes standards for ethical conduct of judges. It consists of broad statements called Canons, specific rules set forth in Sections under each Canon, a Definitions Section, an Application Section and Commentary. The text of the Canons and the Sections, including the Definitions and Application Sections, is authoritative. The Commentary, by explanation and example, provides guidance with respect to the purpose and meaning of the Canons and Sections. The Commentary is not intended as a statement of additional rules. When the text uses "shall" or "shall not," it is intended to impose binding obligations the violation of which, if proven, can result in disciplinary action. When "should" or "should not" is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When "may" is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscriptions.

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is not to be construed to impinge on the essential independence of judges in making judicial decisions.

The Code is designed to provide guidance to judges and candidates for judicial office and to provide a structure for regulating conduct through disciplinary agencies. It is not designed or intended as a basis for civil liability or criminal prosecution. Furthermore, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.

The text of the Canons and Sections is intended to govern conduct of judges and to be binding upon them. It is not intended, however, that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.

The Code of Judicial Conduct is not intended as an exhaustive guide for the conduct of judges. They should also be governed in their judicial and personal conduct by general ethical standards. The Code is intended, however, to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct.

Definitions

"**Appropriate authority"** denotes the authority with responsibility for initiation of disciplinary process with respect to the violation to be reported.

"**Candidate."** A candidate is a person seeking selection for or retention in judicial office by election or appointment. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, opens a campaign account as defined by Florida law, declares or files as a candidate with the election or appointment authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election or appointment to nonjudicial office.

"**Court personnel"** does not include the lawyers in a proceeding before a judge.

"**De minimis"** denotes an insignificant interest that could not raise reasonable question as to a judge's impartiality.

"**Economic interest"** denotes ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership of an interest in a mutual or common investment fund that holds securities is not an economic interest in such securities unless the judge participates in the management of the fund or a proceeding pending or impending before the judge could substantially affect the value of the interest;

(ii) service by a judge as an officer, director, advisor, or other active participant in an educational, religious, charitable, fraternal, sororal, or civic organization, or service by a judge's spouse, parent, or child as an officer, director, advisor, or other active participant in any organization does not create an economic interest in securities held by that organization;

(iii) a deposit in a financial institution, the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or of a member in a credit union, or a similar proprietary interest, is not an economic interest in the organization unless a proceeding pending or impending before the judge could substantially affect the value of the interest;

(iv) ownership of government securities is not an economic interest in the issuer unless a proceeding pending or impending before the judge could substantially affect the value of the securities.

"**Fiduciary"** includes such relationships as personal representative, administrator, trustee, guardian, and attorney in fact.

"Impartiality" or **"impartial"** denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

"**Judge.**" When used herein this term means Article V, Florida Constitution judges and, where applicable, those persons performing judicial functions under the direction or supervision of an Article V judge.

"**Knowingly**," "**knowledge,**" "**known**," or "**knows**" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"**Law**" denotes court rules as well as statutes, constitutional provisions, and decisional law.

"**Member of the candidate's family**" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the candidate maintains a close familial relationship.

"**Member of the judge's family**" denotes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship.

"**Member of the judge's family residing in the judge's household**" denotes any relative of a judge by blood or marriage, or a person treated by a judge as a member of the judge's family, who resides in the judge's household.

"**Nonpublic information**" denotes information that, by law, is not available to the public. Nonpublic information may include but is not limited to: information that is sealed by statute or court order, impounded or communicated in camera; and information offered in grand jury proceedings, presentencing reports, dependency cases, or psychiatric reports.

"**Political organization**" denotes a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

"**Public election.**" This term includes primary and general elections; it includes partisan elections, nonpartisan elections, and retention elections.

"**Require**." The rules prescribing that a judge "require" certain conduct of others are, like all of the rules in this Code, rules of reason. The use of the term "require" in that context means a judge is to exercise reasonable direction and control over the conduct of those persons subject to the judge's direction and control.

"**Third degree of relationship**." The following persons are relatives within the third degree of relationship: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, or niece.

Amended January 5, 2006 (SC05-281).

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

COMMENTARY

Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn upon their acting without fear or favor. Although judges should be independent, they must comply with the law, including the provisions of this Code. Public confidence in the impartiality of the judiciary is maintained by the adherence of each judge to this responsibility. Conversely, violation of this Code diminishes public confidence in the judiciary and thereby does injury to the system of government under law.

CANON 2

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge should not hold membership in an organization that practices invidious discrimination on the basis of race, sex, religion, or national origin. Membership in a fraternal, sororal, religious, or ethnic heritage organization shall not be deemed to be a violation of this provision.

COMMENTARY

Canon 2A. Irresponsible or improper conduct by judges erodes public confidence in the judiciary. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3B(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds, with knowledge of all the relevant circumstances that a reasonable inquiry would disclose, a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, and competence is impaired.

See also Commentary under Section 2C.

Canon 2B. Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business, although a judge may use judicial letterhead to write character reference letters when such letters are otherwise permitted under this Code.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 5D(5) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 7 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

Canon 2C. Florida Canon 2C is derived from a recommendation by the American Bar Association and from the United States Senate Committee Resolution, 101st Congress, Second Session, as adopted by the United States Senate Judiciary Committee on August 2, 1990.

Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on the history of the organization's selection of members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See New York State Club Ass'n. Inc. v. City of New York, 487 U.S. 1, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). Other relevant factors include the size and nature of the organization and the diversity of persons in the locale who might reasonably be considered potential members. Thus the mere absence of diverse membership does not by itself demonstrate a violation unless reasonable persons with knowledge of all the relevant circumstances would expect that the membership would be diverse in the absence of invidious discrimination. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex, or national origin persons who would otherwise be admitted to membership.

This Canon is not intended to prohibit membership in religious and ethnic clubs, such as Knights of Columbus, Masons, B'nai B'rith, and Sons of Italy; civic organizations, such as Rotary, Kiwanis, and The Junior League; young people's organizations, such as Boy Scouts, Girl Scouts, Boy's Clubs, and Girl's Clubs; and charitable organizations, such as United Way and Red Cross.

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

When a person who is a judge on the date this Code becomes effective learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization.

Commentary amended January 5, 2006 (SC05-281).

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

A. Judicial Duties in General.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the specific standards set forth in the following sections apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not, with respect to parties or classes of parties, cases, controversies or issues likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

(11) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary Responsibilities.

(1) A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.

(2) A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) the judge's spouse or a person within the third degree of relationship to the judge participated as a lower court judge in a decision to be reviewed by the judge.

(f) the judge, while a judge or candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to:

(i) parties or classes of parties in the proceeding;

(ii) an issue in the proceeding; or

(iii) the controversy in the proceeding.

(2) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification.

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

Amended January 23, 2003 (838 So. 2d 521); January 5, 2006 (SC05-281).

COMMENTARY

Canon 3B(4). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.

Canon 3B(5). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Canon 3B(7). The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief as amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Canon 3B(8). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the judge to that end.

Canon 3B(9) and 3B(10). Sections 3B(9) and (10) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3B(9) and (10) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 4-3.6 of the Rules Regulating the Florida Bar.

Canon 3B(10). Commending or criticizing jurors for their verdict may imply a judicial expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

Canon 3C(4). Appointees of a judge include assigned counsel, officials such as referees, commissioners, special magistrates, receivers, mediators, arbitrators, and guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4). See also Fla. Stat. Sec. 112.3135 (1991).

Canon 3D. Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or reporting the violation to the appropriate authority or other agency or body. If the conduct is minor, the Canon allows a judge to address the problem solely by direct communication with the offender. A judge having knowledge, however, that another judge has committed a violation of this Code that raises a substantial question as to that other judge's fitness for office or has knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, is required under this Canon to inform the appropriate authority. While worded differently, this Code provision has the identical purpose as the related Model Code provisions.

Canon 3E(1). Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. The fact that the judge conveys this information does not automatically require the judge to be disqualified upon a request by either party, but the issue should be resolved on a case-by-case basis. Similarly, if a lawyer or party has previously filed a complaint against the judge with the Judicial Qualifications Commission, that fact does not automatically require disqualification of the judge. Such disqualification should also be on a case-by-case basis.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Canon 3E(1)(b). A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Canon 3E(1)(d). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

Canon 3E(1)(e). It is not uncommon for a judge's spouse or a person within the third degree of relationship to a judge to also serve as a judge in either the trial or appellate courts. However, where a judge exercises appellate authority over another judge, and that other judge is either a spouse or a relationship within the third degree, then this Code requires disqualification of the judge that is exercising appellate authority. This Code, under these circumstances, precludes the appellate judge from participating in the review of the spouse's or relation's case.

Canon 3F. A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

Commentary amended June 15, 1995, effective Nov. 9, 1995 (656 So. 2d 926); Aug. 24, 1995 (659 So. 2d 692); January 23, 2003 (838 So. 2d 521); January 5, 2006 (SCO5-281).

CANON 4

A JUDGE IS ENCOURAGED TO ENGAGE IN ACTIVITIES TO IMPROVE THE LAW, THE LEGAL SYSTEM, AND THE ADMINISTRATION OF JUSTICE

A. A judge shall conduct all of the judge's quasi-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

B. A judge is encouraged to speak, write, lecture, teach and participate in other quasi-judicial activities concerning the law, the legal system, the administration of justice, and the role of the judiciary as an independent branch within our system of government, subject to the requirements of this Code.

C. A judge shall not appear at a public hearing before, or otherwise consult with an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

D. A judge is encouraged to serve as a member, officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system, the judicial branch, or the administration of justice, subject to the following limitations and the other requirements of this Code.

(1) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(a) will be engaged in proceedings that would ordinarily come before the judge, or

(b) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(2) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(a) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(b) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(c) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4D(2)(a), if the membership solicitation is essentially a fund-raising mechanism;

(d) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

Amended February 20, 2003 (840 So. 2d 1023).

COMMENTARY

Canon 4A. A judge is encouraged to participate in activities designed to improve the law, the legal system, and the administration of justice. In doing so, however, it must be understood that expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. See Section 2C and accompanying Commentary.

Canon 4B. The canon is clarified in order to encourage judges to engage in activities to improve the law, the legal system, and the administration of justice. As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including, but not limited to, the improvement of the role of the judiciary as an independent branch of government, the revision of substantive and procedural law, the improvement of criminal and juvenile justice, and the improvement of justice in the areas of civil, criminal, family, domestic violence, juvenile delinquency, juvenile dependency, probate and motor vehicle law. To the extent that time permits, a judge is encouraged to do so, either independently or through a bar association, judicial conference or other organization dedicated to the improvement of the law. Support of pro bono legal services by members of the bench is an activity that relates to improvement of the administration of justice. Accordingly, a judge may engage in activities intended to encourage attorneys to perform pro bono services, including, but not limited to: participating in events to recognize attorneys who do pro bono work, establishing general procedural or scheduling accommodations for pro bono attorneys as feasible, and acting in an advisory capacity to pro bono programs. Judges are encouraged to participate in efforts to promote the fair administration of justice, the independence of the judiciary and the integrity of the legal profession, which may include the expression of opposition to the persecution of lawyers and judges in other countries.

The phrase "subject to the requirements of this Code" is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

Canon 4C. See Section 2B regarding the obligation to avoid improper influence.

Canon 4D(1). The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to reexamine the activities of each organization with which the judge is affiliated to determine if it is proper for the judge to continue the affiliation. For example, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

Canon 4D(2). A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: 1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority, 2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves and 3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4D(2) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

A judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code.

Commentary amended February 20, 2003 (840 So. 2d 1023).

CANON 5

A JUDGE SHALL REGULATE EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH JUDICIAL DUTIES

A. Extrajudicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they do not:

(1) cast reasonable doubt on the judge's capacity to act impartially as a judge;

(2) demean the judicial office; or

(3) interfere with the proper performance of judicial duties.

B. Avocational Activities. A judge is encouraged to speak, write, lecture, teach and participate in other extrajudicial activities concerning non-legal subjects, subject to the requirements of this Code.

C. Governmental, Civic or Charitable Activities.

(1) A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests.

(2) A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, the judicial branch, or the administration of justice. A judge may, however, represent a country, state or locality on ceremonial occasions or in connection with historical, educational or cultural activities.

(3) A judge may serve as an officer, director, trustee or non-legal advisor of an educational, religious, charitable, fraternal, sororal or civic organization not conducted for profit, subject to the following limitations and the other requirements of this Code.

(a) A judge shall not serve as an officer, director, trustee or non-legal advisor if it is likely that the organization

(i) will be engaged in proceedings that would ordinarily come before the judge, or

(ii) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 5C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iii) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

D. Financial Activities.

(1) A judge shall not engage in financial and business dealings that

(a) may reasonably be perceived to exploit the judge's judicial position, or

(b) involve the judge in frequent transactions or continuing business relationships with those lawyers or other persons likely to come before the court on which the judge serves.

(2) A judge may, subject to the requirements of this Code, hold and manage investments of the judge and members of the judge's family, including real estate, and engage in other remunerative activity.

(3) A judge shall not serve as an officer, director, manager, general partner, advisor or employee of any business entity except that a judge may, subject to the requirements of this Code, manage and participate in:

(a) a business closely held by the judge or members of the judge's family, or

(b) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.

(5) A judge shall not accept, and shall urge members of the judge's family residing in the judge's household not to accept, a gift, bequest, favor or loan from anyone except for:

(a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an invitation to the judge and the judge's spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice;

(b) a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;

(c) ordinary social hospitality;

(d) a gift from a relative or friend, for a special occasion, such as a wedding, anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;

(e) a gift, bequest, favor or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Canon 3E;

(f) a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges;

(g) a scholarship or fellowship awarded on the same terms and based on the same criteria applied to other applicants; or

(h) any other gift, bequest, favor or loan, only if: the donor is not a party or other person who has come or is likely to come or whose interests have come or are likely to come before the judge; and, if its value, or the aggregate value in a calendar year of such gifts, bequests, favors, or loans from a single source, exceeds $100.00, the judge reports it in the same manner as the judge reports gifts under Section 6B(2).

E. Fiduciary Activities.

(1) A judge shall not serve as executor, administrator or other personal representative, trustee, guardian, attorney in fact or other fiduciary, except for the estate, trust or person of a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

(2) A judge shall not serve as a fiduciary if it is likely that the judge as a fiduciary will be engaged in proceedings that would ordinarily come before the judge, or if the estate, trust or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(3) The same restrictions on financial activities that apply to a judge personally also apply to the judge while acting in a fiduciary capacity.

F. Service as Arbitrator or Mediator.

(1) A judge shall not act as an arbitrator or mediator or otherwise perform judicial functions in a private capacity unless expressly authorized by law or Court rule. A judge may, however, take the necessary educational and training courses required to be a qualified and certified arbitrator or mediator, and may fulfill the requirements of observing and conducting actual arbitration or mediation proceedings as part of the certification process, provided such program does not, in any way, interfere with the performance of the judge's judicial duties.

(2) A senior judge may serve as a mediator in a case in which the senior judge is not presiding only if the senior judge is certified pursuant to rule 10.100, Florida Rules for Certified and Court-Appointed Mediators. Such senior judge may be associated with entities that are solely engaged in offering mediation or other alternative dispute resolution services but that are not otherwise engaged in the practice of law. However, such senior judge may be in no other way advertise, solicit business, associate with a law firm, or participate in any other activity that directly or indirectly promotes his or her mediation services. A senior judge shall not serve as a mediator in any case in which the judge is currently presiding. A senior judge who provides mediation services shall not preside over the same type of case the judge mediates in the circuit where the mediation services are provided; however, a senior judge may preside over other types of cases (e.g., criminal, juvenile, family law, probate) in the same circuit and may preside over cases in circuits in which the judge does not provide mediation services. A senior judge shall disclose if the judge is being utilized or has been utilized as a mediator by any party, attorney, or law firm involved in the case pending before the senior judge. Absent express consent of all parties, a senior judge is prohibited from presiding over any case involving any party, attorney, or law firm that is utilizing or has utilized the judge as a mediator within the previous three

years. A senior judge shall disclose any negotiations or agreements for the provision of mediation services between the senior judge and any of the parties or counsel to the case.

G. Practice of Law. A judge shall not practice law. Notwithstanding this prohibition, a judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

Amended January 10, 2002 (816 So. 2d 1084); February 20, 2003 (840 So. 2d 1023); November 3, 2005 (SC04-2482).

COMMENTARY

Canon 5A. Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives. For that reason, judges are encouraged to participate in extrajudicial community activities.

Expressions of bias or prejudice by a judge, even outside the judge's judicial activities, may cast reasonable doubt on the judge's capacity to act impartially as a judge. Expressions which may do so include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status. See Section 2C and accompanying Commentary.

Canon 5B. In this and other Sections of Canon 5, the phrase "subject to the requirements of this Code" is used, notably in connection with a judge's governmental, civic or charitable activities. This phrase is included to remind judges that the use of permissive language in various Sections of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct.

Canon 5C(1). See Section 2B regarding the obligation to avoid improper influence.

Canon 5C(2). Section 5C(2) prohibits a judge from accepting any governmental position except one relating to the law, legal system or administration of justice as authorized by Section 4D. The appropriateness of accepting extrajudicial assignments must be assessed in light of the demands on judicial resources created by crowded dockets and the need to protect the courts from involvement in extrajudicial matters that may prove to be controversial. Judges should not accept governmental appointments that are likely to interfere with the effectiveness and independence of the judiciary.

Section 5C(2) does not govern a judge's service in a nongovernmental position. See Section 5C(3) permitting service by a judge with educational, religious, charitable, fraternal, sororal or civic organizations not conducted for profit. For example, service on the board of a public educational institution, unless it were a law school, would be prohibited under Section 5C(2), but service on the board of a public law school or any private educational institution would generally be permitted under Section 5C(3).

Canon 5C(3). Section 5C(3) does not apply to a judge's service in a governmental position unconnected with the improvement of the law, the legal system or the administration of justice; see Section 5C(2).

See Commentary to Section 5B regarding use of the phrase "subject to the following limitations and the other requirements of this Code." As an example of the meaning of the phrase, a judge permitted by Section 5C(3) to serve on the board of a fraternal institution may be prohibited from such service by Sections 2C or 5A if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge.

Service by a judge on behalf of a civic or charitable organization may be governed by other provisions of Canon 5 in addition to Section 5C. For example, Section 5G prohibits a judge from serving as a legal advisor to a civic or charitable organization.

Canon 5C(3)(a). The changing nature of some organizations and of their relationship to the law makes it necessary for a judge to regularly reexamine the activities of each organization with which the judge is affiliated in order to determine if it is proper for the judge to continue the affiliation. For example, in many jurisdictions charitable hospitals are now more frequently in court than in the past.

Canon 5C(3)(b). A judge may solicit membership or endorse or encourage membership efforts for a nonprofit educational, religious, charitable, fraternal, sororal or civic organization as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: 1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority, 2) a judge may solicit other persons for membership in the organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves and 3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 5C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise.

A judge must not be a speaker or guest of honor at an organization's fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code.

Canon 5D(1). When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain. See Section 2B; see also Section 3B(11).

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with persons likely to come either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position. This rule is necessary to avoid creating an appearance of exploitation of office or favoritism and to minimize the potential for disqualification. With respect to affiliation of relatives of the judge with law firms appearing before the judge, see Commentary to Section 3E(1) relating to disqualification.

Participation by a judge in financial and business dealings is subject to the general prohibitions in Section 5A against activities that tend to reflect adversely on impartiality, demean the judicial office, or interfere with the proper performance of judicial duties. Such participation is also subject to the general prohibition in Canon 2 against activities involving impropriety or the appearance of impropriety and the prohibition in Section 2B against the misuse of the prestige of judicial office. In addition, a judge must maintain high standards of conduct in all of the judge's activities, as set forth in Canon 1. See Commentary for Section 5B regarding use of the phrase "subject to the requirements of this Code."

Canon 5D(2). This Section provides that, subject to the requirements of this Code, a judge may hold and manage investments owned solely by the judge, investments owned solely by a member or members of the judge's family, and investments owned jointly by the judge and members of the judge's family.

Canon 5D(3). Subject to the requirements of this Code, a judge may participate in a business that is closely held either by the judge alone, by members of the judge's family, or by the judge and members of the judge's family.

Although participation by a judge in a closely-held family business might otherwise be permitted by Section 5D(3), a judge may be prohibited from participation by other provisions of this Code when, for example, the business entity frequently appears before the judge's court or the participation requires significant time away from judicial duties. Similarly, a judge must avoid participating in a closely-held family business if the judge's participation would involve misuse of the prestige of judicial office.

Canon 5D(5). Section 5D(5) does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

Because a gift, bequest, favor or loan to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

Canon 5D(5)(a). Acceptance of an invitation to a law-related function is governed by Section 5D(5)(a); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Section 5D(5)(h).

A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Sections 5A(1) and 2B.

Canon 5D(5)(d). A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required. See, however, Section 5D(5)(e).

Canon 5D(5)(h). Section 5D(5)(h) prohibits judges from accepting gifts, favors, bequests or loans from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts, favors, bequests or loans from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge.

Canon 5E(3). The restrictions imposed by this Canon may conflict with the judge's obligation as a fiduciary. For example, a judge should resign as trustee if detriment to the trust would result from divestiture of holdings the retention of which would place the judge in violation of Section 5D(4).

Canon 5F(1). Section 5F(1) does not prohibit a judge from participating in arbitration, mediation or settlement conferences performed as part of judicial duties. An active judge may take the necessary educational and training programs to be certified or qualified as a mediator or arbitrator, but this shall not be a part of the judge's judicial duties. While such a course will allow a judge to have a better understanding of the arbitration and mediation process, the certification and qualification of a judge as a mediator or arbitrator is primarily for the judge's personal benefit. While actually participating in the mediation and arbitration training activities, care must be taken in the selection of both cases and locations so as to guarantee that there is no interference or conflict between the training and the judge's judicial responsibilities. Indeed, the training should be conducted in such a manner as to avoid the involvement of persons likely to appear before the judge in legal proceedings.

Canon 5F(2). The purpose of these admonitions is to ensure that the senior judge's impartiality is not subject to question. Although a senior judge may act as a mediator or arbitrator, attention must be given to relationships with lawyers and law firms which may require disclosure or disqualification. These provisions are intended to prohibit a senior judge from soliciting lawyers to use his or her mediation services when those lawyers are or may be before the judge in proceedings where the senior judge is acting in a judicial capacity.

Canon 5G. This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies. However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge's family. See Section 2B.

The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.

Commentary amended February 20, 2003 (840 So. 2d 1023); November 3, 2005 (915 So. 2d 145).

CANON 6

FISCAL MATTERS OF A JUDGE SHALL BE CONDUCTED IN A MANNER THAT DOES NOT GIVE THE APPEARANCE OF INFLUENCE OR IMPROPRIETY; A JUDGE SHALL REGULARLY FILE PUBLIC REPORTS AS REQUIRED BY ARTICLE II, SECTION 8, OF THE CONSTITUTION OF FLORIDA, AND SHALL PUBLICLY REPORT GIFTS; ADDITIONAL FINANCIAL INFORMATION SHALL BE FILED WITH THE JUDICIAL QUALIFICATIONS COMMISSION TO ENSURE FULL FINANCIAL DISCLOSURE

A. Compensation for Quasi-Judicial and Extrajudicial Services and Reimbursement of Expenses.

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extrajudicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in the performance of judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

(1) Compensation. Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

(2) Expense Reimbursement. Expense reimbursement shall be limited to the actual cost of travel, food, and lodging reasonably incurred by the judge and, where appropriate to the occasion, to the judge's spouse. Any payment in excess of such an amount is compensation.

B. Public Financial Reporting.

(1) Income and Assets. A judge shall file such public report as may be required by law for all public officials to comply fully with the provisions of Article II, Section 8, of the Constitution of Florida. The form for public financial disclosure shall be that recommended or adopted by the Florida Commission on Ethics for use by all public officials. The form shall be filed with the Florida Commission on Ethics on the date prescribed by law, and a copy shall be filed simultaneously with the Judicial Qualifications Commission.

(2) Gifts. A judge shall file a public report of all gifts which are required to be disclosed under Canon 5D(5)(h) of the Code of Judicial Conduct. The report of gifts received in the preceding calendar year shall be filed with the Florida Commission on Ethics on or before July 1 of each year. A copy shall be filed simultaneously with the Judicial Qualifications Commission.

(3) Disclosure of Financial Interests Upon Leaving Office. A judge shall file a final disclosure statement within 60 days after leaving office, which report shall cover the period between January 1 of the year in which the judge leaves office and his or her last day of office, unless, within the 60-day period, the judge takes another public position requiring financial disclosure under Article II, Section 8, of the Constitution of Florida, or is otherwise required to file full and public disclosure for the final disclosure period. The form for disclosure of financial interests upon leaving office shall be that recommended or adopted by the Florida Commission on Ethics for use by all public officials. The form shall be filed with the Florida Commission on Ethics and a copy shall be filed simultaneously with the Judicial Qualifications Commission.

C. Confidential Financial Reporting to the Judicial Qualifications Commission.

To ensure that complete financial information is available for all judicial officers, there shall be filed with the Judicial Qualifications Commission on or before July 1 of each year, if not already included in the public report to be filed under Canon 6B(1) and (2), a verified list of the names of the corporations and other business entities in which the judge has a financial interest as of December 31 of the preceding year, which shall be transmitted in a separate sealed envelope, placed by the Commission in safekeeping, and not be opened or the contents thereof disclosed except in the manner hereinafter provided.

At any time during or after the pendency of a cause, any party may request information as to whether the most recent list filed by the judge or judges before whom the cause is or was pending contains the name of any specific person or corporation or other business entity which is a party to the cause or which has a substantial direct or indirect financial interest in its outcome. Neither the making of the request nor the contents thereof shall be revealed by the chair to any judge or other person except at the instance of the individual making the request. If the request meets the requirements hereinabove set forth, the chair shall render a prompt answer thereto and thereupon return the report to safekeeping for retention in accordance with the provisions hereinabove stated. All such requests shall be verified and transmitted to the chair of the Commission on forms to be approved by it.

D. Limitation of Disclosure.

Disclosure of a judge's income, debts, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.

Amended January 10, 2002 (816 So. 2d 1084).

COMMENTARY

Canon 6A. See Section 5D(5)(a)-(h) regarding reporting of gifts, bequests and loans.

The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. Judges must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial.

Canon 6C. Subparagraph A prescribes guidelines for additional compensation and the reimbursement of expense funds received by a judge.

Subparagraphs B and C prescribe the three types of financial disclosure reports required of each judicial officer.

The first is the Ethics Commission's constitutionally required form pursuant to Article II, Section 8, of the Constitution. It must be filed each year as prescribed by law. The financial reporting period is for the previous calendar year. A final disclosure statement is generally required when a judge leaves office. The filing of the income tax return is a permissible alternative.

The second is a report of gifts received during the preceding calendar year to be filed publicly with the Florida Commission on Ethics. The gifts to be reported are in accordance with Canon 5D(5)(h). This reporting is in lieu of that prescribed by statute as stated in the Supreme Court's opinion rendered in In re Code of Judicial Conduct, 281 So. 2d 21 (Fla.1973). The form for this report is as follows:

Form 6A. Gift Disclosure

All judicial officers must file with the Florida Commission on Ethics a list of all gifts received during the preceding calendar year of a value in excess of $100.00 as provided in Canon 5D(5) and Canon 6B(2) of the Code of Judicial Conduct.

Name: _____
Telephone: _____
Address: _____
Position Held:_____

Please identify all gifts you received during the preceding calendar year of a value in excess of $100.00, as required by Canon 5D(5) and Canon 6B(2) of the Code of Judicial Conduct.

_____
_____
_____
_____

OATH

State of Florida
County of _____
I, _____, the public official filing this disclosure statement, being first duly sworn, do depose on oath and say that the facts set forth in the above statement are true, correct, and complete to the best of my knowledge and belief.

_____
(Signature of Reporting Official)

_____
(Signature of Officer Authorized to Administer Oaths)

My Commission expires _____.
Sworn to and subscribed before me this
_____ day of _____, 20_____.

COMMENTARY

The third financial disclosure report is prescribed in subparagraph C. This provision ensures that there will be complete financial information for all judicial officers available with the Judicial Qualifications Commission by requiring that full disclosure be filed confidentially with the Judicial Qualifications Commission in the event the limited disclosure alternative is selected under the provisions of Article II, Section 8.

The amendment to this Canon requires in 6B(2) a separate gift report to be filed with the Florida Commission on Ethics on or before July 1 of each year. The form to be used for that report is included in the commentary to Canon 6. It should be noted that Canon 5, as it presently exists, restricts and prohibits the receipt of certain gifts. This provision is not applicable to other public officials.

With reference to financial disclosure if the judge chooses the limited disclosure alternative available under the provision of Article II, Section 8, of the Constitution of Florida, without the inclusion of the judge's Federal Income Tax Return, then the judge must file with the Commission a list of the names of corporations or other business entities in which the judge has a financial interest even though the amount is less than $1,000. This information remains confidential until a request is made by a party to a cause before the judge. This latter provision continues to ensure that complete financial information for all judicial officers is available with the Judicial Qualifications Commission and that parties who are concerned about a judge's possible financial interest have a means of obtaining that information as it pertains to a particular cause before the judge.

Canon 6D. Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See "economic interest" as explained in the Definitions Section. Section 5D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties; Section 6B requires a judge to report all compensation the judge received for activities outside judicial office. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.

CANON 7

A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL REFRAIN FROM INAPPROPRIATE POLITICAL ACTIVITY

A. All Judges and Candidates.

(1) Except as authorized in Sections 7B(2), 7C(2) and 7C(3), a judge or a candidate for election or appointment to judicial office shall not:

(a) act as a leader or hold an office in a political organization;

(b) publicly endorse or publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) attend political party functions; or

(e) solicit funds for, pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions.

(2) A judge shall resign from judicial office upon becoming a candidate for a nonjudicial office either in a primary or in a general election, except that the judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity, and independence of the judiciary, and shall encourage members of the candidate's family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 7C(1), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) with respect to parties or classes of parties, cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office; or

(ii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;

(iii) while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. This section does not apply to proceedings in which the judicial candidate is a litigant in a personal capacity.

(e) may respond to personal attacks or attacks on the candidate's record as long as the response does not violate Section 7A(3)(d).

B. Candidates Seeking Appointment to Judicial or Other Governmental Office.

(1) A candidate for appointment to judicial office or a judge seeking other governmental office shall not solicit or accept funds, personally or through a committee or otherwise, to support his or her candidacy.

(2) A candidate for appointment to judicial office or a judge seeking other governmental office shall not engage in any political activity to secure the appointment except that:

(a) such persons may:

(i) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;

(ii) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals; and

(iii) provide to those specified in Sections 7B(2)(a)(i) and 7B(2)(a)(ii) information as to his or her qualifications for the office;

(b) a non-judge candidate for appointment to judicial office may, in addition, unless otherwise prohibited by law:

(i) retain an office in a political organization,

(ii) attend political gatherings, and

(iii) continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions.

C. Judges and Candidates Subject to Public Election.

(1) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not personally solicit campaign funds, or solicit attorneys for publicly stated support, but may establish committees of responsible persons to secure and manage the expenditure of funds for the candidate's campaign and to obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting campaign contributions and public support from any person or corporation authorized by law.[1] A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or members of the candidate's family.

(2) A candidate for merit retention in office may conduct only limited campaign activities until such time as the judge certifies that the judge's candidacy has drawn active opposition. Limited campaign activities shall only include the conduct authorized by subsection C(1), interviews with reporters and editors of the print, audio and visual media, and appearances and speaking engagements before public gatherings and organizations. Upon mailing a certificate in writing to the Secretary of State, Division of Elections, with a copy to the Judicial Qualifications Commission, that the judge's candidacy has drawn active opposition, and specifying the nature thereof, a judge may thereafter campaign in any manner authorized by law, subject to the restrictions of subsection A(3).

[1]When first adopted, the new Canon 7C(1) prohibited a candidate from establishing a campaign committee or expending funds earlier than one year before the general election. *In re Code of Judicial Conduct*, 643 So. 2d 1037 (Fla. 1994). Previously there had been no time limit on the establishment of a campaign committee or on the expenditure of funds in furtherance of a judicial campaign. This restriction was enjoined by the United States District Court for the Northern District of Florida. *Zeller v. Florida Bar and Florida Judicial Qualifications Commission*, Case No. TCA 95-40073-MMP (N.D. Fla. 1995). Subsequently, in *In re: Code of Judicial Conduct*, 659 So. 2d 692 (Fla. 1995), the Court deleted the one-year rule from Canon 7C(1).

(3) A judicial candidate involved in an election or re-election, or a merit retention candidate who has certified that he or she has active opposition, may attend a political party function to speak in behalf of his or her candidacy or on a matter that relates to the law, the improvement of the legal system, or the administration of justice. The function must not be a fund raiser, and the invitation to speak must also include the other candidates, if any, for that office. The candidate should refrain from commenting on the candidate's affiliation with any political party or other candidate, and should avoid expressing a position on any political issue. A judicial candidate attending a political party function must avoid conduct that suggests or appears to suggest support of or opposition to a political party, a political issue, or another candidate. Conduct limited to that described above does not constitute participation in a partisan political party activity.

D. Incumbent Judges. A judge shall not engage in any political activity except (i) as authorized under any other Section of this Code, (ii) on behalf of measures to improve the law, the legal system or the administration of justice, or (iii) as expressly authorized by law.

E. Applicability. Canon 7 generally applies to all incumbent judges and judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 4-8.2(b) of the Rules Regulating The Florida Bar.

F. Statement of Candidate for Judicial Office. Each candidate for a judicial office, including an incumbent judge, shall file a statement with the qualifying officer within 10 days after filing the appointment of campaign treasurer and designation of campaign depository, stating that the candidate has read and understands the requirements of the Florida Code of Judicial Conduct. Such statement shall be in substantially the following form:

STATEMENT OF CANDIDATE FOR JUDICIAL OFFICE

I, _____, the judicial candidate, have received, have read, and understand the requirements of the Florida Code of Judicial Conduct.

___Signature of Candidate___
___Date___

Amended August 24, 1995 (659 So. 2d 692); May 30, 1996 (675 So. 2d 111); November 12, 1998 (720 So. 2d 1079); March 10, 2005 (897 So. 2d 1262); January 5, 2006 (SCO5-281).

COMMENTARY

Canon 7A(1). A judge or candidate for judicial office retains the right to participate in the political process as a voter.

Where false information concerning a judicial candidate is made public, a judge or another judicial candidate having knowledge of the facts is not prohibited by Section 7A(1) from making the facts public.

Section 7A(1)(a) does not prohibit a candidate for elective judicial office from retaining during candidacy a public office such as county prosecutor, which is not "an office in a political organization."

Section 7A(1)(b) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office.

A candidate does not publicly endorse another candidate for public office by having that candidate's name on the same ticket.

Canon 7A(3)(a). Although a judicial candidate must encourage members of his or her family to adhere to the same standards of political conduct in support of the candidate that apply to the candidate, family members are free to participate in other political activity.

Canon 7A(3)(d). Section 7A(3)(d) prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of his or her personal views. Section 7A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties. This Section applies to any statement made in the process of securing judicial office, such as statements to commissions charged with judicial selection and tenure and legislative bodies confirming appointment.

Canon 7B(2). Section 7B(2) provides a limited exception to the restrictions imposed by Sections 7A(1) and 7D. Under Section 7B(2), candidates seeking reappointment to the same judicial office or appointment to another judicial office or other governmental office may apply for the appointment and seek appropriate support.

Although under Section 7B(2) non-judge candidates seeking appointment to judicial office are permitted during candidacy to retain office in a political organization, attend political gatherings and pay ordinary dues and assessments, they remain subject to other provisions of this Code during candidacy. See Sections 7B(1), 7B(2)(a), 7E and Application Section.

Canon 7C. The term "limited campaign activities" is not intended to permit the use of common forms of campaign advertisement which include, but are not limited to, billboards, bumperstickers, media commercials, newspaper advertisements, signs, etc. Informational brochures about the merit retention system, the law, the legal system or the administration of justice, and neutral, factual biographical sketches of the candidates do not violate this provision.

Active opposition is difficult to define but is intended to include any form of organized public opposition or an unfavorable vote on a bar poll. Any political activity engaged in by members of a judge's family should be conducted in the name of the individual family member, entirely independent of the judge and without reference to the judge or to the judge's office.

Canon 7D. Neither Section 7D nor any other section of the Code prohibits a judge in the exercise of administrative functions from engaging in planning and other official activities with members of the executive and legislative branches of government. With respect to a judge's activity on behalf of measures to improve the law, the legal system and the administration of justice, see Commentary to Section 4B and Section 4C and its Commentary.

Commentary amended March 10, 2005 (897 So. 2d 1262); January 5, 2006 (SC05 – 281).

APPLICATION OF THE CODE OF JUDICIAL CONDUCT

This Code applies to justices of the Supreme Court and judges of the District Courts of Appeal, Circuit Courts, and County Courts.

Anyone, whether or not a lawyer, who performs judicial functions, including but not limited to a civil traffic infraction hearing officer, court commissioner, general or special magistrate, domestic relations commissioner, child support hearing officer, or judge of compensation claims, shall, while performing judicial functions, conform with Canons 1, 2A, and 3, and such other provisions of this Code that might reasonably be applicable depending on the nature of the judicial function performed.

Any judge responsible for a person who performs a judicial function should require compliance with the applicable provisions of this Code.

If the hiring or appointing authority for persons who perform a judicial function is not a judge then that authority should adopt the applicable provisions of this Code.

A. Civil Traffic Infraction Hearing Officer

A civil traffic infraction hearing officer:

(1) is not required to comply with Section 5C(2), 5D(2) and (3), 5E, 5F, and 5G, and Section 6B and 6C.

(2) should not practice law in the civil or criminal traffic court in any county in which the civil traffic infraction hearing officer presides.

B. Retired/Senior Judge

(1) A retired judge eligible to serve on assignment to temporary judicial duty, hereinafter referred to as "senior judge," shall comply with all the provisions of this Code except Sections 5C(2), 5E, 5F(1), and 6A. A senior judge shall not practice law and shall refrain from accepting any assignment in any cause in which the judge's present financial business dealings, investments, or other extra-judicial activities might be directly or indirectly affected.

(2) If a retired justice or judge does not desire to be assigned to judicial service, such justice or judge who is a member of The Florida Bar may engage in the practice of law and still be entitled to receive retirement compensation. The justice or judge shall then be entitled to all the rights of an attorney-at-law and no longer be subject to this Code.

Amended November 3, 2005 (915 So. 2d 145); January 5, 2006 (SC05-281).

COMMENTARY

Section A. Please see In re Florida Rules of Practice and Procedure for Traffic Courts--Civil Traffic Infraction Hearing Officer Pilot Program, 559 So. 2d 1101 (Fla.1990), regarding civil traffic infraction hearing officers.

Commentary amended November 3, 2005 (915 So. 2d 145); January 5, 2006 (SC05-281).

EFFECTIVE DATE OF COMPLIANCE

A person to whom this Code becomes applicable shall comply immediately with all provisions of this Code except Sections 5D(2), 5D(3) and 5E and shall comply with these Sections as soon as reasonably possible and shall do so in any event within the period of one year.

COMMENTARY

If serving as a fiduciary when selected as judge, a new judge may, notwithstanding the prohibitions in Section 5E, continue to serve as fiduciary but only for that period of time necessary to avoid serious adverse consequences to the beneficiary of the fiduciary relationship and in no event longer than one year. Similarly, if engaged at the time of judicial selection in a business activity, a new judge may, notwithstanding the prohibitions in Section 5D(3), continue in that activity for a reasonable period but in no event longer than one year.

CHAPTER 4. RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession.

As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal

education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Zealous advocacy is not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the practice of law conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self-regulation helps maintain the legal profession's independence

from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

Scope:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms of “shall” or “shall not.” These define proper conduct for purposes of professional discipline. Others, generally cast in the term “may,” are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer’s professional role.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term “should,” do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer’s role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings.

The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under

other law.
Furthermore, for purposes of determining the

lawyer's authority and responsibility, principles
of substantive law external to these rules determine
whether a client-lawyer relationship exists.
Most of the duties flowing from the clientlawyer
relationship attach only after the client
has requested the lawyer to render legal services
and the lawyer has agreed to do so. But there
are some duties, such as that of confidentiality
under rule 4-1.6, which attach when the lawyer
agrees to consider whether a client-lawyer relationship
shall be established. See rule 4-1.18.
Whether a client-lawyer relationship exists for
any specific purpose can depend on the circumstances
and may be a question of fact.
Failure to comply with an obligation or prohibition
imposed by a rule is a basis for invoking
the disciplinary process. The rules presuppose
that disciplinary assessment of a lawyer's
conduct will be made on the basis of the facts
and circumstances as they existed at the time of
the conduct in question in recognition of the fact
that a lawyer often has to act upon uncertain or
incomplete evidence of the situation. Moreover,
the rules presuppose that whether discipline
should be imposed for a violation, and the severity
of a sanction, depend on all the circumstances,
such as the willfulness and seriousness
of the violation, extenuating factors, and
whether there have been previous violations.
Violation of a rule should not itself give rise
to a cause of action against a lawyer nor should
it create any presumption in such a case that a
legal duty has been breached. In addition, violation
of a rule does not necessarily warrant any
other nondisciplinary remedy, such as disqualification
of a lawyer in pending litigation. The
rules are designed to provide guidance to lawyers
and to provide a structure for regulating
conduct through disciplinary agencies. They are
not designed to be a basis for civil liability.
Furthermore, the purpose of the rules can be
subverted when they are invoked by opposing
parties as procedural weapons. The fact that a
rule is a just basis for a lawyer's self-assessment,
or for sanctioning a lawyer under the administration
of a disciplinary authority, does not
imply that an antagonist in a collateral proceeding
or transaction has standing to seek enforcement
of the rule. Accordingly, nothing in the
rules should be deemed to augment any substantive
legal duty of lawyers or the extra-disciplinary
consequences of violating such duty. Nevertheless,
since the rules do establish standards
of conduct by lawyers, a lawyer's violation of a
rule may be evidence of a breach of the applicable
standard of conduct.

Terminology:

"Belief" or "believes" denotes that the person
involved actually supposed the fact in question
to be true. A person's belief may be inferred

from circumstances.
“Consult” or “consultation” denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.
“Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See “informed consent” below. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
“Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization.
“Fraud” or “fraudulent” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.
“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
“Knowingly,” “known,” or “knows” denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.
“Lawyer” denotes a person who is a member of The Florida Bar or otherwise authorized to practice in any court of the State of Florida.
“Partner” denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.
“Reasonable” or “reasonably” when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.
“Reasonable belief” or “reasonably believes” when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.
“Reasonably should know” when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.
“Screened” denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.
“Substantial” when used in reference to degree or extent denotes a material matter of clear and weighty importance.

“Tribunal” denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.

“Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and e-mail. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Comment

Confirmed in writing

If it is not feasible to obtain or transmit a written confirmation at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client’s informed consent, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

Firm

Whether 2 or more lawyers constitute a firm above can depend on the specific facts. For example, 2 practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm, they should be regarded as a firm for purposes of the rules. The terms of any formal agreement between associated lawyers are relevant in determining whether they are a firm, as is the fact that they have mutual access to information concerning the clients they serve. Furthermore, it is relevant in doubtful cases to consider the underlying purpose of the rule that is involved. A group of lawyers could be regarded as a firm for purposes of the rule that the same lawyer should not represent opposing parties in litigation, while it might not be so regarded for purposes of the rule that information acquired by 1 lawyer is attributed to another.

With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar

question can arise concerning an unincorporated association and its local affiliates.
Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules.

Fraud

When used in these rules, the terms “fraud” or “fraudulent” refer to conduct that has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed consent

Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (e.g., a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, e.g., rules 4-1.2(c), 4-1.6(a), 4-1.7(b), and 4-1.18. The communication necessary to obtain such consent will vary according to the rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client’s or other person’s options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the

advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.
In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter.
A number of rules state that a person's consent be confirmed in writing. See, e.g., rule 4-1.7(b). For a definition of "writing" and "confirmed in writing," see terminology above.
Other rules require that a client's consent be obtained in a writing signed by the client. See, e.g., rule 4-1.8(a). For a definition of "signed," see terminology above.

Screened

This definition applies to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest under rules 4-1.11, 4-1.12, or 4-1.18.
The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce, and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter, and periodic reminders of the screen to the screened lawyer and all other firm personnel.
In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening

4-3. ADVOCATE

RULE 4-3.1 MERITORIOUS CLAIMS AND CONTENTIONS

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Comment

The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed. However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law.

The lawyer's obligations under this rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this rule.

THE FLORIDA BAR

Florida's Standards for Imposing Lawyer Sanctions

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I. PREFACE

A. Background

In 1979, the American Bar Association published the Standards for Lawyer Discipline and Disability Proceedings. 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 t the court maintains control of the proceeding and punishes a law 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 o 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-decendent'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. 32f 404 A.2d 1137 (1979), the New Jersey Supreme Court imposed a one year suspension on a lawyer who represented both sides in a real estate transaction (and who also attempted to retain an unearned commission and called for a title search which was not ordered by the client).

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

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 reproval (reprimand) when he failed to fully explain to his clients the nature of a contingency interest which he possessed in insurance proceeds used to satisfy an adverse judgment against the clients in a personal injury action.

4.64 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)f 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).

6.22 Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

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, unlicenced 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 Mitan, 75 Ill.2d 118, 387 N.E.2d 278 (1979), cert. denied, 444 U.S. 916 (1979), the respondent made false statements and deliberately failed to disclose certain information on his application for admission to the bar. These false statements and omissions included his failure to disclose at least four of his previous addresses, the wrong birth date, his change of name, a previous marriage, a subsequent divorce, other law schools attended, application for admission to another state's bar, previous employers and occupations, prior civil suits and arrests, and conviction of a felony, The court felt that these falsehoods and omissions had a direct effect on the ability to practice law and be a competent member of the profession, and imposed disbarment.

7.2 Suspension is 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 reproval (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 reproval [public reprimand] on a lawyer who failed to communicate with a client and who had received a private reproval for the same misconduct. See also: Matter of Davis, 280 S.E.2d 644 (S.C. 1981), where the court explained that a 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 (l983); (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 Responsibilily, 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 (l983).

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 ll.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 my 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.

Conference of County Court Judges
and
Trial Lawyers Section of The Florida Bar

Guidelines for

Professional Conduct

(2001 Edition)

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FOREWORD (Back to Top)

In 1993, the Executive Council of the Trial Lawyers Section of The Florida Bar (which represents over 6,000 trial lawyers in Florida) formed a professionalism committee to prepare practical guidelines on professional conduct for trial lawyers. After reviewing the numerous aspirational and model guidelines from Florida and around the country, the professionalism committee determined that, with minor modifications, the guidelines that had been prepared by the Hillsborough County Bar Association were the best model for the entire state. Therefore, in 1994, at the request of the professionalism committee, the Executive Council of the Trial Lawyers Section unanimously approved the Guidelines for Professional Conduct. The Trial Lawyers Section then sought the endorsement of the Guidelines from the Florida Conference of Circuit Court Judges; at its meeting held in September 1995, the Conference approved the Guidelines. In so doing, the Conference asserted that the Guidelines do not have the force of law and that trial judges still have the right and obligation to consider on a case-by-case basis issues raised by the Guidelines. Since their endorsement by the Conference, the Guidelines have been followed by lawyers throughout the state and have been endorsed by administrative order in many circuits.

Beginning in 1999, the Trial Lawyers Section undertook to rewrite the Guidelines to clarify certain provisions, to make certain provisions consistent with current law, and to eliminate certain provisions considered unnecessary because they were redundant of either a rule of civil procedure or a rule of professional conduct, which lawyers are expected to follow as minimum standards of professionalism. The 2001 edition of the Guidelines is the result of that effort. These revised Guidelines are promulgated jointly by the Conference of Circuit Court Judges, the Conference of County Court Judges, and the Trial Lawyers Section of The Florida Bar. It is hoped that dissemination of these Guidelines will give direction to both lawyers and judges concerning how lawyers should conduct themselves in all phases of trial practice. The adoption of the Guidelines by the Trial Lawyers Section

also is intended to express support for trial judges who require that lawyers conduct themselves professionally.

For most lawyers, these Guidelines simply will reflect their current practice. However, it is hoped that the use of these Guidelines will continue to increase the level of professionalism in trial practice in Florida.

This 2001 edition supercedes the previous edition of the Guidelines.

PREAMBLE (Back to Top)

The effective administration of justice requires the interaction of many professionals and disciplines, but none is more critical than the role of the lawyer. In fulfilling that role, a lawyer performs many tasks, few of which are easy, most of which are exacting. In the final analysis, a lawyer's duty is always to the client. In striving to fulfill that duty, a lawyer always must be conscious of his or her broader duty to the judicial system that serves both attorney and client. To the judiciary, a lawyer owes candor, diligence, and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties is a lawyer's duty of courtesy and cooperation with fellow professionals for the efficient administration of our system of justice and the respect of the public it serves.

In furtherance of these fundamental concepts, the following Guidelines for Professional Conduct are adopted. It is recognized that these Guidelines must be applied in keeping with the advocacy of the interests of one's client and the long tradition of professionalism among and between members of the Trial Lawyers Section of The Florida Bar. These Guidelines are subject to the Florida and Federal Rules of Civil Procedure, the Florida Rules of Professional Conduct, and the specific requirements of any standing or administrative order, local court rule, or order entered in a specific case. Although we do not expect every lawyer to agree with every guideline, these standards reflect our best effort to encourage decency and courtesy in our professional lives without intruding unreasonably on each lawyer's choice of style or tactics.

A. GENERAL PRINCIPLES (Back to Top)

1. A lawyer is both an officer of the court and an advocate. As such, the lawyer always should strive to uphold the honor and dignity of the profession, avoid disorder and disruption in the courtroom, and maintain a respectful attitude toward the court.

2. A lawyer's word should be his or her bond.

3. A lawyer should adhere strictly to all express promises and agreements with other counsel, whether oral or in writing.

4. A lawyer should be courteous and civil in all professional dealings with other persons. Lawyers should act in a civil manner regardless of the ill feelings that their clients may have toward others. Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks, or acrimony toward other counsel, parties, or witnesses.

5. Lawyers should require that persons under their supervision conduct themselves with courtesy and civility.

6. When consistent with their clients' interests, lawyers should cooperate with opposing counsel to avoid litigation and to resolve litigation that already has commenced.

7. A lawyer should not use any aspect of the litigation process, including discovery and motion practice, as a means of harassment or to unnecessarily prolong litigation or increase litigation expenses.

B. SCHEDULING, CONTINUANCES, AND EXTENSIONS OF TIME (Back to Top)

1. Attorneys are encouraged to communicate with opposing counsel before scheduling depositions, hearings, and other proceedings -- to schedule them at times that are mutually convenient for all interested persons. If an attorney does not communicate with opposing counsel before scheduling a deposition or hearing, the attorney should be willing to reschedule that deposition or hearing if the time selected is inconvenient for opposing counsel.

2. On receipt of an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a lawyer promptly should agree to the proposal or offer a counter suggestion that is as close in time as is reasonably possible.

3. As soon as they become apparent, a lawyer should call to the attention of those affected, including the court or tribunal, potential scheduling conflicts or problems.

4. Attorneys should cooperate with each other when conflicts and calendar changes are necessary and requested.

5. Counsel never should request a calendar change or misrepresent a conflict to obtain an advantage or delay. However, in the practice of law, emergencies will arise that affect our families or our professional commitments and create conflicts that make requests inevitable. We should be cooperative with each other whenever possible in agreeing to calendar changes, and should make requests of other counsel only when absolutely necessary.

6. Attorneys should attempt to provide opposing counsel, parties, witnesses, and other affected persons sufficient notice of depositions, hearings, and other proceedings, except on agreement of counsel, in an emergency, or in other circumstances compelling more expedited scheduling.

7. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.

8. A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair, and prompt consideration and adjudication of the client's claim or defense.

9. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery, or motions, ordinarily should be granted between counsel as a matter of courtesy unless time is of the essence.

10. After a first extension, any additional requests for time should be addressed by balancing the need for expedition against the deference one ordinarily should give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely that a court would grant the extension if asked to do so.

11. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."

12. A lawyer should not seek extensions or continuances or refuse to grant them for the purpose of harassment or prolonging litigation.

13. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions, such as preserving the right to seek reciprocal scheduling concessions. However, when granting extensions, a lawyer should not seek to preclude an opponent's substantive rights, such as the right to move against a complaint.

14. A lawyer should not request rescheduling, cancellations, extensions, or postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

C. SERVICE OF PAPERS (Back to Top)

1. Papers should not be served to take advantage of an opponent's known absence from the office or at a time or in a manner designed to inconvenience an adversary, such as late on Friday afternoon or the day before a secular or religious holiday. A "paper" is any written material that is to be filed with a court or other tribunal.

2. Service should be made personally or by facsimile transmission when it is likely that service by mail, even when allowed, will not provide the opposing party with adequate time to review the paper before a court appearance. Sending an additional copy by electronic mail also is encouraged, if possible.

D. WRITTEN SUBMISSIONS TO COURTS, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS, AND DECLARATIONS (Back to Top)

1. Copies of any submissions to the court (correspondence, memoranda of law, case law, and so forth) should be provided simultaneously to opposing counsel by substantially the same method of delivery by which they are provided to the court. For example, if a memorandum of law is hand-delivered to the court, a copy should be hand-delivered or faxed to opposing counsel at the same time. If asked by the court to prepare an order, counsel should furnish a copy of the order, and any transmitted letter, to opposing counsel when the material is submitted to the court. Sending an additional copy by electronic mail also is encouraged, if possible.

2. Papers, including memoranda of law, should not be served at court appearances unless the proponent agrees to give opposing counsel reasonable time following the court appearance in which to respond to the papers. If papers, including memoranda of law, are served before a court appearance, those papers should not be served so close in time to the court appearance as to inhibit the ability of opposing counsel to prepare for that appearance or to respond to the papers.

3. Neither written submissions nor oral presentations should disparage the intelligence, ethics, morals, integrity, or personal behavior of one's adversary, unless those characteristics or actions are directly and necessarily in issue.

E. COMMUNICATION WITH ADVERSARIES (Back to Top)

1. Counsel always should be civil and courteous in communicating with an adversary, whether in writing or orally.

2. Letters should not be written to ascribe to one's adversary a position that the adversary has not taken or to create "a record" of events that have not occurred.

3. Unless specifically permitted or invited by the court, letters between counsel should not be sent to judges.

F. DEPOSITIONS (Back to Top)

1. Depositions should be taken only when actually needed to ascertain facts or information or to perpetuate testimony. Depositions never should be used as a means of harassment or to generate expense.

2. When scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and deponents, when it is possible to do so without prejudicing the client's rights.

3. When scheduling depositions on oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.

4. Counsel should not attempt to delay a deposition for dilatory purposes, but only if necessary to meet real scheduling problems.

5. Counsel should not inquire into a deponent's personal affairs or integrity when that inquiry is not relevant to the subject matter involved in the pending action.

6. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment. Counsel should not conduct questioning in a manner that is intended to harass a witness, such as by repeating questions after they have been answered, by raising one's voice, or by appearing angry at the witness.

7. Counsel defending a deposition should limit objections to those that are well founded and permitted by the Florida or Federal Rules of Civil Procedure or applicable case law. Counsel should remember that most objections are preserved and need be interposed only when the form of the question is defective or when privileged information is sought. When objecting to the form of a question, counsel simply should state: "I object to the form of the question." The grounds should not be stated unless asked for by the examining attorney. When the grounds are requested, they should be stated succinctly.

8. While a question is pending, counsel should not coach the deponent nor suggest answers, through objections or otherwise.

9. Counsel should refrain from self-serving speeches during depositions.

10. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer, including disparaging personal remarks or acrimony toward opposing counsel, and gestures, facial expressions, audible comments, or the like as manifestations of approval or disapproval during the testimony of the witness.

G. DOCUMENT DEMANDS (Back to Top)

1. When responding to unclear document demands, receiving counsel should attempt to discuss the demands with propounding counsel so that the demands can be complied with fully or appropriate objections can be raised.

2. Document production should not be delayed to prevent opposing counsel from inspecting documents before scheduled depositions or for any other tactical reason.

3. A lawyer should never use document demands for the purpose of harassing or improperly burdening an adversary or to cause the adversary to incur unnecessary expense.

H. INTERROGATORIES (Back to Top)

1. In responding to interrogatories whose meaning is unclear, receiving counsel should attempt to discuss the meaning with propounding counsel so that the interrogatories can be answered fully or appropriate objections can be raised.

2. Objections to interrogatories should be based on a good faith belief and not be made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.

3. A lawyer should never use interrogatories for the purpose of harassing or improperly burdening an adversary or to cause the adversary to incur unnecessary expense.

I. MOTION PRACTICE (Back to Top)

1. Lawyers should avoid unnecessary motion practice or other judicial intervention by negotiating and agreeing with other counsel whenever practicable. For example, before setting for hearing a nondispositive motion, counsel shall make a reasonable effort to resolve the issue.

2. A lawyer should not force an adversary to make a motion and then not oppose it.

3. After a hearing, the attorney charged with preparing the proposed order should prepare it promptly, generally no later than the following business day, unless it should be submitted immediately to the court. The order fairly and accurately must represent the ruling of the court.

4. Before submitting a proposed order to the court, attorneys should provide the order to opposing counsel for approval, either orally or in writing. Opposing counsel then promptly should communicate any objections. As soon as objections are made, the drafting attorney immediately should submit a copy of the proposed order to the court and advise the court whether the proposed order has been approved by opposing counsel.

J. EX PARTE COMMUNICATIONS WITH COURTS AND OTHERS (Back to Top)

1. A lawyer should avoid ex parte communication on the substance of a pending case with a judge before whom the case is pending.

2. Before making an authorized ex parte application or communication to the court, a lawyer should make diligent efforts to notify the opposing party or a lawyer known or likely to represent the opposing party and to accommodate the schedule of that lawyer to permit the opposing party to be represented on the application. A lawyer should make an ex parte application or communication (including an application to shorten an otherwise applicable time period) only when there is a bona fide emergency that will result in serious prejudice to the lawyer's client if the application or communication is made on regular notice.

3. Attorneys should notify opposing counsel of all oral or written communications with the court or other tribunal, except those involving only scheduling matters.

4. A lawyer should be courteous and may be cordial to a judge, but should never show marked attention or unusual informality to the judge. A judge should be referred to by surname in court. A lawyer should avoid anything calculated to gain, or to have the appearance of gaining, special personal consideration or favor from a judge.

K. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION (Back to Top)

1. An attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.

2. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.

3. In every case, counsel should consider whether the client's interest could be served adequately and the controversy disposed of more quickly and economically by expedited trial, voluntary trial resolution, arbitration, mediation, or other forms of alternative dispute resolution.

L. TRIAL CONDUCT AND COURTROOM DECORUM (Back to Top)

1. A lawyer always should interact with parties, counsel, witnesses, jurors or prospective jurors, court personnel, and judges with courtesy and civility, and should avoid undignified or discourteous conduct that is degrading to the court or the proceedings.

2. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses or at any other time, absolutely are prohibited.

3. During trials and evidentiary hearings, the lawyers mutually should agree to disclose the identities and duration of witnesses anticipated to be called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual aid equipment.

4. A lawyer should abstain from conduct calculated to detract or divert the fact finder's attention from the relevant facts or otherwise cause the fact finder to reach a decision on an impermissible basis.

5. A lawyer knowingly should not misstate, distort, or improperly exaggerate any fact or opinion nor permit the lawyer's silence or inaction to mislead anyone.

6. In appearing in his or her professional capacity before a tribunal, a lawyer should not

a. state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;

b. ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;

c. assert a personal knowledge or opinions concerning the facts in issue, except when testifying as a witness;

d. assert a personal opinion concerning the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused, but may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to the matters at issue.

7. A question should not be interrupted by an objection unless the question is patently objectionable or there is a reasonable ground to believe that information is being included that should not be disclosed to the jury.

8. When a judge already has made a ruling about the inadmissibility of certain evidence, a lawyer should not seek to circumvent the effect of that ruling and get the evidence before the jury by repeated questions relating to the evidence in question, although the lawyer may make a record for later proceedings of the ground for urging the admissibility of the evidence in question. This does not preclude efforts by the lawyer to have the evidence admitted through other, proper means.

9. A lawyer scrupulously should abstain from all acts, comments, and attitudes calculated to curry favor with any juror, by fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience, or the like.

10. A lawyer never should attempt to place before a tribunal or jury evidence known to be clearly inadmissible, nor make any remarks or statements intended improperly to influence the outcome of any case.

11. A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not affected adversely.

HILLSBOROUGH COUNTY STANDARDS OF PROFESSIONAL COURTESY

The effective administration of justice requires the interactions of many professions and disciplines, but none is more critical than the role of the lawyer. In fulfilling that role, a lawyer performs many tasks; few of which are easy; most of which are exacting. In the final analysis, a lawyer's duty is always to the client. But in striving to fulfill that duty, a lawyer must be ever conscious of his broader duty to the judicial system that serves both attorney and client.

To the judiciary, a lawyer owes candor, diligence and utmost respect. To the administration of justice, a lawyer unquestionably owes the fundamental duties of personal dignity and professional integrity. Coupled with those duties, however, is a lawyer's duty of courtesy and cooperation with fellow professionals for the efficient administration of our systems of justice and the respect of the public it serves.

In furtherance of these fundamental concepts, in recognition that they must be applied in a manner consistent with the interests of one's client and the Code of Professional Conduct, and in keeping with the long tradition of professionalism among and between members of this Bar Association, the following Standards of Professional Courtesy are hereby adopted. Although we do not expect every lawyer will agree with every guideline, these standards reflect our best effort at encouraging decency and courtesy in our professional lives without intruding unreasonably on each lawyer's choice of style or tactics.

A. SCHEDULING, CONTINUANCES, AND EXTENSIONS OF TIME.

Scheduling and Continuances

1. Attorneys are encouraged to communicate with opposing counsel prior to scheduling depositions, hearings and other proceedings, so as to schedule them at times that are mutually convenient for all interested persons. If an attorney does not communicate with opposing counsel prior to scheduling a deposition or hearing, he should be willing to re-schedule that deposition or hearing if the time selected is inconvenient for opposing counsel.
2. Upon receiving an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a lawyer should promptly agree to the proposal or offer a counter suggestion.
3. A lawyer should call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal, as soon as they become apparent to the lawyer.
4. Attorneys should cooperate with each other when conflicts and calendar changes are necessary and requested.
5. Counsel should never request a calendar change or misrepresent a conflict in order to obtain and advantage or delay. However, in the practice of law, emergencies affecting or families or our professional commitments will arise which conflicts and make requests inevitable. We should be cooperative with each other whenever possible in agreeing to calendar changes, and should make such requests of other counsel only when absolutely necessary.
6. Attorneys should endeavor to provide opposing counsel, parties, witnesses, and other affected persons, sufficient notice of depositions, hearing and other proceedings, except upon agreement of counsel, in an emergency, or in other circumstances compelling more expedited scheduling.
7. When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is truly calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.

Extensions

8. A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair and prompt consideration and adjudication of the client's claim or defense.
9. First requests for reasonable extensions of time to respond to litigation deadlines, whether relating to pleadings, discovery or motions, should ordinarily be granted between counsels as a matter of courtesy

unless time is of the essence.
10. After a first extension, any additional requests for time should be dealt with by balancing the need for expedition against the deference one should ordinarily give to an opponent's schedule of professional and personal engagements, the reasonableness of the length of extension requested, the opponent's willingness to grant reciprocal extensions, the time actually needed for the task, and whether it is likely a court would grant the extension if asked to do so.
11. A lawyer should advise clients against the strategy of granting no time extensions for the sake of appearing "tough."
12. A lawyer should not seek extensions or continuances or refuse to grant them for the purpose of harassment or prolonging litigation.
13. A lawyer should not attach to extensions unfair and extraneous conditions. A lawyer is entitled to impose conditions such as preserving rights that an extension might jeopardize or seeking reciprocal scheduling concessions. A lawyer should not, by granting extensions, seek to preclude an opponent's substantive rights, such as his or her right to move against a complaint.
14. A lawyer should not request rescheduling, cancellations, extensions, or postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

B. SERVICE OF PAPERS.

1. The timing and manner of services should not be used to the disadvantage of the party receiving the papers.
2. Papers and memoranda of law should not be served so close to a court appearance so as to inhibit the ability of opposing counsel to prepare for that appearance or, where permitted by law, to respond to the papers.
3. Papers should not be served in order to take advantage of opponent's known absence from the office or at a time or in a manner designed to inconvenience and adversary, such as late on Friday afternoon or the day preceding a secular or religious holiday.
4. Service should be made personally or by courtesy copy facsimile transmission when it is likely that service by mail, even when allowed, will prejudice the opposing party.

C. WRITTEN SUBMISSIONS TO A COURT, INCLUDING BRIEFS, MEMORANDA, AFFIDAVITS AND DECLARATIONS

1. Written briefs or memoranda of points and authorities should not rely on facts that are not properly part of the record. A litigant may, however, present historical, economic or sociological data, if such data appear in or are derived from generally available sources.
2. Neither written submissions nor oral presentations should disparage the intelligence, ethics, moral integrity or personal behavior of one's adversaries, unless such things are directly and necessarily in issue.

D. COMMUNICATIONS WITH ADVERSARIES.

1. Counsel should at all times be civil and courteous in communicating with adversaries, whether in writing or orally.
2. Letters should not be written to ascribe to one's adversary a position he or she has not taken or to create "a record" of events that have not occurred.
3. Letters intended only to make a record should be used sparingly and only when thought to be necessary under all the circumstances.
4. Unless specifically permitted or invited by the court, letters between counsels should not be sent to judges.
5. A lawyer should adhere strictly to all expenses promises to an agreement with opposing counsel, whether oral or writing, and should adhere in good faith to all agreements implied by the circumstance or by local custom.
6. During the course of representation of a client, a lawyer should not communicate or cause another to communicate on the subject of the representation with a party known to be represented by a lawyer in that matter without prior consent of the lawyer representing such other party unless authorized by law to

do so.

E. DEPOSITIONS.

1. Depositions should be taken only when actually needed to ascertain facts or information or to perpetuate testimony. They should never be used as a means of harassment or to generate expense.
2. In scheduling depositions, reasonable consideration should be given to accommodating schedules of opposing counsel and of the deponent, where it is possible to do so without prejudicing the client's rights.
3. IN scheduling depositions upon oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.
4. When another party notices a deposition in the reasonably near future counsel should ordinarily not notice another deposition for an earlier date without the agreement of opposing counsel.
5. Counsel should not attempt to delay a deposition for dilatory purposes but if necessary to meet real scheduling problems.
6. Counsel should not inquire into a deponent's personal affairs or question a deponent's integrity where such inquiry is irrelevant to the subject matter of the deposition.
7. Counsel should refrain from repetitive or argumentative questions or those asked solely for purposes of harassment.
8. Counsel defending a deposition should limit objections to those that are well founded and necessary for the protection of a client's interest. Counsel should bear in mind that most objections are preserved and need to be interposed only when the form of a question is defective or privileged information is sought.
9. While a question is pending, counsel should not, through objections or otherwise, coach the deponent or suggest answers.
10. Counsel should not direct a deponent to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass, or are not calculated to lead to admissible evidence.
11. Counsel for all parties should refrain from self-serving speeches during depositions.
12. Counsel should not engage in any conduct during a deposition that would not be allowed in the presence of a judicial officer.

F. DOCUMENT DEMANDS.

1. Demands for production of documents should be limited to documents actually and reasonably believed to be needed for the prosecution or defense of an action and not made to harass or embarrass a party or witness or to impose an inordinate burden or expense in responding.
2. Demands for document production should not be so broad as to encompass documents clearly not relevant to the subject matter of the case.
3. In responding to document demands, counsel should not strain to interpret the request in an artificially restrictive manner in order to avoid disclosure.
4. Documents should be withheld on the grounds of privilege only where appropriate.
5. Counsel should not produce documents in a disorganized or unintelligible fashion, or in a way calculated to hide or obscure the existence of particular documents.
6. Document production should not be delayed to prevent opposing counsel from inspecting documents prior to scheduled depositions or for any other tactical reason.

G. INTERROGATORIES.

1. Interrogatories should be used sparingly and never to harass or impose undue burden or expense on adversaries.
2. Interrogatories should not be read by the recipient in an artificial manner designed to assure the answers are not truly responsive.
3. Objections to interrogatories should be based on a good faith belief in their merit and not made for the purpose of withholding relevant information. If an interrogatory is objectionable only in part, the unobjectionable portion should be answered.
4. A lawyer should never use discovery for the purpose of harassing or improperly burdening an

adversary or causing the adversary to incur unnecessary expense.

H. MOTION PRACTICE.

1. Before setting a motion for hearing, counsel should make effort to resolve the issue.
2. A lawyer should not force his or her adversary to make a motion and then not oppose it.
3. Following a hearing, the attorney charged with preparing the proposed order should prepare it properly, generally no later than the following business day, unless it should immediately be submitted to the court. Attorneys should promptly provide, either orally or in writing, proposed orders to opposing counsel for approval. Opposing counsel should then promptly communicate any objections and at that time, the drafting attorney should immediately submit a copy of the proposed order to the court and advise the court as to whether or not it has been approved by opposing counsel. The order must fairly and adequately represent the ruling of the court.

I. DEALING WITH NON-PARTY WITNESSES.

1. Counsel should not issue subpoenas to non-party witnesses except in connection with their appearance at a hearing, trial or deposition.
2. Deposition subpoenas should be accompanied by notices of deposition with copies to all counsel.
3. Where counsel obtains documents pursuant to a deposition subpoena, copies of the documents should be made available as soon as possible to the adversary at his or her expense even if the deposition is cancelled or adjourned.

J. EX PARTE COMMUNCATIONS WITH THE COURT AND OTHERS.

1. A lawyer should avoid ex parte communication on the substance of a pending case with a judge before whom such case is pending.
2. Even where applicable laws or rules permit an ex parte application or communication to the court, before making such an application or communication, a lawyer should make diligent efforts to notify the opposing party or a lawyer known to represent or likely to represent the opposing party and should make reasonable efforts to accommodate the schedule of such lawyer to permit the opposing party to be represented on the application. A lawyer should make such application or communication (including an application to shorten an otherwise applicable time period) (only where there is a bona fide emergency such that the lawyer's client will be seriously prejudiced by a failure to make the application or communication on regular notice.
3. Attorneys should notify opposing counsel of all oral or written communications with the court or other tribunal, except those involving only scheduling matters. Copies of any submissions to the court (such as correspondence, memoranda of law, case law, etc.), should simultaneously be provided to opposing counsel by substantially the same method of delivery by which they are provided to the court. For example, if a memorandum of law is hand-delivered to the court, at the same time a copy should be hand-delivered or faxed to opposing counsel.
4. A lawyer should be courteous and may be cordial to a judge but should never show marked attention or unusual informality to a judge, uncalled for by their personal relations. A judge should be referred to by surname in court. A lawyer should avoid anything calculated to gain, or having the appearance of gaining, special personal consideration or favor from a judge.

K. SETTLEMENT AND ALTERNATIVE DISPUTE RESOLUTION.

1. Except where there are strong and overriding issues of principle, an attorney should raise and explore the issue of settlement in every case as soon as enough is known about the case to make settlement discussions meaningful.
2. Counsel should not falsely hold out the possibility of settlement as a means for adjourning discovery or delaying trial.
3. In every case, counsel should consider whether the client's interest could be adequately served and the controversy more expeditiously and economically disposed of by arbitration, mediation or other forms of alternative dispute resolution.

L. PRE-TRIAL CONFERENCE

1. A lawyer should carefully read the order setting trial and complete the pre-trial conference statement in full to the extent it can be agreed to by the parties.
2. A lawyer should be familiar withal the evidence in the case.
3. A lawyer should be sure discovery is completed of address the need for additional discovery with opposing counsel in advance, or file and appropriate motion.
4. A lawyer should evaluate the case and have a figure in mind at which the case could reasonably settle with authorization from the client to do so.
5. A lawyer should determine if the court needs to, and agrees to, hear any motions at the pre-trial.
6. The attorney who will try the case must appear at the pre-trial conference, unless excused by the Court.
7. A lawyer should not ask for a continuance unless the client agrees and signs the motion.

M. TRIAL, CONDUCT AND COURTROOM DECORUM.

1. A lawyer should always deal with parties, counsel, witnesses, jurors or prospective jurors, court personnel and the judge with courtesy and civility and avoid undignified or discourteous conduct which is degrading to the court.
2. Be punctual and prepared for any court appearance.
3. Stand as court is opened, recessed or adjourned; when the jury enters or retires from the courtroom; and when addressing, or being addressed by the Court.
4. Examination of jurors and witnesses should be conducted from a suitable distance. A lawyer should not crowd or lean over the witness or jury and during interrogation should avoid blocking opposing counsel's view of the witness.
5. It is inappropriate to extract promises and suggest specific monetary amounts during voir dire.
6. Counsel should address all public remarks to the court, not to opposing counsel.
7. A lawyer should avoid disparaging personal remarks or acrimony toward opposing counsel.
8. Counsel should refer to all adult persons, including witnesses, other counsel, and the parties by their surnames and not by their first or given names.
9. Only one attorney for each party shall examine, or cross-examine each witness. The attorney stating objections, if any, during direct examination, shall be the attorney recognized for cross-examination.
10. Counsel should request permission before approaching the bench. Any documents counsel wish to have the Court examine should be handled to the clerk.
11. Have the clerk pre-mark potential exhibits.
12. Any paper or exhibit not previously marked for identification should first be handed to the clerk to be marked before it is tendered to a witness for examination. Any exhibit offered in evidence should, at the time of such offer, be handed to opposing counsel.
13. In making objections, counsel should state only the legal grounds for the objection and should withhold all further comment or argument unless elaboration is requested by the Court.
14. Generally, in examining a witness, counsel shall not repeat or echo the answer given by the witness.
15. Offers of, or requests for, a stipulation should be made privately, not within the hearing of the jury, unless the offeror knows or has reason to believe the opposing lawyer will accept it.
16. In opening statements and in arguments to the jury, counsel shall not express personal knowledge or opinion concerning any matter in issue.
17. Counsel shall admonish all persons at counsel table that gestures, facial expressions, audible comments, or the like, as manifestations of approval or disapproval during the testimony of witnesses, or at any other time, are absolutely prohibited.
18. During trials and evidentiary hearings the lawyers should mutually agree to disclose the identities, and duration of witnesses anticipated to b called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual-aid equipment.
19. A lawyer should not mark on or alter exhibits, charts, graphs, and diagrams without opposing counsel's permission or leave of Court.
20. A lawyer should abstain from conduct calculated to detract or divert the fact-finder's attention from the relevant facts or otherwise cause it to reach a decision on an impermissible basis.

21. A lawyer's word should be his or her bond. The lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion and should not improperly permit the lawyer's silence or inaction to mislead anyone.
22. A charge of impropriety by one lawyer against another in the course of litigation should never be made except when relevant to the issues of the case.
23. A lawyer should not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. A lawyer, however, may advance, guarantee or acquiesce in the payment of:
(a) expenses reasonably incurred by a witness in attending or testifying;
(b) reasonable compensation to a witness for his lost time in attending or testifying;
(c) a reasonable fee for the professional services of an expert witness.
24. In appearing in his or her professional capacity before a tribunal, a lawyer should not:
(a) state or allude to any matter that he or she has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence;
(b) ask any question that he or she has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person;
(c) assert one's personal knowledge of the facts in issue, except when testifying as a witness;
(d) assert one's personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but may argue, on the lawyer's analysis of the evidence, for any position or conclusion with respect to
the matters stated herein.
25. A question should not be interrupted by an objection unless the question is patently objectionable or there is reasonable ground to believe that matter is being included which cannot properly be disclosed to the jury.
26. A lawyer should address objections, requests and observations to the Court and not engage in undignified or discourteous conduct which is degrading to court procedure.
27. Where a judge has already made a ruling in regard to the inadmissibility of certain evidence, a lawyer should not seek to circumvent the effect of that ruling and get the evidence before the jury by repeating questions relating to the evidence in question, although he is at liberty to make a record for later proceedings of his ground for urging the admissibility of the evidence in question. This does not preclude the evidence being properly admitted through other means.
28. A lawyer should not attempt to get before the jury evidence which is improper.
29. A lawyer should scrupulously abstain from all acts, comments and attitudes calculated to curry favor with any juror, by fawning, flattery, actual or pretended solicitude for the juror's comfort or convenience or the like.
30. A lawyer should never attempt to place before a tribunal, or jury, evidence known to be clearly inadmissible, nor make any remarks or statements which are intended to improperly influence the outcome of any case.
31. A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.
32. Attorneys should not knowingly misstate, misrepresent or distort any fact or legal authority to the court or to opposing counsel and shall not mislead by inaction or silence. Further, if this occurs unintentionally and is later discovered, it should immediately be disclosed or otherwise corrected.

Professional Practice

Henry Latimer Center for Professionalism

Ideals and Goals of Professionalism

These aspirational guidelines were adopted by the Board of Governors of The Florida Bar on May 16, 1990.

As The Florida Bar grows, it becomes more important to articulate our ideals of professionalism and to emulate such ideals by deed. To The Florida Bar, Lawyer Professionalism includes:

1. a commitment to serve others;
2. being dedicated to the proper use of one's knowledge to promote a fair and just result;
3. endeavoring always to enhance one's knowledge and skills;
4. ensuring that concern for the desired result does not subvert fairness, honesty, respect and courtesy for others with whom one comes into contact, be they fellow professionals, clients, opponents, public officials, including members of the judiciary, or the public;
5. contributing one's skill, knowledge and influence as a lawyer to further the profession's commitment to serving others and to promoting the public good, including efforts to provide all persons, regardless of their means or popularity of their causes, with access to the law and the judicial system;
6. educating the public about the capabilities and limits of the profession, specifically what it can achieve and the appropriate methods of obtaining those results; and
7. accepting responsibility for one's own professional conduct as well as others in the profession, including inculcating a desire to uphold professional standards and fostering peer regulation to ensure each member is competent and public-spirited.

To reinforce and communicate the ideals of lawyer professionalism among our members, and particularly, to take the "abrasions" out of our conduct with others, especially our colleagues at the Bar, The Florida Bar adopts the following statement of ideals and aspirational goals:

1. Commitment to Equal Justice Under Law and the Public Good

Ideal:

A Florida lawyer should, in both professional and personal conduct, recognize that a license to practice law is a privilege which gives the lawyer a special position of trust, power and influence in our society. This privilege brings corresponding duties, for which the lawyer is accountable to the public, namely, to use that position and power in an honest and fair manner which respects the dignity of others, promotes the public good, and protects our system of equal justice under the law.

Goals:

1.1 A lawyer should at all times avoid the appearance of impropriety.

1.2 A lawyer should counsel and encourage other lawyers to abide by these ideals of professionalism.

1.3 A lawyer should at all times promote in the general public an understanding of the role of the legal profession in our system of equal justice under law.

1.4 A lawyer should encourage and support only those judicial candidates who by skill, knowledge, experience, integrity, temperament and commitment to public service are qualified to hold such positions.

1.5 When considering whether to advertise and what methods of advertising to use, a lawyer's first goal should be to promote and protect public confidence in a just and fair legal system founded on the rule of law.

1.6 Upon being employed by a new client, a lawyer should discuss fee and cost arrangements at the outset of the representation, and promptly confirm those arrangements in writing.

1.7 In any representation in which the fee arrangement is other than a contingent percentage-of-recovery fee or a fixed, flat-sum fee or in which the representation is anticipated to be of more than brief duration, a lawyer should bill clients on a regular, frequent interim basis.

1.8 When a fee dispute arises that cannot be amicably resolved, a lawyer should endeavor to refer the dispute to the appropriate fee arbitration panel.

2. Adherence to a Fundamental Sense of Honor, Integrity, and Fair Play

Ideal:

A lawyer should at all times be guided by a fundamental sense of honor, integrity, and fair play, and should counsel his or her client to do likewise.

Goals:

2.1 A lawyer should not impose arbitrary or unreasonable deadlines for action by others.

2.2 A lawyer should not make scheduling decisions with the motive of limiting opposing counsel's opportunity to prepare or respond.

2.3 A lawyer should not unreasonably oppose an adversary's application for an order or an adversary's request to insert a term or provision in a document.

2.4 A lawyer should never permit nonlawyer support personnel to communicate with a judge or judicial officer on any matters pending before the judge or officer or with other court personnel except on scheduling and other ministerial matters.

2.5 A lawyer should notify opposing counsel of all communications with the court or other tribunal, except those involving only scheduling or clerical matters.

2.6 When submitting any written communication to a court or other tribunal, a lawyer should provide opposing counsel with a copy of the document contemporaneously, and sufficiently in advance of any related hearing to assure both the court and opposing counsel have a reasonable opportunity to review it beforehand.

2.7 A lawyer should promptly comply with requests to prepare proposed orders.

2.8 When scheduling hearings and other adjudicative proceedings, a lawyer should request an amount of time that is truly calculated to permit full and fair presentation of the matter to be adjudicated and to permit equal response by the lawyer's adversary.

2.9 A lawyer should immediately notify all counsel of any hearing time that the lawyer has reserved with the court or tribunal.

2.10 When there has been pre-trial disclosure of trial witnesses, a lawyer should make a reasonable, good-faith effort to identify those witnesses whom the lawyer believes are reasonably likely to be called to testify.

2.11 During trials and evidentiary hearings the lawyers should mutually agree to disclose the identities, and duration of witnesses anticipated to be called that day and the following day, including depositions to be read, and should cooperate in sharing with opposing counsel all visual-aid equipment.

2.12 When there has been pre-trial disclosure of trial exhibits, a lawyer should make a reasonable good-faith effort to identify those exhibits that the lawyer believes will be proffered into evidence.

2.13 A lawyer should not mark on or alter exhibits, charts, graphs, and diagrams without opposing counsel's permission or leave of court.

2.14 A lawyer should abstain from conduct calculated to detract or divert the fact-finder's attention from the relevant facts or otherwise cause it to reach a decision on an impermissible basis.

3. Honesty and Candor

Ideal:

A lawyer's word should be his or her bond. The lawyer should not knowingly misstate, distort, or improperly exaggerate any fact or opinion and should not improperly permit the lawyer's silence or inaction to mislead anyone.

Goals:

3.1 In drafting a proposed letter of intent, the memorialization of an oral agreement or a written contract reflecting an agreement reached in concept, a lawyer should draft a document that fairly reflects the agreement of the parties.

3.2 In drafting documents, a lawyer should point out to opposing counsel all changes that the lawyer makes or causes to be made from one draft to another.

3.3 A lawyer should not withhold information from a client to serve the lawyer's own interest or convenience.

4. Fair and Efficient Administration of Justice

Ideal:

A lawyer should always conduct himself or herself to assure the just, speedy, and inexpensive determination of every action and resolution of every controversy.

Goals:

4.1 A lawyer should endeavor to achieve the client's lawful objectives as economically and expeditiously as possible.

4.2 A lawyer should counsel the client concerning the benefits of mediation, arbitration, and other alternative methods of resolving disputes.

4.3 A lawyer should counsel the client to consider and explore settlement in good faith.

4.4 A lawyer should accede to reasonable requests for waivers of procedural formalities when the client's legitimate interests are not adversely affected.

4.5 A lawyer should not invoke a rule for the purpose of creating undue delay.

4.6 A lawyer should never use discovery for the purpose of harassing or improperly burdening an adversary or causing the adversary to incur unnecessary expense.

4.7 A lawyer should frame reasonable discovery requests tailored to the matter at hand.

4.8 A lawyer should assure that responses to proper requests for discovery are timely and complete and are consistent with the obvious intent of the request.

4.9 In civil cases, a lawyer should stipulate all facts and principles of law which are not in dispute, and should promptly respond to requests for stipulations of fact or law.

4.10 After consulting with the client, a lawyer should voluntarily withdraw claims defenses when it becomes apparent that they are without merit, are superfluous or merely cumulative.

4.11 A lawyer should appear at a hearing before a court or other tribunal fully prepared to submit the matter at issue to the court or tribunal for adjudication.

4.12 A lawyer should not use the post-hearing submission of proposed orders as a guise to argue or reargue the merits of the matter to be determined.

4.13 A lawyer should not request rescheduling, cancellations, extensions, and postponements without legitimate reasons and never solely for the purpose of delay or obtaining unfair advantage.

5. Courtesy

Ideal:

A lawyer should treat all persons with courtesy and respect and at all times abstain from rude, disruptive and disrespectful behavior. The lawyer should encourage the lawyer's clients and support personnel to do likewise even when confronted with rude, disruptive and disrespectful behavior.

6. Respect for the Time and Commitments of Others

Ideal:

A lawyer should respect the time and commitments of others.

Goals:

6.1 Before scheduling a hearing on any motion or discovery objection, a lawyer should endeavor to resolve or narrow the issue at hand.

6.2 In scheduling depositions upon oral examination, a lawyer should allow enough time to permit the conclusion of the deposition, including examination by all parties, without adjournment.

6.3 Unless circumstances compel more expedited scheduling, a lawyer should endeavor to provide litigants, witnesses, and other affected persons or parties with ample advance notice of hearings, depositions, meetings, and other proceedings, and whenever practical, schedule such activities at times that are convenient to all interested persons.

6.4 A lawyer should accede to all reasonable requests for scheduling, rescheduling, cancellations, extensions, and postponements that do not prejudice the client's opportunity for full, fair and prompt consideration and adjudication of the client's claim or defense.

6.5 Upon receiving an inquiry concerning a proposed time for a hearing, deposition, meeting, or other proceeding, a lawyer should promptly agree to the proposal or offer a counter suggestion.

6.6 A lawyer should call potential scheduling conflicts or problems to the attention of those affected, including the court or tribunal, as soon as they become apparent to the lawyer.

6.7 A lawyer should avoid last-minute cancellations of hearings, depositions, meetings, and other proceedings.

6.8 A lawyer should promptly notify the court or tribunal of any resolution by the parties that renders a scheduled court appearance unnecessary.

6.9 A lawyer should be punctual in attending all court appearances, depositions, meetings, conferences, and other proceedings.

6.10 A lawyer should respond promptly to inquiries and communications from clients and

others.

7. Independence of Judgment

Ideal:

A lawyer should exercise independent judgment and should not be governed by a client's ill will or deceit.

Goals:

7.1 A lawyer should counsel the client or prospective client, even with respect to a meritorious claim or defense, concerning the public and private burdens of pursuing the claim as compared with the benefits to be achieved.

7.2 A lawyer should at all times provide the client with objective evaluations and advise without purposefully understating or overstating achievable results or otherwise creating unrealistic expectations.

7.3 A lawyer should not permit the client's ill will toward an adversary, witness, or tribunal to become that of the lawyer's.

7.4 A lawyer should counsel the client against the use of tactics designed: (a) to hinder or improperly delay the process involved; or (b) to embarrass, harass, intimidate, improperly burden, or oppress an adversary, party or any other person and should withdraw from representation if the client insists on such tactics.

7.5 In contractual and business negotiations, a lawyer should counsel the client concerning what is reasonable and customary under the circumstances.

[Updated: 07-27-2006]

Oath of Admission to The Florida Bar

The general principles which should ever control the lawyer in the practice of the legal profession are clearly set forth in the following oath of admission to the Bar, which the lawyer is sworn on admission to obey and for the willful violation to which disbarment may be had.

"I do solemnly swear:

"I will support the Constitution of the United States and the Constitution of the State of Florida;

"I will maintain the respect due to courts of justice and judicial officers;

"I will not counsel or maintain any suit or proceedings which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land;

"I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;

"I will maintain the confidence and preserve inviolate the secrets of my clients, and will accept no compensation in connection with their business except from them or with their knowledge and approval;

"I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

"I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God."

(NOTE: This form may **NOT** be used for admission purposes. You must obtain the official form from the Florida Board of Bar Examiners for admission.)

Creed Of Professionalism

I revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each.

I will further my profession's devotion to public service and to the public good.

I will strictly adhere to the spirit as well as the letter of my profession s code of ethics, to the extent that the law permits and will at all times be guided by a fundamental sense of honor, integrity, and fair play.

I will not knowingly misstate, distort, or improperly exaggerate any fact or opinion and will not improperly permit my silence or inaction to mislead anyone.

I will conduct myself to assure the just, speedy and inexpensive determination of every action and resolution of every controversy.

I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy.

I will respect the time and commitments of others.

I will be diligent and punctual in communicating with others and in fulfilling commitments.

I will exercise independent judgment and will not be governed by a client's ill will or deceit.

My word is my bond.

Fiscal Year	**03-04**	**04-05**	**05-06**	**06-07**
Bar Population	74,874	77,102	79,290	81,534
Fees	$19,186,482.00	$19,186,482.00	$20,379,103.00	$21,006,000
Cost of Discipline	$8,562,449.00	$8,836,123.00	$9,185,376.00	$9,462,926
% Dues to Discipline	44.63%	44.65%	45.07%	45.04%
Cost Per Member	$114.36	$114.60	$115.84	$116.06
Disbarments	34	41	52	48
Permanent Disbarment	7	3	5	18
License Revoked	2	4	3	2
Disbarment on Consent	0	0	3	13
Suspensions	20	24	33	22
Emergency Suspension	19	15	21	12
Felony Suspension	19	15	20	4
Rehabilitative Suspension	44	63	53	89
Suspension w/Probation	18	19	21	12
Suspension & Public Reprimand	0	1	0	1
Suspension & Incapacity	1	0	1	0
Public Reprimands	40	42	29	39
Public Reprimand w/Probation	6	23	16	22
Resigned (Disciplinary)	16	28	9	0
Permanent Resignation	4	1	4	0
Admonishments	19	23	16	17
Admonishment w/Probation	3	7	6	1
GC Admonishment	43	37	45	56
Probation	6	5	3	7
Emergency Probation	1	0	0	0
Conditional Admission Probation	29	35	19	27
Injunctions	0	0	0	1
Total Final Orders	331	386	359	391
Cost Per Sanction	$25,868.00	$22,313.44	$25,801.62	$24,201.85
Files Opened	8,820	8,451	8,736	9,063