



THE FLORIDA BAR

Florida's Standards for Imposing Lawyer Sanctions

100 PREFACE

1.1 STANDARDS FOR IMPOSING LAWYER SANCTIONS

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

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

The Florida Bar (the bar) will use these standards to determine discipline recommended to referees and the court and to determine acceptable pleas under the Rules Regulating The Florida Bar.

Comment

It should also be noted that the court has set forth its 3 objectives for lawyer discipline in *The Florida Bar v. Lord*, 433 So. 2d 983, 986 (Fla. 1983). First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in similar conduct.

1.2 DEFINITIONS

(a) "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.

(b) “Intent” is the conscious objective or purpose to accomplish a particular result.

(c) “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.

(d) “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.

(e) “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.

1.3 PURPOSE AND NATURE OF SANCTIONS

(a) Purpose of Lawyer Disciplinary Proceedings. The purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession.

(b) Public Nature of Lawyer Disciplinary Proceedings. Ultimate disposition of lawyer discipline is public.

(c) 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 these 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.

Comment

Purpose of Lawyer Disciplinary Proceedings

The primary purpose of lawyer discipline is to protect the public. Second is the need to protect the integrity of the legal system and to ensure 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, deterring unethical behavior among all members of the profession.

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, fiduciaries, or law professors, do not lose their association with the legal profession because of their primary occupation. The public expects that anyone who is admitted to the practice of law, regardless of daily occupational activities, will conform to the ethical standards of the legal profession. If the lawyer fails to meet these standards, appropriate sanctions should be imposed.

Public Nature of Lawyer Disciplinary Proceedings

Public disclosure of lawyer discipline may enhance public perception 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 from it. The more the public knows about how effectively the disciplinary system works, the more confidence the public will have in that system and in the profession's ability to discipline itself.

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 1 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, and treating lawyers who are disciplined for similar misconduct consistently. Public sanctions also educate other lawyers concerning what conduct will be sanctioned and help deter misconduct by others in the profession. The preventive aspect of discipline cannot be overlooked.

Purpose of These Standards

The Rules Regulating The Florida Bar 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.

These standards are guidelines to be used in imposing sanctions following a finding of lawyer misconduct. These standards are not grounds for discipline but constitute a model 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.

These standards are designed to promote consistency in the imposition of sanctions by identifying the relevant factors that the court considers and then applying these factors to situations where lawyers have engaged in various types of misconduct.

200 SANCTIONS

2.1 SCOPE

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

Comment

Sanctions in disciplinary matters are neither criminal nor civil but sui generis (in their own class) and imposed under the authority of the 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 on 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 the lawyer's practice or transferred to inactive status; disciplinary sanctions should not be imposed. Disciplinary sanctions do not include delinquencies that may be imposed on lawyers who violate administrative rules applicable to members of the bar, such as by failing to pay membership fees or to attend mandatory continuing legal education programs.

2.2 DISBARMENT, DISCIPLINARY REVOCATION, AND DISCIPLINARY RESIGNATION

Disbarment, disciplinary revocation, and disciplinary resignation terminate the individual's status as a lawyer. Where disbarment is not permanent, a lawyer who has been disbarred must apply for readmission through the Florida Board of Bar Examiners.

Comment

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 and the reputation of the legal profession is protected by the action of the court and bar in taking appropriate actions against unethical lawyers. Unless otherwise specified in the disbarment order, a disbarred lawyer may seek readmission to the bar after 5 years; however, the court may order a longer period of time before a disbarred lawyer may seek readmission, and disbarment may be permanent. Disbarment includes disbarment by consent, and disciplinary revocation and disciplinary resignation are tantamount to disbarment. *See The Florida Bar v. Hale*, 762 So. 2d. 515, 517 (Fla. 2000).

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 90 days or less does not require proof of rehabilitation. A suspension of more than 90 days requires proof of rehabilitation and may require passage of all or part of the bar examination. No suspension is ordered for a specific period of time in excess of 3 years.

Comment

Suspension includes suspension by consent. If the conduct is so egregious that a suspension longer than 3 years seems warranted, the sanction of disbarment should be imposed.

In addition, the Rules Regulating The Florida Bar draw a distinction between suspensions for 90 days or less and suspensions for more than 90 days. A lawyer who has been suspended for 90 days or less is reinstated automatically on completion of the suspension. However, a lawyer who has been suspended for more than 90 days may not be reinstated without showing by clear and convincing evidence rehabilitation, compliance with all applicable orders or rules, and fitness to practice law.

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 suspension:

- (a)** on determination of a felony; or
- (b)** when the lawyer's continuing conduct appears to be causing great public harm.

Comment

An emergency suspension on determination of a felony or when the lawyer's continuing conduct appears to be causing great public harm is necessary to protect members of the public and to maintain public confidence in the legal profession. Public confidence in the profession is strengthened when expedited procedures are available in these instances of lawyer misconduct.

Due process does not require a hearing prior to imposing an emergency suspension following a criminal determination or judgment of guilt. 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.

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.

Comment

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. A public reprimand serves the useful purpose of identifying lawyers who have violated ethical standards and educating 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 impose other sanctions or conditions in conjunction with a public reprimand. When a lawyer lacks competence in one area of practice, for example, the court may impose a public reprimand and also require the lawyer to attend continuing education courses. In a case of neglect, the court may impose a public reprimand and probation, during which the lawyer's diligence in handling client matters can 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.

Comment

Although admonishment is the least serious of the formal disciplinary sanctions, the public is informed about the lawyer's misconduct, even though the ethical violation results in little or no injury

to the client, the public, the legal system, or the profession. Disclosure of that information helps protect the public and enhances the preventive 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 reinstatement.

Comment

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. 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:

- (1) quarterly or semi-annual reports of caseload status, appropriate in neglect cases, *see The Florida Bar v. Shoureas*, 892 So. 2d 1002 (Fla. 2004);
- (2) supervision by another lawyer, *see The Florida Bar v. Maier*, 784 So. 2d 411 (Fla. 2001);
- (3) periodic audits of trust accounts, appropriate in cases where lawyers improperly handle client funds, *see The Florida Bar v. Riggs*, 944 So. 2d 167 (Fla. 2006);
- (4) attendance at continuing education programs, appropriate in cases of incompetence, *see The Florida Bar v. MacNamara*, 132 So. 3d 165 (Fla. 2013);
- (5) participation in alcohol or drug abuse programs, appropriate where the lawyer's abuse of alcohol or drugs was a significant cause of the misconduct, *see The Florida Bar v. Cohen*, 919 So. 2d 384 (Fla. 2005);

(6) periodic physical or mental examinations, appropriate where the lawyer's physical or mental condition was a significant cause of the misconduct, *see The Florida Bar v. McFall*, 863 So. 2d 203 (Fla. 2003);

(7) passing the bar examination or the appropriate professional responsibility examination, *see The Florida Bar v. Wolf*, 930 So. 2d 574 (Fla. 2006);

(8) limitations on practice, *see The Florida Bar v. Miklowitz*, 980 So. 2d 491 (Fla. 2008); or

(9) other conditions 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. If a lawyer is charged with violating the conditions of probation, a hearing may be needed to determine whether a violation has occurred. The disciplinary authority has the burden of establishing any violation by clear and convincing evidence. On finding that a lawyer has violated probation conditions, the court may extend the probation, impose a more severe sanction, or take other appropriate action.

2.8 OTHER SANCTIONS AND REMEDIES

Other sanctions and remedies which may be imposed include:

(a) restitution;

(b) assessment of costs;

(c) limitation on practice;

(d) appointment of a receiver under chapter 5 of The Rules Regulating The Florida Bar;

(e) requirement that the lawyer take the bar examination or Multistate Professional Responsibility Examination;

(f) requirement that the lawyer attend continuing legal education courses;

(g) evaluation or treatment for a substance-related disorder or personal and emotional problems; and

(h) other requirements that the court deems consistent with the purposes of lawyer sanctions.

Comment

The court may impose these other sanctions and remedies when 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.

The bar encourages all impaired lawyers to participate in Florida Lawyers Assistance, Inc.'s supervised rehabilitation program or any treatment program approved by Florida Lawyers Assistance, Inc. The bar views participation in these programs, occurring either before or after disciplinary proceedings have commenced, as mitigation. See *The Florida Bar v. Liberman*, 43 So. 3d 36 (Fla. 2010).

2.9 RECIPROCAL DISCIPLINE

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

Comment

Public confidence in the profession is enhanced when lawyers who are admitted in more than 1 jurisdiction are prevented from avoiding the effect of discipline in 1 jurisdiction by practicing in another. The Rules Regulating The Florida Bar provide that a copy of the order imposing discipline from the other jurisdiction constitutes evidence that the respondent committed the misconduct. Reciprocal discipline can be imposed without a hearing, but the court may 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 reports 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 and to allow a lawyer under a rehabilitative suspension to apply for reinstatement.

Comment

Readmission occurs when a disbarred, disciplinarily revoked, or disciplinarily resigned lawyer is returned to practice. A lawyer seeking to be readmitted to practice must show, by clear and convincing evidence, rehabilitation, compliance with all applicable orders or rules, and fitness to practice law.

A lawyer under rehabilitative suspension will not be reinstated unless the lawyer can show, by clear and convincing evidence, rehabilitation, compliance with all applicable orders and rules, and fitness to practice law.

The court may order conditional readmission or conditional reinstatement when appropriate. Conditions that can be imposed include probation or other sanctions or remedies.

300 AGGRAVATION AND MITIGATION

3.1 GENERALLY

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

Comment

Each disciplinary case involves unique facts and circumstances. In striving for fair disciplinary sanctions, consideration must be given to the facts pertaining to the professional misconduct and to any aggravating or mitigating factors. 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.

“Like other factual findings, a referee's findings in mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record.” *See The Florida Bar v. Alters*, 260 So. 3d 72 (Fla. 2018), *The Florida Bar v.*

Ratiner, 238 So. 3d 117 (Fla. 2018), *The Florida Bar v. Germain*, 957 So. 2d 613 (Fla. 2007).

3.2 AGGRAVATION

(a) Definition. Aggravation is any factor that justifies an increase in the degree of discipline to be imposed.

(b) Aggravating factors. Factors which may be considered in aggravation include:

- (1) prior disciplinary offenses, provided that after 7 or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct will not be considered as an aggravating factor;
- (2) dishonest or selfish motive;
- (3) a pattern of misconduct;
- (4) multiple offenses;
- (5) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (6) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (7) refusal to acknowledge the wrongful nature of the conduct;
- (8) vulnerability of the victim;
- (9) substantial experience in the practice of law;
- (10) indifference to making restitution;
- (11) obstruction of fee arbitration awards by refusing or intentionally failing to comply with a final award; and
- (12) failure to complete a practice and professionalism enhancement program required as part of diversion.

Comment

Cases citing each of the aggravating factors listed above include:

(1) prior disciplinary offenses: *The Florida Bar v. Bosecker*, 259 So. 3d 689 (Fla. 2018), *The Florida Bar v. Petersen*, 248 So. 3d 1069 (Fla. 2018), *The Florida Bar v. Shankman*, 41 So. 3d 166 (Fla. 2010);

(2) dishonest or selfish motive: *The Florida Bar v. Alters*, 260 So. 3d 72 (Fla. 2018), *The Florida Bar v. Tauler*, 775 So. 2d 944 (Fla. 2000);

(3) pattern of misconduct: *The Florida Bar v. Horton*, No. SC 17-782, 2019 WL 4064990 (Fla. Aug. 29, 2019), *The Florida Bar v. Parrish*, 241 So. 3d 66 (Fla. 2018);

(4) multiple offenses: *The Florida Bar v. Parrish*, 241 So. 3d 66 (Fla. 2018);

(5) bad faith obstruction of disciplinary proceedings: *The Florida Bar v. Rotstein*, 835 So. 2d 241 (Fla. 2002);

(6) lack candor during the disciplinary process: *The Florida Bar v. Rotstein*, 835 So. 2d 241 (Fla. 2002);

(7) refusal to acknowledge wrongful nature of conduct: *The Florida Bar v. Bosecker*, 259 So. 3d 689 (Fla. 2018), *The Florida Bar v. Brutus* 216 So. 3d 1286 (Fla. 2017), *The Florida Bar v. Rosenberg*, 169 So. 3d 1155 (Fla. 2015), *The Florida Bar v. Cohen*, 157 So. 3d 283 (Fla. 2015);

(8) vulnerability of victim: *The Florida Bar v. Marcellus*, 249 So. 3d 538 (Fla. 2018), *The Florida Bar v. Brutus*, 216 So. 3d 1286 (Fla. 2017);

(9) substantial experience in the practice of law: *The Florida Bar v. Petersen*, 248 So. 3d 1069 (Fla. 2018), *The Florida Bar v. Parrish*, 241 So. 3d 66 (Fla. 2018);

(10) indifference to making restitution: *The Florida Bar v. Rosenberg*, 169 So. 3d 1155 (Fla. 2015), *The Florida Bar v. Tipler*, 8 So. 3d 1109 (Fla. 2009).

3.3 MITIGATION

(a) Definition. Mitigation is any factor that justifies a reduction in the degree of discipline to be imposed.

(b) Mitigating Factors. Factors which may be considered in mitigation include:

(1) absence of a prior disciplinary record;

- (2) absence of a dishonest or selfish motive;
- (3) personal or emotional problems;
- (4) timely good faith effort to make restitution or to rectify the consequences of the misconduct;
- (5) full and free disclosure to the bar or cooperative attitude toward the proceedings;
- (6) inexperience in the practice of law;
- (7) character or reputation;
- (8) physical or mental disability or impairment or substance-related disorder;
- (9) unreasonable delay in the disciplinary proceedings if the respondent did not substantially contribute to the delay and the respondent demonstrates specific prejudice resulting from that delay;
- (10) interim rehabilitation;
- (11) imposition of other penalties or sanctions;
- (12) remorse;
- (13) remoteness of prior offenses; and
- (14) prompt compliance with a fee arbitration award.

Comment

The court considers restitution a mitigating factor. See *The Florida Bar v. Horton*, No. SC 17-782, 2019 WL 4064990 (Fla. Aug. 29, 2019), *The Florida Bar v. Calvo*, 630 So. 2d 548 (Fla. 1993), *The Florida Bar v. Pincket*, 398 So. 2d 802 (Fla. 1980). Restitution is not a complete defense to a charge of misconduct. However, a policy of considering restitution as a mitigating factor will encourage lawyers to make restitution, reducing the degree of injury to the client. Restitution made on 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. See *The Florida Bar v. Ullensvang*, 400 So. 2d 969

(Fla. 1981). While the court treats disabilities or impairments as mitigating factors, it is important to note that the consideration of these factors do not completely excuse the lawyer's misconduct. See *The Florida Bar v. Bloom*, 972 So. 2d 172 (Fla. 2007), *The Florida Bar v. Brownstein*, 953 So. 2d 502 (Fla. 2007).

Cases citing each of the mitigating factors listed above include:

(1) absence of a prior disciplinary record: *The Florida Bar v. Horton*, No. SC 17-782, 2019 WL 4064990 (Fla. 2019), *The Florida Bar v. Berthiaume*, 78 So. 3d 503 (Fla. 2012), *The Florida Bar v. Irish*, 48 So. 3d 767 (Fla. 2010);

(2) absence of a selfish or dishonest motive: *The Florida Bar v. Behm*, 41 So. 3d 136 (Fla. 2010), *The Florida Bar v. Smith*, 866 So. 2d 41 (Fla. 2004);

(3) personal or emotional problems: *The Florida Bar v. Russell-Love*, 135 So. 3d 1034 (Fla. 2014), *The Florida Bar v. Behm*, 41 So. 3d 136 (Fla. 2010), *The Florida Bar v. Del Pino*, 955 So. 2d 556 (Fla. 2007);

(4) timely good faith effort to make restitution or to rectify consequences of misconduct: *The Florida Bar v. Horton*, No. SC 17-782, 2019 WL 4064990 (Fla. Aug. 29, 2019);

(5) full and free disclosure to the bar or cooperative attitude toward proceedings: *The Florida Bar v. Wolf*, 930 So. 2d 574 (Fla. 2006);

(6) inexperience in the practice of law: *The Florida Bar v. Kinsella*, 260 So. 3d 1046 (Fla. 2018), *The Florida Bar v. Berthiaume*, 78 So. 3d 503 (Fla. 2012);

(7) character or reputation: *The Florida Bar v. Scheinberg*, 129 So. 3d 315 (Fla. 2013), *The Florida Bar v. Dove*, 985 So. 2d 1001 (Fla. 2008), *The Florida Bar v. Cox*, 794 So. 2d 1278 (Fla. 2001);

(8) physical or mental disability or impairment: *The Florida Bar v. Polk*, 126 So. 3d 240 (Fla. 2013), *The Florida Bar v. Liberman*, 43 So. 3d 36 (Fla. 2010), *The Florida Bar v. Behm*, 41 So. 3d 136 (Fla. 2010);

(9) delay in disciplinary proceedings: *The Florida Bar v. Wolf*, 930 So. 2d 574 (Fla. 2006);

(10) interim rehabilitation: *The Florida Bar v. Liberman*, 43 So. 3d 36 (Fla. 2010), *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008);

(11) imposition of other penalties or sanctions: *The Florida Bar v. Kinsella*, 260 So. 3d 1046 (Fla. 2018), *The Florida Bar v. Picon*, 205 So. 3d 759 (Fla. 2016);

(12) remorse; *The Florida Bar v. Kinsella*, 260 So. 3d 1046 (Fla. 2018), *The Florida Bar v. Gardiner*, 183 So. 3d 240 (Fla. 2014).

3.4 FACTORS WHICH ARE NEITHER AGGRAVATING NOR MITIGATING

The following factors are not 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) retirement before completion of disciplinary proceedings;
- (e) complainant's recommendation as to sanction;
- (f) failure of injured client to complain;
- (g) entry of an award in a fee arbitration proceeding.

Comment

While the court has considered each of these factors, the purposes of lawyer discipline are best served by viewing them as irrelevant to determining the appropriate sanction. Restitution made by a respondent only after a disciplinary proceeding has been instituted may be considered in mitigation. See *The Florida Bar v. Stark*, 616 So. 2d 41 (Fla. 1993); *The Florida Bar v. Nunn*, 596 So. 2d 1053 (Fla. 1992).

Mitigation does not include a lawyer's claim that "the client made me do it." Each lawyer is responsible for adhering to the profession's ethical standards. 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 *The Florida Bar v. Shankman*, 41 So. 3d 166 (Fla. 2010). In addition, neither the withdrawal of the complaint against the lawyer nor the lawyer's resignation before 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. 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.

The complainant's recommendation as to a sanction is a factor that is not aggravating or 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 that can be either aggravating or mitigating.

Finally, that an injured client has not complained does not serve as mitigation. The disciplinary system is designed to protect all members of the public. That 1 injured person is willing to forgive and forget should not relieve or excuse the lawyer, who then has the capability of injuring others. See *The Florida Bar v. Mitchell*, 645 So. 2d 414 (Fla. 1994).

400 VIOLATIONS OF DUTIES OWED TO CLIENTS

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 ethics rules, agency law, and 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 on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving the failure to preserve client property:

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

(b) Suspension. Suspension is appropriate when a lawyer knows or should know that the lawyer is dealing improperly with client property and causes injury or potential injury to a client.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

(d) Admonishment. 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, where there are trust account procedures or record keeping violations, or where there is an unintentional mishandling of client property.

Comment

Disbarment

Disbarment is the presumed appropriate sanction for misappropriation of client funds, and the overwhelming majority of cases involving misappropriation have resulted in disbarment despite findings of mitigation. See *The Florida Bar v. Valentine-Miller*, 974 So. 2d 333 (Fla. 2008).

In *The Florida Bar v. Alters*, 260 So. 3d 72 (Fla. 2018), disbarment was warranted for a respondent who violated professional conduct rules arising out of improper trust account transfers. After discovering misappropriation of client funds under the respondent's former partner's direction, the respondent continued to leave the partner in

charge of the trust account without putting in place any safeguards to prevent further misappropriation. Client funds continued to be misappropriated under the partner's direction even after the former partner left firm, and the respondent entirely abandoned the duty to protect client funds held in trust.

In *The Florida Bar v. Rousso*, 117 So. 3d 756, 767 (Fla. 2013), the court disbarred 2 lawyers who abandoned their professional duty to safeguard their clients' funds even though the court did not find intent to misappropriate the money or that the respondents received any direct benefit from the missing funds. Embezzlement of more than 4 million dollars of trust funds by a non-lawyer employee of the law firm did not relieve the respondents of responsibility for safekeeping of trust account funds.

In *The Florida Bar v. Mirk*, 64 So. 3d 1180 (Fla. 2011), the court held that a respondent's misappropriation of \$31,487.50 in client funds held in trust warranted disbarment despite the respondent's claim that there was an agreement with the client entitling the respondent to a \$40,000 flat fee; but the agreement was not in writing, and the respondent had made a number of withdrawals without the client's knowledge or permission.

Suspension

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.

In *The Florida Bar v. Brutus*, 216 So. 3d 1286 (Fla. 2017), the respondent was suspended for 1 year, followed by a 2-year probation, where the respondent improperly distributed marital funds prior to execution of the settlement agreement despite the trial court's order that funds be maintained in trust, and where the lawyer was also found to be negligent in maintaining the trust account.

In *The Florida Bar v. Mason*, 826 So. 2d 985 (Fla. 2002), transferring money from the trust account to cover operating account shortages warranted a 2-year suspension, rather than disbarment, where the respondent made mistakes in accounting practices, inadvertently transferred proceeds without proper records, did not

cause any loss to the clients or intentionally misappropriate funds, would likely become rehabilitated, had no prior disciplinary history, was experiencing personal and emotional problems during bitter divorce, made a timely good faith effort to correct the problems, was inexperienced in handling the administrative responsibilities of a solo law practice, had a good reputation, and was remorseful.

In *The Florida Bar v. Tauler*, 775 So. 2d 944 (Fla. 2000), the respondent's misappropriation of client funds and multiple resultant rule violations warranted a 3-year suspension rather than disbarment in light of mitigating factors including severe financial hardship brought on by the respondent's spouse's health problems and bankruptcy, the respondent's clear commitment to providing legal assistance to those in need, and fact that the misconduct was an isolated incident.

Public Reprimand

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 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 the lawyer's office staff concerning proper procedures in handling client funds.

The court has 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. Silver*, 788 So. 2d 958 (Fla. 2001), a respondent was publicly reprimanded for violating the safekeeping property rule by failing to timely notify medical providers with letters of protection or assignments by the client of the client's final settlement in a personal injury case. In *The Florida Bar v. Lumley*, 517 So. 2d 13 (Fla. 1987), the court held that in the absence of intent to defraud or deprive clients of their funds, and where all trust shortages were replaced, comingling personal funds in the same bank account with funds held in trust for clients, and knowingly using entrusted funds for purposes other than those intended by clients, warrants a public reprimand.

Admonishment

Admonishment should be reserved for cases where the lawyer's negligence poses little or no 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 the lawyer's 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 on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving improper revelation of information relating to the representation of a client:

(a) Disbarment. Disbarment is appropriate when a lawyer, with the intent to benefit the lawyer or another, intentionally 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.

(b) Suspension. 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.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer negligently 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.

(d) Admonishment. Admonishment is appropriate when a lawyer negligently reveals information relating to the 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.

Comment

Disbarment

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.

Suspension

Suspension is appropriate when the lawyer does not intentionally use the professional relationship to benefit the lawyer 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. In *The Florida Bar v. Lange*, 711 So. 2d 518 (Fla. 1998), the respondent received a 1-year suspension where, among other things, the respondent knowingly disclosed confidential communications made by a former client when disclosure was not consented to by the former client and was not made for the purpose of preventing a future crime or to prevent harm to another. In *The Florida Bar v. Knowles*, 99 So. 3d 918 (Fla. 2012), the court imposed a 1-year suspension where the respondent engaged in multiple rule violations including contacting the State Attorney's Office to inform them of the respondent's belief that the client would lie in immigration court, when that belief was predicated on the client's statement to the respondent that the client would do anything to avoid deportation, including lying.

Public Reprimand

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 reprimand should be imposed.

4.3 FAILURE TO AVOID CONFLICTS OF INTEREST

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving conflicts of interest:

(a) Disbarment. Disbarment is appropriate when a lawyer causes serious or potentially serious injury to the client and, without the informed consent of the affected client(s):

(1) 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;

(2) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another; or

(3) 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.

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

(c) Public Reprimand. 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.

(d) Admonishment. 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.

Comment

Disbarment

The court generally disbars 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. Disbarment is also appropriate in cases of representation of multiple clients when a lawyer knowingly engages in conduct with the intent to benefit the lawyer or another. 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. Disbarment is warranted when there is such an intentional abuse of the lawyer-client relationship.

In *The Florida Bar v. Doherty*, 94 So. 3d 443 (Fla. 2012), the court held that disbarment was the appropriate sanction for the respondent's failure to disclose in writing to an elderly client to whom the lawyer provided both legal and financial investment services, including brokering the sale of annuities, the lawyer's financial interest in the annuity transactions in violation of the rule prohibiting a lawyer from engaging in a business transaction with a client unless the lawyer makes specific written disclosures to the client. The respondent's misconduct was egregious because the lawyer advised the client to take specific actions that would earn the lawyer a financial benefit and failed to disclose this personal interest to the client, had prior disciplinary history, acted with a selfish motive, and refused to acknowledge the wrongful nature of the misconduct.

Suspension

Conflicts can take the form of a conflict between the lawyer and client, between current clients, or between a former client and a current client. In the case of conflicts between a lawyer and a current client, suspension is appropriate when the lawyer knows that the lawyer's interests may be or are likely to be adverse to the client's interests, but does not fully disclose the conflict, and causes injury or potential injury to the client. 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-client representation to each affected client and causes injury or potential injury to one or more of the clients. 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 current client.

In *The Florida Bar v. Scott*, 39 So. 3d 309 (Fla. 2010), the court held that a 3-year suspension was warranted for a respondent who engaged in misconduct by representing 2 clients with unwaivable conflicts of interest and making misrepresentations to the clients. In *The Florida Bar v. Herman*, 8 So. 3d 1100 (Fla. 2009), the court held that an 18-month suspension from the practice of law was the appropriate sanction for failing to inform a client or obtain the client's consent before representing that client at the same time the respondent represented the respondent's own company, which was the client's competitor.

Public Reprimand

The court generally imposes 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. In *The Florida Bar v. Miller*, 555 So. 2d 854 (Fla. 1990), the court held the drafting of a will for a client that named the respondent as contingent beneficiary without advising the client to confer with another lawyer before signing, warranted a public reprimand. In imposing that sanction, the court specifically noted the abundant mitigation present including that respondent never expected to actually inherit under the will, did not originate the idea of being named contingent beneficiary, did not attempt to influence the client to name the lawyer contingent beneficiary, had enjoyed an unblemished disciplinary record for over 40 years, and had a close personal friendship with the deceased.

The court also imposes public reprimands in cases of subsequent representation. In *The Florida Bar v. Madsen*, 400 So. 2d 947 (Fla.1981), the respondent received a public reprimand for representing a buyer in an effort to obtain a replacement motor home and then later representing the seller of the unsatisfactory motor home in an action brought by the buyers.

4.4 LACK OF DILIGENCE

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving a failure to act with reasonable diligence and promptness in representing a client:

(a) Disbarment. Disbarment is appropriate when a lawyer causes serious or potentially serious injury to a client and:

- (1) abandons the lawyer's practice;
- (2) knowingly fails to perform services for a client; or
- (3) engages in a pattern of neglect with respect to client matters.

(b) Suspension. Suspension is appropriate when a lawyer causes injury or potential injury to a client and:

- (1) knowingly fails to perform services for a client; or
- (2) engages in a pattern of neglect with respect to client matters.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer is negligent, does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

(d) Admonishment. 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.

Comment

Disbarment

Lack of diligence can take a variety of forms. Some lawyers simply abandon their practices, leaving clients unaware that they have no legal representation and often 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. DeMarco*, 601 So. 2d 1197 (Fla. 1992), the respondent was disbarred for abandoning his practice and failing to diligently handle client matters by leaving the jurisdiction without notifying the court or clients with pending cases. In *The Florida Bar v. Davis*, 149 So. 3d 1121 (Fla. 2014), the court held that disbarment was warranted where the respondent knowingly failed to perform services for the client after charging a \$5,000 retainer fee and failing to answer

the bar complaint or participate in the disciplinary proceedings. See *The Florida Bar v. Mitchell*, 285 So. 2d 96 (Fla.1980).

Suspension

Suspension should be imposed when a lawyer knows that the lawyer 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. In *The Florida Bar v. Petersen*, 248 So. 3d 1069 (Fla. 2018), the court held that a 3-year suspension was warranted for the respondent, who took no action on a case for 2 years, made misrepresentations to the court, and fostered conflicts with clients in order to withdraw while still being able to collect fees. In *The Florida Bar v. Whitney*, 132 So. 3d 1095 (Fla. 2013), the court held that a 1-year suspension was warranted for the respondent who failed to act with reasonable diligence and promptness in representing a client where the client and his cohabitating girlfriend hired the respondent to provide them with legal advice with respect to girlfriend's illegal immigration status, the respondent did not seek information regarding the girlfriend's prohibited status, and took no meaningful action other than 2 trips to the girlfriend's native country (1 of which was for purposes other than the case). In *The Florida Bar v. Feige*, 937 So. 2d 605 (Fla. 2006), the court held that a 3-year suspension was the appropriate sanction for a complete lack of diligence in representing clients resulting in violations of 16 different rules in 7 different client matters. The respondent not only grossly neglected clients and their matters but also gave unsound advice and misled parties in order to cover up the lack of diligence, with a history of disciplinary cases, including a prior 2-year suspension.

Public Reprimand

The court imposes a public reprimand when the lawyer is negligent. In *The Florida Bar v. Whitaker*, 596 So. 2d 672 (Fla.1992), a public reprimand was imposed on a respondent who neglected a client matter by allowing the statute of limitations to run and who also failed to keep the client reasonably informed about their legal matter. In *The Florida Bar v. Cohen*, 157 So. 3d 283 (Fla. 2015), the court imposed a public reprimand and 10-day suspension on a respondent whose conduct included filing a motion for continuance of resentencing hearing without

indicating whether the state agreed, without submitting a copy of the motion directly to the trial court, without setting the motion for hearing, and for failing to attend the resentencing hearing or make any effort to explain the absence. The court concluded that this conduct violated the rule requiring the respondent to act with reasonable diligence and was prejudicial to the administration of justice.

4.5 LACK OF COMPETENCE

Absent aggravating or mitigating circumstances and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving failure to provide competent representation to a client:

(a) Disbarment. 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 causes injury or potential injury to a client.

(b) Suspension. 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.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer causes injury or potential injury to a client and:

(1) demonstrates failure to understand relevant legal doctrines or procedures; or

(2) is negligent in determining whether the lawyer is competent to handle a legal matter.

(d) Admonishment. Admonishment is appropriate when a lawyer engages in an isolated instance of neglect in determining whether the lawyer is competent to handle a legal matter and causes little or no injury to a client.

Comment

Disbarment

Disbarment should be imposed on lawyers who are found to have engaged in multiple instances of incompetent behavior. For example, in *The Florida Bar v. Blaha*, 366 So. 2d 443 (Fla. 1978), the court disbarred the respondent who mishandled a guardianship and real estate transaction, and also filed a complaint for another client in the wrong court, resulting in denial of relief. In representing a third client, the respondent mishandled a replevin action, filing replevin under old rules at a time when the client had not yet perfected a security interest necessary to support the action. As a result of this incompetence, the respondent was eventually held in contempt and fined \$3,000.00. In *The Florida Bar v. Springer*, 873 So. 2d 317 (Fla. 2004), the court held that disbarment, rather than a 1-year suspension, was the appropriate sanction for the respondent's multiple instances of misconduct in 6 matters in which the respondent failed to provide competent representation, failed to act with reasonable diligence, failed to keep the client reasonably informed, and misrepresented the status of the matter to the client.

Suspension

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 the lawyer 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 the lawyer's practice to certain areas. In *The Florida Bar v. Picon*, 205 So. 3d 759 (Fla. 2016), the respondent's conduct in appearing for court late, at a time other than was noticed, or not at all, violated the rule requiring competent representation, in 1 case resulting in a client's 5-day incarceration, warranting a 1-year suspension. In *The Florida Bar v. Maurice*, 955 So. 2d 535 (Fla. 2007), the court held that a 90-day suspension was the appropriate sanction for respondent's incompetent representation and conflict of interest by unnecessarily initiating probate so that a testator's caretaker would have the right to purchase a condominium even though the recorded quitclaim deed drafted by the respondent gave the testator only a life estate, and the remainder vested in others immediately on the testator's death.

Public Reprimand

The court imposes public reprimands on lawyers who negligently provide incompetent representation. For example, in *The Florida Bar v. Gray*, 380 So. 2d 1292 (Fla. 1980), a public reprimand was warranted when the respondent agreed to represent a client in a claim for violation of the truth in lending laws, but only secured a number of lay publications and did not engage in sufficient study and investigation to become competent. In *The Florida Bar v. Garcia*, 485 So. 2d 1254 (Fla. 1986), the court held that undertaking to represent a client in matters which the lawyer is not knowledgeable warranted a public reprimand and supervised probation.

While a public reprimand alone can be appropriate, a combination of a public reprimand and probation is often a more productive approach. Probation can be effective in assisting lawyers to improve their legal skills. The court can use probation to impose conditions necessary to assist that particular lawyer, for example, by requiring 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 1-year probation on a respondent who mishandled a quiet title action. The court imposed as conditions of probation that the respondent refrain from representing clients in real estate matters and complete 30 hours of approved continuing education courses in real property.

4.6 LACK OF CANDOR

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases where the lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

(a) Disbarment. 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.

(b) Suspension. Suspension is appropriate when a lawyer knowingly deceives a client and causes injury or potential injury to the client.

(c) Public Reprimand. 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.

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

Comment

Disbarment

Disbarment is appropriate when a lawyer intentionally abuses the fiduciary relationship, making misrepresentations to a client in order to benefit the lawyer or another regardless of injury or potential injury to a client. In *The Florida Bar v. St. Louis*, 967 So. 2d 108 (Fla. 2007), the court held that disbarment was the appropriate sanction for the respondent who entered into a secret engagement agreement with the opposing party in underlying litigation in which the respondent agreed to not bring future cases against that party, did not tell the clients about the secret engagement agreement, made false statements to a judge regarding the matter, and also made a false representation to the bar.

Suspension

Suspension is appropriate when a lawyer knowingly deceives a client, although not necessarily for the lawyer's 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. In *The Florida Bar v. Adorno*, 60 So. 3d 1016 (Fla. 2011), the court held that a 3-year suspension was warranted for misconduct that included negotiating a \$7 million settlement on behalf of 7 named plaintiffs while abandoning thousands of putative class members in an action against a city to recover for allegedly improper assessments, claimed a \$2 million fee from the settlement amount, and secured a nondisclosure agreement with the named plaintiffs to keep the settlement secret from putative class members.

In *The Florida Bar v. Rodriguez*, 959 So. 2d 150 (Fla. 2007), the court held that a 2-year suspension was appropriate for the respondent who engaged in actions that directly conflicted with the clients' interests when the respondent entered into secret engagement agreement with the opposing party agreeing not to bring future cases against them and failed to disclose the conflict of interest to the clients, exposing them to potential harm. In distinguishing this case from *The Florida Bar v. St. Louis*, *supra*, which involved the respondent's partner, the court noted

that the respondent did not draft or sign the secret agreement, did not deliberately deceive the court or bar, and did not refuse to answer specific inquiries of clients as the respondent's partner did.

500 VIOLATIONS OF DUTIES OWED TO THE PUBLIC

5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY

Absent aggravating or mitigating circumstances and on application of the factors to be considered in imposing sanctions, 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:

(a) Disbarment. Disbarment is appropriate when a lawyer:

(1) is convicted of a felony under applicable law;

(2) 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;

(3) engages in the sale, distribution, or importation of controlled substances;

(4) engages in the intentional killing of another;

(5) attempts, conspires, or solicits another to commit any of the offenses listed in this subdivision; or

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

(b) Suspension. Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included elsewhere in this subdivision or other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer engages in conduct involving dishonesty, fraud, deceit, or misrepresentation that is not included elsewhere in this subdivision and that adversely reflects on the lawyer's fitness to practice law.

(d) Admonishment. Admonishment is appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.

Comment

Disbarment

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.

The court imposes disbarment on lawyers who are convicted of serious felonies. In *The Florida Bar v. Liberman*, 43 So. 3d 36 (Fla. 2010), the court disbarred the respondent after being convicted of 1 felony count of drug trafficking, noting that the presumptive discipline for a felony conviction is disbarment, and the burden is on the lawyer to overcome this presumption.

Suspension

Lawyers who engage in criminal conduct other than that described above in this subdivision 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.

In *The Florida Bar v. Kinsella*, 260 So. 3d 1045 (Fla. 2018), the court imposed a 3-year suspension after the respondent entered a no contest plea to a first-degree misdemeanor petit theft in connection with stealing money from cash registers at stores where the respondent was employed. In *The Florida Bar v. Erlenbach*, 138 So. 3d 369 (Fla. 2014), the court imposed a 1-year suspension followed by a 2-year probationary period for failing to timely file income tax returns and failing to pay funds withheld for federal income tax, social security tax, and Medicare tax, although no criminal charges were ever filed.

5.2 FAILURE TO MAINTAIN THE PUBLIC TRUST

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, 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:

(a) Disbarment. 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 the lawyer or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

(b) Suspension. 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.

(c) Public Reprimand. 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.

Comment

Disbarment

In *The Florida Bar v. Gardiner*, 183 So. 3d 240 (Fla. 2014), a lawyer who was also a judge was disbarred after failing to disclose a significant relationship with a prosecuting lawyer in a capital murder case over which the lawyer presided as judge and for dishonest conduct before the Judicial Qualifications Commission. In *The Florida Bar v. Mogil*, 763 So. 2d 303 (Fla. 2000), a lawyer who was also a licensed lawyer and judge in New York was disbarred in Florida after being disbarred in New York for sending multiple harassing and threatening communications to a criminal defense lawyer, for distributing disparaging and offensive comments on judicial stationery at a bar function, and for making misleading and false statements in the disciplinary investigations.

Suspension

Suspension is an appropriate sanction when lawyers who are public officials knowingly act improperly, but not necessarily for their own benefit. In *The Florida Bar v. Scheinberg*, 129 So. 3d 315 (Fla. 2013),

the lead prosecutor in a capital murder case received a 2-year suspension for exchanging numerous telephone calls and texts with the presiding judge which were not disclosed to defense counsel.

Public Reprimand

In *The Florida Bar v. Williams-Yulee*, 138 So. 3d 379 (Fla. 2014), the respondent received a public reprimand for directly soliciting funds for the respondent's judicial campaign in violation of the rules requiring judicial candidates to comply with the applicable provisions of the code of judicial conduct.

600 VIOLATIONS OF DUTIES OWED TO THE LEGAL SYSTEM

6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, 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:

(a) Disbarment. Disbarment is appropriate when a lawyer:

(1) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or

(2) 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.

(b) Suspension. 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.

(c) Public Reprimand. 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.

(d) Admonishment. Admonishment is appropriate when a lawyer is negligent in determining whether submitted statements or documents

are false or in failing to disclose material information on 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.

Commentary

Disbarment

Lawyers who engage in these practices violate the most fundamental duty of an officer of the court. As the court noted in a case where a lawyer was disbarred for making intentional misrepresentations to a judge, “[a]n officer of the court who knowingly seeks to corrupt the legal process can expect to be excluded from that process.” See *The Florida Bar v. St. Louis*, 967 So. 2d 108, 122-23 (Fla. 2007). In *St. Louis*, the respondent was disbarred for entering into a secret engagement agreement with the opposing party in underlying litigation, agreeing not to bring future cases against that party; failing to inform clients about the engagement agreement; making false statements to a judge regarding the matter; and making a false representation and omissions to the bar. In *The Florida Bar v. Salnik*, 599 So. 2d 101 (Fla. 1992), the court disbarred the respondent, who used a judge's stamp to forge a judgment and sent the fictitious judgment to the opposing party for intimidation purposes. In ordering disbarment, the court stated, “[r]esorting to forgery when legal attempts to obtain relief are unsuccessful is completely contrary to the most basic ideals of the legal profession.” *Id.* at 103.

Suspension

Suspension is appropriate when a lawyer has not acted with intent to deceive the court, but when the lawyer knows that material information is being withheld and does not inform the court. In *The Florida Bar v. Dupee*, 160 So. 3d 838 (Fla. 2015), the respondent was suspended for 1 year for assisting the client in a pattern of deceptive conduct. The respondent filed the client's inaccurate financial statement, withheld financial documents during discovery, allowed the client to present false testimony during a deposition without taking any remedial action, and failed to notify opposing counsel that the respondent had possession of a coin collection that was disputed property. In *The Florida Bar v. Cox*, 794 So. 2d 1278 (Fla. 2001), a prosecutor was suspended for 1 year for withholding the name of a

confidential informant. Although the respondent knew the witness's real name, the respondent introduced the witness to the court, jury, and defense counsel by a different name to protect the informant's identity. The misrepresentation prevented the defendant from discovering potentially impeaching evidence regarding the witness's prior criminal history, resulting in a mistrial and subsequent double jeopardy preclusion.

Public Reprimand

Public reprimand is appropriate when a lawyer is merely negligent in determining whether statements or documents are false or in taking remedial action when material information is being withheld. In *The Florida Bar v. Littman*, 612 So. 2d 582 (Fla. 1993), the respondent received a public reprimand for filing a motion to change residential custody and failed to include the Uniform Child Custody Jurisdiction Act affidavit required by Florida law. The court noted that "[t]he worst that resulted in the present case is that [the respondent] embarrassed himself and his client by his negligent failure to appreciate applicable law." *Id.* at 583.

6.2 ABUSE OF THE LEGAL PROCESS

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, 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:

(a) Disbarment. Disbarment is appropriate when a lawyer causes serious or potentially serious interference with a legal proceeding or 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.

(b) Suspension. 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.

(c) Public Reprimand. 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.

(d) Admonishment. 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.

Comment

Disbarment

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. In *The Florida Bar v. Ratiner*, 238 So. 3d 117 (Fla. 2018), the respondent was disbarred for engaging in multiple acts of misconduct which disrupted a tribunal. The respondent stated "lie, lie, lie" in quick succession while opposing counsel examined a witness and repeatedly kicked opposing counsel's table. The respondent also was disrespectful toward the court, disobeyed the judge's orders, engaged in intentionally disruptive behavior, and generally acted like a bully. The respondent had a history of similar misconduct and refused to acknowledge the wrongful nature of his actions by attempting to shift the blame to others. In *The Florida Bar v. Norkin*, 183 So. 3d 1018 (Fla. 2016), the respondent was permanently disbarred for practicing law while suspended and for additional misconduct involving conduct prejudicial to the administration of justice. The respondent sent offensive and threatening e-mails to bar counsel and behaved in a contemptuous manner during a previous public reprimand before the court by intentionally smirking and staring down each justice. The respondent had a prior history of similar misconduct and exhibited no remorse. The court determined that the respondent was not amenable to rehabilitation. The court stated that "[s]uch misconduct cannot and will not be tolerated as it sullies the dignity of judicial proceedings and debases the constitutional republic we serve." *Id.* at 1023.

Suspension

In many cases, lawyers are suspended when they knowingly violate court orders. Knowing violations can occur when a lawyer fails to

comply with a court order that applies directly to the lawyer, 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. In *The Florida Bar v. Gwynn*, 94 So. 3d 425 (Fla. 2012), the respondent was suspended for 91 days for engaging in a pattern of misconduct which interfered with the legal process and the administration of justice. Specifically, a bankruptcy judge found that the respondent had (1) filed frivolous claims to harass the opponent and opposing counsel; (2) failed to research and verify claims advanced in motions respondent filed; (3) engaged in willful abuse of the judicial system; and (4) continually made allegations, both in pleadings and in testimony before the bankruptcy court, that were incorrect or false. The judge found that the respondent's conduct was "objectively unreasonable and vexatious" and "sufficiently reckless to warrant a finding of conduct tantamount to bad faith ... for the purpose of harassing her opponent." *Id.* at 427.

Public Reprimand

The court imposes a public reprimand on lawyers who engage in misconduct at trial, 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. In *The Florida Bar v. Barcus*, 697 So. 2d 71 (Fla. 1997), the respondent who ineptly handled a difficult client matter but did not engage in a pattern of neglect received a public reprimand. The respondent failed to appear for the client's deposition, filed a notice of appeal for the sole purpose of delaying a foreclosure, failed to file the appellate brief, filed an untimely motion for extension of time to file the brief, and failed to file a motion for rehearing or to set aside or vacate a foreclosure. In *The Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001), the respondent who repeatedly made disparaging and profane remarks to belittle and humiliate the opposing party and opposing counsel during a family law case received a public reprimand and 2-year probation. The court also imposes public reprimands when lawyers neglect to respond to orders of the disciplinary agency. In *The Florida Bar v. Leacock*, 192 So. 3d 44 (Fla. 2015) (unpublished disposition), the court publicly reprimanded a respondent who neglected to respond to the bar's investigative inquiries in a timely manner. The court noted that it takes seriously a

lawyer's obligation to completely and timely respond to investigative inquiries made by the bar.

6.3 IMPROPER COMMUNICATIONS WITH INDIVIDUALS IN THE LEGAL SYSTEM

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, 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:

(a) Disbarment. Disbarment is appropriate when a lawyer:

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

(b) Suspension. Suspension is appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that the 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.

(c) Public Reprimand. 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.

(d) Admonishment. 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.

Comment

Disbarment

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. In *The Florida Bar v. Bailey*, 803 So. 2d 683 (Fla. 2001), the respondent was disbarred for engaging in various acts of serious misconduct, including sending an ex parte letter to the presiding judge in the client's criminal trial. In the letter, the respondent conveyed information that was damaging to the client in an effort to compromise the client before sentencing for the purpose of protecting the respondent's interest and control of the client's stock that had been segregated from other forfeited assets to pay the respondent's fees. Similarly, in *The Florida Bar v. Tipler*, 8 So. 3d 1109 (Fla. 2009), the respondent was disbarred after being charged with perjury, a first-degree misdemeanor. The respondent pleaded guilty to interference with judicial proceedings, a misdemeanor. The charges grew out of the respondent's representation of a client in a medical malpractice case where the respondent attempted to submit into evidence a videotape that had been edited to delete scenes that were harmful to the client's claim. To authenticate the video, the respondent questioned a witness as to whether the tape was accurate, without having shown the edited version to the witness, thus creating a situation where the witness unknowingly gave false testimony concerning the authenticity of the videotape.

Suspension

In *The Florida Bar v. Committe*, 136 So. 3d 1111 (Fla. 2014), the respondent was suspended for 3 years for attempting to intimidate the opposing party in a civil suit who had been awarded a judgment payable in equal shares by the respondent and the lawyer's client after the client's suit was dismissed as being meritless. When the pro se opposing party attempted to collect on the judgment, the respondent wrote a letter to the United States Attorney accusing the opposing party of attempted extortion to intimidate the opposing party into not pursuing the collection action. Similarly, in *The Florida Bar v. Lopez*, 406 So. 2d 1100 (Fla. 1982), the respondent was suspended for 1 year for urging 2 adverse parties to change their testimony in exchange for general releases from prosecution. In imposing this sanction, the court rejected a referee's recommendation of a 3-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." *Id.* at 1102. In *The Florida Bar v. Scheinberg*, 129 So. 3d 315 (Fla. 2013), the court imposed a 2-year suspension of a prosecutor when engaging in numerous personal communications with the presiding judge in a capital murder case which were not disclosed to defense counsel. Although none of the communications pertained to the pending case, the personal nature of the exchanges created the appearance of impropriety and caused harm to the judicial process.

Public Reprimand

The court imposes public reprimands on lawyers who engage in improper communications. For example, in *The Florida Bar v. Feinberg*, 760 So. 2d 933 (Fla. 2000), the court imposed a public reprimand on a prosecutor who spoke to the defendant about cooperating in his case to obtain a plea deal without defense counsel's knowledge or permission and later denying that the communication occurred. The court noted that "...attorneys must be extremely cautious in determining whether to speak with an individual who appears to be represented by counsel. Moreover, ...[lawyers] must be ever vigilant to avoid inducement into compromising conduct that is detrimental to our judicial system. [Lawyers] must also be forthright and truthful when confronted with a possible problem." *Id.* at 939-40.

700 VIOLATIONS OF OTHER DUTIES OWED AS A PROFESSIONAL

7.1 DECEPTIVE CONDUCT OR STATEMENTS AND UNREASONABLE OR IMPROPER FEES

Absent aggravating or mitigating circumstances and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving deceptive conduct or statements, improper division of fees, or unreasonable or improper fees.

(a) Disbarment. 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.

(b) Suspension. 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.

(c) Public Reprimand. 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.

(d) Admonishment. 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.

Comment

Disbarment

Disbarment is appropriate in cases when a lawyer knowingly engages in conduct that violates a duty owed as a professional with the intent to benefit the lawyer or another, and 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 an application for admission to the bar. In *The Florida Bar v. Orta*, 689 So. 2d 270 (Fla. 1997), the respondent was disbarred for making false statements and omissions of material facts during disciplinary reinstatement proceedings when the respondent attempted to conceal ownership of foreign real property and the existence of a foreign bank account, intentionally omitting the information during the bar's investigation into the respondent's fitness to resume the practice of law, making varying statements to the bar and to a bank official as to the origin of currency in his foreign bank account, and failing to disclose to the United State Probation Office the existence of foreign assets despite the requirement that the respondent do so. The respondent engaged in these dishonest acts during the time when the respondent should have been acting in the most upstanding manner.

Suspension

Suspension is appropriate when a 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 the lawyer does not intentionally abuse the professional relationship by engaging in deceptive conduct. In *The Florida Bar v Draughon*, 94 So. 3d 566 (Fla. 2012), the respondent was suspended from the practice of law for 1 year for transferring real property and other assets from a corporation he wholly owned and controlled, to himself without any consideration at a time when the transfers left the corporation unable to satisfy its obligations to existing creditors. In fraudulently transferring the property to himself, the lawyer acted with the actual intent to defraud his creditors and violated well-established law prohibiting fraudulent transfers. In *The Florida Bar v. Richardson*, 574 So. 2d 60 (Fla. 1990), the court suspended the respondent when the respondent did not mislead clients but routinely charged a fee to open the file, a monthly administrative-type fee, and billed clients for a pre-determined minimum of time spent on routine tasks, such as telephone calls and document preparation, even when those tasks took significantly less time than the amount billed. The court noted: “Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The [lawyer’s] fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that; it brings the court into disrepute and destroys the power to perform adequately the function of its creation.” *Id.* at 62.

Public Reprimand

Public reprimand is appropriate in most cases for 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 *The Florida Bar v. Levin*, 570 So. 2d 917 (Fla. 1990), the court publicly reprimanded a respondent for engaging in illegal gambling.

The court typically imposes public reprimands when lawyers engage in a single instance of charging an excessive or improper fee. The court stated in *The Florida Bar v. Rubin*, 709 So. 2d 1361, 1364 (Fla. 1998), “[t]his Court expects strict compliance with ... rules requiring

a client's written consent to [a lawyer's] fee regardless of the circumstances involved. These requirements must be diligently adhered to and enforced in order ... to preserve public confidence in the legal profession." In *The Florida Bar v. Kavanaugh*, 915 So. 2d 89 (Fla. 2005), the court determined that a public reprimand was warranted when a respondent collected a clearly excessive fee by improperly withholding 53% of net recovery for fees when the respondent was only entitled to 40% of any recovery amount pursuant to a contingency fee contract with the client.

The court also imposes public reprimands on lawyers who are negligent in supervising their employees. For example, in *The Florida Bar v. Roth*, 693 So. 2d 969, 972 (Fla.1997), a public reprimand was warranted for negligent supervision when a nonlawyer employee created a fraudulent facsimile cover sheet even though the lawyer did not personally engage in fabricating the facsimile transmission.

800 PRIOR DISCIPLINE ORDERS

8.1 VIOLATION OF COURT ORDER OR ENGAGING IN SUBSEQUENT SAME OR SIMILAR MISCONDUCT

Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving prior discipline:

(a) Disbarment. Disbarment is appropriate when a lawyer:

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

(2) has been suspended for the same or similar misconduct and intentionally engages in further similar acts of misconduct.

(b) Suspension. Suspension is appropriate when a lawyer has been publicly reprimanded for the same or similar conduct and engages in a further similar act of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer:

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

(2) has received an admonishment for the same or similar misconduct and engages in further similar acts of misconduct.

Comment

Disbarment

Disbarment is appropriate 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 and continues to practice law. The court generally imposes disbarment in these cases. As the court explained in *The Florida Bar v. Brown*, 635 So. 2d 13, 13–14 (Fla. 1994), “[c]lear violation of any order or disciplinary status that denies a lawyer the license to practice law generally is punishable by disbarment, absent strong extenuating factors.” In *The Florida Bar v. Heptner*, 887 So. 2d 1036, 1045 (Fla. 2004), the court held that disbarment is an appropriate sanction based solely on a respondent’s disregard of the court’s order of suspension.

Disbarment is also appropriate when a lawyer intentionally engages in the same or similar misconduct for which the lawyer was previously disciplined. In *The Florida Bar v. Mavrides*, 442 So. 2d 220, 220 (Fla. 1983), the court disbarred a respondent finding that “none of Mavrides’ derelictions, standing alone, would require disbarment. The cumulative demonstration of his acts, however, shows that he is unfit to practice law.” See also *The Florida Bar v. Bosecker*, 259 So. 3d 689, 699 (Fla. 2018) (“the Court views cumulative misconduct more seriously than an isolated instance of misconduct, and cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct”).

Suspension

Suspension is appropriate when a lawyer engages in the same or similar misconduct for which the lawyer was 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. Marcellus*, 249 So. 3d 538, 546 (Fla. 2018), “This Court has long held that ‘cumulative misconduct of a similar nature warrants an even more severe discipline than might dissimilar conduct.’”

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

9.1 DEFINITIONS

(a) “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.

(b) “Solicitation” has 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.

(c) “Direct mail communication” includes written or electronic communications as described in the Rules Regulating The Florida Bar.

9.2 COMMUNICATIONS ABOUT A LAWYER’S SERVICES

Absent mitigating or aggravating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving an advertisement that violates applicable rules:

(a) **Rehabilitative Suspension.** Rehabilitative suspension is appropriate when a lawyer:

(1) knowingly fails to file an advertisement for review, the advertisement does not comply with applicable rules, and that noncompliance results in actual injury; or

(2) disseminates an advertisement that contains multiple violations of applicable rules, and that noncompliance results in actual injury.

(b) Suspension. Suspension is appropriate when a lawyer negligently fails to file an advertisement for review, the advertisement contains a single violation of applicable rules, and that noncompliance results in actual injury.

(c) Public Reprimand. Public Reprimand is appropriate when a lawyer:

(1) knowingly fails to file multiple advertisements for review and the advertisements are otherwise in compliance with applicable rules; or

(2) negligently fails to file an advertisement for review, the advertisement does not comply with applicable rules, but the noncompliance does not result in actual injury.

(d) Admonishment. Admonishment is appropriate when a lawyer:

(1) fails to file an advertisement for review that is otherwise in compliance with applicable rules; or

(2) disseminates an advertisement that does not comply with applicable rules other than failure to include required content, but there is no potential for or actual injury.

Comment

Many lawyer advertising cases result in diversion. In more serious cases, discipline is imposed. In *The Florida Bar v. Doe*, 634 So. 2d 160 (Fla. 1994), the respondent was admonished for running a paid article that was not filed for review. In *The Florida Bar v. Greenspan*, 708 So. 2d 926 (Fla. 1998), the respondent received a public reprimand and probation for failure to file a yellow page advertisement for review. In *The Florida Bar v. Willmott*, 923 So. 2d 1165 (Fla. 2006), the respondent was publicly reprimanded for advertising "FREE INITIAL CONSULTATION" but charging a \$100 consultation fee unless the prospective client retained the respondent. In *The Florida Bar v. Budish*, 421 So. 2d 501 (Fla. 1982), the respondent was publicly reprimanded for advertising a \$75 fee to change a name, then charging the client \$100 plus \$44 in costs and for advertising a free consultation, then charging a client \$35 and performing no additional work. In *The Florida Bar v. Elster*, 770 So. 2d 1184 (Fla. 2000), the respondent was suspended for 3 years for, among other violations, having a business card using the misleading trade name of "Immigration Verification

Associates" and listing the respondent's interpreter as president where the respondent did not and never had any associates, the firm was never incorporated, and the interpreter was not president, finding the business card misleading on its face.

9.3 DIRECT MAIL COMMUNICATIONS

Absent mitigating or aggravating circumstances and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving an advertisement that violates applicable rules:

(a) Rehabilitation Suspension. Rehabilitation suspension is appropriate when a lawyer knowingly fails to file a direct mail communication for review, the direct mail communication does not comply with applicable rules, and that noncompliance results in actual injury.

(b) Suspension. Suspension is appropriate when a lawyer:

(1) knowingly fails to file multiple direct mail communications (for this standard "multiple" includes the same direct mail communication sent to more than one recipient) for review and the direct mail communications are otherwise in compliance with the applicable rules.

(2) negligently fails to file a direct mail communication for review, the direct mail communication fails to comply with 2 or more subdivisions of the rules applicable to direct mail communications, and that noncompliance results in actual injury.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer:

(1) disseminates a direct mail communication that fails to comply with 2 or more subdivisions of the rules applicable to direct mail communications that does not result in actual injury; or

(2) knowingly fails to file a direct mail communication that does not violate applicable rules.

(d) Admonishment. Admonishment is appropriate when a lawyer:

(1) negligently fails to file a direct mail communication that is otherwise in compliance with applicable rules; or

(2) disseminates a direct mail communication that fails to comply with 1 subdivision of the rules applicable to direct mail communications.

Comment

Lawyers have been disciplined for violations of the lawyer advertising rules on direct mail. In *The Florida Bar v. Letwin*, 70 So. 3d 578 (Fla. 2011), the respondent was suspended for 1 year followed by 3 years probation for sending a direct mail advertisement that falsely stated that the lawyer was engaged in a class action when the class had not been certified, that falsely stated that recipients as prospective class members had to hire the lawyer or their claims would not be recognized, that was not marked "advertisement," and that enclosed a contract that was not marked "SAMPLE" and "Do Not Sign."

9.4 SOLICITATION VIOLATIONS

Absent mitigating or aggravating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases of solicitation:

(a) Rehabilitation Suspension. Rehabilitation suspension is appropriate when a lawyer engages in solicitation, personally or through an employee or other agent, that involves fraud, deceit, or misrepresentation, or another violation of the Rules Regulating The Florida Bar, and results in actual injury.

(b) Suspension. Suspension is appropriate 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.

(c) Public Reprimand. Public reprimand is appropriate when a lawyer is negligent in supervising employees or agents who engage in prohibited solicitation involving fraud, deceit, or misrepresentation, or another violation of the Rules Regulating The Florida Bar, regardless of whether actual injury occurs.

(d) Admonishment. Admonishment is appropriate 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.

Comment

Improper solicitation is the most serious form of advertising violation. Lawyers have been suspended for in-person solicitation of prospective clients. In *The Florida Bar v. Dopazo*, 232 So. 3d 258 (Fla. 2017), the respondent was suspended for 1 year for soliciting the mother of a child in the hospital with a brain injury. In *The Florida Bar v. Wolfe*, 759 So. 2d 639 (Fla. 2000), the respondent was suspended for 1 year for direct solicitation of prospective clients by passing out brochures in areas affected by several tornados that devastated parts of the state.

A suspension is also appropriate when a lawyer knowingly solicits employment indirectly through another person. In *The Florida Bar v. Roberto*, 59 So. 3d 1101 (Fla. 2011), the court suspended a respondent for 1 year for, among other violations, asking a client, who was a criminal defendant, to refer prospective clients to him for representation in criminal cases. The respondent provided the client with a cellular telephone for use in effecting the referrals. The court noted that, although the respondent was inexperienced, he should have known it was improper to use a client to solicit business from potential clients.

9.5 FORFEITURE OF FEES

(a) 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.

(b) 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.

9.6 MITIGATION AND AGGRAVATION

(a) 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:

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

(2) 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; or

(3) the respondent sought guidance from the bar and followed the advice given with respect to the advertisement, direct mail communication, or solicitation, even though that advice may no longer be accurate or may have been erroneous at the time it was given.