

Lawyer Regulation

Standards for Imposing Lawyer Sanctions

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STANDARDS FOR IMPOSING LAWYER SANCTIONS AND BLACK LETTER RULES

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

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

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

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

1. "Injury" is harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. The level of injury can range from "serious" injury to "little or no" injury; a reference to "injury" alone indicates any level of injury greater than "little or no" injury.
2. "Intent" is the conscious objective or purpose to accomplish a particular result.
3. "Knowledge" is the conscious awareness of the nature or attendant circumstances of the conduct but without the conscious objective or purpose to accomplish a particular result.
4. "Negligence" is the failure of a lawyer to heed a substantial risk that circumstances exist or that a result will follow, which failure is a deviation from the standard care that a reasonable lawyer would exercise in the situation.
5. "Potential injury" is the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted

from the lawyer's misconduct.

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A. PURPOSE AND NATURE OF SANCTIONS

1.1 PURPOSE OF LAWYER DISCIPLINE PROCEEDINGS

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

1.2 PUBLIC NATURE OF LAWYER DISCIPLINE PROCEEDINGS

Ultimate disposition of lawyer discipline should be public.

1.3 PURPOSE OF THESE STANDARDS

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

B. SANCTIONS

2.1 SCOPE

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

2.2 DISBARMENT

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

- (1)** no application should be considered for five years from the effective date of disbarment; and
- (2)** the petition must show by clear and convincing evidence;

- (a) successful completion of the bar examination; and
- (b) rehabilitation and fitness to practice law.

2.3 SUSPENSION

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

2.4 EMERGENCY SUSPENSION

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

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

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.

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.

2.7 PROBATION

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

2.8 OTHER SANCTIONS AND REMEDIES

Other sanctions and remedies which may be imposed include:

- (a) restitution;
- (b) assessment of costs;
- (c) limitation upon practice;
- (d) appointment of a receiver;
- (e) requirement that the lawyer take the bar examination or professional responsibility examination;
- (f) requirement that the lawyer attend continuing education courses; and

(g) other requirements that the state's highest court or disciplinary board deems consistent with the purposes of lawyer sanctions.

2.9 RECIPROCAL DISCIPLINE

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

2.10 READMISSION AND REINSTATEMENT

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

C. FACTORS TO BE CONSIDERED IN IMPOSING SANCTIONS

3.0 GENERALLY

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

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

4.0 VIOLATIONS OF DUTIES OWED TO CLIENTS

4.1 FAILURE TO PRESERVE THE CLIENT'S PROPERTY

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

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

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

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

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

4.2 FAILURE TO PRESERVE THE CLIENT'S CONFIDENCES

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

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

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

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

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

4.3 FAILURE TO AVOID CONFLICTS OF INTEREST

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

4.31 Disbarment is appropriate when a lawyer, without the informed consent of the client(s):

(a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client; or

(b) simultaneously represents clients that the lawyer knows have adverse interests with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client; or

(c) represents a client in a matter substantially related to a matter in which the interests of a present or former client are materially adverse, and knowingly uses information relating to the representation of a client with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to a client.

4.32 Suspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of

that conflict, and causes injury or potential injury to a client.

4.33 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.

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

4.4 LACK OF DILIGENCE

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

4.41 Disbarment is appropriate when:

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

4.42 Suspension is appropriate when:

- (a) a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client; or
- (b) a lawyer engages in a pattern of neglect and causes injury or potential injury to a client.

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

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

4.5 LACK OF COMPETENCE

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

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

4.52 Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence, and causes injury or potential injury to a client.

4.53 Public reprimand is appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client; or
(b) is negligent in determining whether the lawyer is competent to handle a legal matter and causes injury or potential injury to a client.

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

4.6 LACK OF CANDOR

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

4.61 Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury to the client.

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

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

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

5.0 VIOLATIONS OF DUTIES OWED TO THE PUBLIC

5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the

lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:

5.11 Disbarment is appropriate when:

- (a) lawyer is convicted of a felony under applicable law; or
- (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or
- (c) a lawyer engages in the sale, distribution or importation of controlled substances; or
- (d) a lawyer engages in the intentional killing of another; or
- (e) a lawyer attempts or conspires or solicits another to commit any of the offenses listed in sections (a)-(d); or
- (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

5.12 Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

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

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

5.2 FAILURE TO MAINTAIN THE PUBLIC TRUST

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who engage in conduct that is prejudicial to the administration of justice or who state or imply an ability to influence improperly a government agency or official:

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

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

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

5.24 Admonishment is appropriate when a lawyer in an official or governmental position negligently fails to follow proper procedures or rules, and causes little or no actual or potential injury to a party or to the integrity of the legal process.

6.0 VIOLATIONS OF DUTIES OWED TO THE LEGAL SYSTEM

6.1 FALSE STATEMENTS, FRAUD, AND MISREPRESENTATION

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

6.11 Disbarment is appropriate when a lawyer:

- (a)** with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
- (b)** improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

6.12 Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld, and takes no remedial action.

6.13 Public reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld.

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

6.2 ABUSE OF THE LEGAL PROCESS

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

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

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

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

6.24 Admonishment is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes little or no injury to a party, or causes little or no actual or potential interference with a legal proceeding.

6.3 IMPROPER COMMUNICATIONS WITH INDIVIDUALS IN THE LEGAL SYSTEM

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

6.31 Disbarment is appropriate when a lawyer:

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

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

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

6.34 Admonishment is appropriate when a lawyer negligently engages in an improper communication with an individual in the legal system, and causes little or no actual or potential injury to a party, or

causes little or no actual or potential interference with the outcome of the legal proceeding.

7.0 VIOLATIONS OF OTHER DUTIES OWED AS A PROFESSIONAL

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

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

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

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

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

8.0 PRIOR DISCIPLINE ORDERS

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

8.1 Disbarment is appropriate when a lawyer:

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

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

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

8.3 Public reprimand is appropriate when a lawyer:

- (a) negligently violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or
- (b) has received an admonishment for the same or similar misconduct and engages in further similar acts of misconduct.

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

9.0 AGGRAVATION AND MITIGATION

9.1 GENERALLY

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

9.2 AGGRAVATION

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

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

- (a) prior disciplinary offenses; provided that after 7 or more years in which no disciplinary sanction has been imposed, a finding of minor misconduct shall not be considered as an aggravating factor;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution;
- (k) obstruction of fee arbitration awards by refusing or intentionally failing to comply with a final award.

9.3 MITIGATION

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

discipline to be imposed.

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

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical or mental disability or impairment;
- (i) unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay;
- (j) interim rehabilitation;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses;
- (n) prompt compliance with a fee arbitration award.

9.4 FACTORS WHICH ARE NEITHER AGGRAVATING NOR MITIGATING

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

- (a) forced or compelled restitution;
- (b) agreeing to the client's demand for certain improper behavior or result;
- (c) withdrawal of complaint against the lawyer;
- (d) resignation prior to completion of disciplinary proceedings;
- (e) complainant's recommendation as to sanction;
- (f) failure of injured client to complain;
- (g) an award has been entered in a fee arbitration proceeding.

10.0 STANDARDS FOR IMPOSING LAWYER SANCTIONS IN DRUG CASES

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

- 10.1** Upon the initial contact between The Florida Bar and an accused attorney involving a disciplinary matter, the accused attorney will be advised of the existence of F.L.A., Inc., and informed that good faith, ongoing, supervised rehabilitation with F.L.A., Inc., (when

appropriate) or a treatment program approved by F.L.A., Inc., (when appropriate) in an attempt at rehabilitation both prior to and subsequent to the case being forwarded to the grievance committee for investigation may be viewed as mitigation.

10.2 Absent aggravating or mitigating circumstances, a 91-day suspension followed by probation is appropriate when a lawyer engages in misdemeanor conduct involving controlled substances, regardless of the jurisdiction where such conduct occurs and regardless of whether or not the lawyer is formally prosecuted or convicted concerning said conduct.

10.3 Absent the existence of aggravating factors, the appropriate discipline for an attorney found guilty of felonious conduct as defined by Florida state law involving the personal use and/or possession of a controlled substance who has sought and obtained assistance from F.L.A., Inc., or a treatment program approved by F.L.A., Inc., as described in paragraph one above, would be as follows:

- (a) a suspension from the practice of law for a period of 91 days or 90 days if rehabilitation has been proven; and
- (b) a three-year period of probation, subject to possible early termination or extension of said probation, with a condition that the attorney enter into a rehabilitation contract with F.L.A., Inc., prior to reinstatement.

10.4 Reinstatement after the 91-day suspension imposed under either paragraph two or three above would take place on an expedited basis with a hearing before a referee.

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

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

11.0 MITIGATING FACTORS

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

12.0 AGGRAVATING FACTORS

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

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

13.0 Standards For Imposing Lawyer Sanctions In Advertising and Solicitation Rule Violations

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

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

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

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

Advertisements

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

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

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

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

- (1)** the name of at least 1 lawyer responsible for the content of the advertisement; or
- (2)** the location of 1 or more bona fide offices of the lawyer or lawyers who will actually perform the services that are the subject of the advertisement; or
- (3)** the required information in all applicable languages.

(d) when an advertisement:

- (1)** contains an illustration that is not objectively relevant to the need for legal services in specific matters, provided the illustration does not involve fraud, deceit, or misrepresentation;
- (2)** contains a verbal or visual description, depiction, or portrayal that is not objectively relevant to the selection of an attorney, provided that the description, depiction, or portrayal does not involve fraud, deceit, misrepresentation or manipulation; or
- (3)** contains a statement concerning fees for legal services but does not disclose the responsibility for costs associated with legal services;
- (4)** contains a statement that characterizes the quality of legal services, except for information on request.

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

- (1)** is articulated in more than one human voice; or
- (2)** contains prohibited background sound; or
- (3)** uses the voice or image of a person other than a lawyer who is a member of the firm whose services are advertised; or
- (4)** contains a prohibited background or location for the advertisement.

(f) when an advertisement:

- (1)** contains information concerning an area practice in which the lawyer does not currently engage in the practice of law;
- (2)** states or implies that the lawyer is a specialist, unless the lawyer is certified by The Florida Bar or an organization whose certification program has been accredited by the ABA;
- (3)** fails to contain an indication that the matter will be referred to another lawyer or law firm if that is the case;
- (4)** sets forth a fee schedule that the lawyer fails to honor for at least one year for yellow pages and other advertisements that are published annually and at least 90 days for other advertisements, unless the

- advertisement specifies a shorter period of time;
- (5)** contains a law firm name that is prohibited by the Rules Regulating The Florida Bar;
- (6)** contains a trade name that does not appear on the lawyer's letterhead, business cards, office sign, and fee contracts or does not appear with the lawyer's signature on pleadings and other documents;
- (7)** is paid for, in whole or in part, by a lawyer who is not in a firm whose services are being advertised;
- (8)** contains a statement concerning past success or otherwise creates an unjust expectation as to results that may be obtained;
- (9)** contains statements comparing the services of the advertising lawyer to the services of other lawyers, unless the comparison may be factually substantiated;
- (10)** contains a testimonial;
- (11)** contains statements or claims that are potentially false and misleading;
- (12)** contains statements or claims that are unsubstantiated; or
- (13)** fails to disclose material information that is necessary to prevent the advertisement from being actually or potentially false or misleading.

(g) when a lawyer negligently fails to file an advertisement for review and the advertisement contains a violation that does not constitute fraud, deceit, or misrepresentation.

(h) when another violation of applicable rules is involved that does not constitute fraud, deceit, or misrepresentation and a lawyer negligently fails to include the disclosure statement required for all non-exempt public print media advertisements.

13.2 Public Reprimand is appropriate:

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

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

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

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

- (1)** is articulated in more than one human voice; or
- (2)** contains prohibited background sound; or
- (3)** uses the voice or image of a person other than a

lawyer who is a member of the firm whose services are advertised; or
(4) contains a prohibited background or location for the advertisement.

13.3 Suspension is appropriate:

- (a) when a lawyer negligently fails to file an advertisement for review and the advertisement involves fraud, deceit, or misrepresentation, and results in potential for or actual injury.
- (b) when another violation of applicable rules is involved that constitutes fraud, deceit, or misrepresentation and a lawyer negligently fails to include the disclosure statement required for all non-exempt public print media advertisements.
- (c) when an advertisement:
 - (1) contains a material misrepresentation or omission of facts necessary to avoid a material misrepresentation;
 - (2) contains statements or implications that the lawyer may achieve results by means of violation of the Rules Regulating The Florida Bar;
 - (3) contains statements that are directly or impliedly false or misleading; or
 - (4) contains unfair or deceptive statements or claims.

13.4 Rehabilitation Suspension is appropriate:

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

Direct Mail Communications

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

- (a) when a lawyer fails to file a direct mail communication that is otherwise in compliance with applicable rules.
- (b) when a lawyer fails to include in a direct mail communication, provided that no other violation of applicable rules is involved:
 - (1) the name of at least 1 lawyer responsible for the content of the direct mail communication;
 - (2) the location of 1 or more bonafide offices of the lawyer or lawyers who will actually perform the services that are the subject of the direct mail communication;
 - (3) the required information in all applicable languages;
 - (4) the word "advertisement" in red ink on the first page of the direct mail communication, except for electronic mail communications;
 - (5) the word "advertisement" in red ink in the lower left-hand corner of the envelope containing the direct mail

communication, except for electronic mail communications;

(6) the words "legal advertisement" as the subject line of an electronic mail communication;

(7) a written statement detailing the background, training and experience of the lawyer or law firm;

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

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

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

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

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

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

(d) when a direct mail communication:

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

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

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

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

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

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

(7) fails to contain an indication that the matter will be

referred to another lawyer or law firm if that is the case;

- (8)** sets forth a fee schedule that the lawyer fails to honor for at least 90 days unless the direct mail communication specifies a shorter period of time;
- (9)** contains a law firm name that is prohibited by the Rules Regulating The Florida Bar;
- (10)** contains a trade name that does not appear on the lawyer's letterhead, business cards, office sign, and fee contracts or does not appear with the lawyer's signature on pleadings and other documents;
- (11)** is paid for, in whole or in part, by a lawyer who is not in a firm whose services are being advertised;
- (12)** contains a statement concerning past success or otherwise creates an unjust expectation as to results that may be obtained;
- (13)** contains statements comparing the services of the advertising lawyer to the services of other lawyers, unless the comparison may be factually substantiated;
- (14)** contains a testimonial;
- (15)** contains statements or claims that are potentially false and misleading;
- (16)** contains statements or claims that are unsubstantiated; or
- (17)** fails to disclose material information that is necessary to prevent the advertisement from being actually or potentially false or misleading.

(e) when a lawyer knowingly fails to include the disclosure statement required for all non-exempt public print media direct mail communications, provided that no other violation of applicable rules is involved.

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

- (1)** sends a direct mail communication concerning a personal injury, wrongful death, accident or disaster within 30 days of the incident; or
- (2)** sends a direct mail communication when the lawyer knows that the recipient does not want to receive direct mail communications from the lawyer; or
- (3)** sends a direct mail communication when the lawyer knows or reasonably should know that the recipient is unlikely to use reasonable judgment in employing a lawyer because of the person's physical, emotional or mental state; or
- (4)** sends a direct mail communication by registered mail or other restricted delivery; or
- (5)** states or implies that the direct mail communication has received approval from The Florida Bar; or
- (6)** sends a direct mail communication that resembles

legal pleadings or legal documents, except for electronic mail communications; or

(7) reveals the nature of the prospective client's legal problem on the outside of a direct mail communication if prompted by a specific occurrence, except for electronic mail communications.

13.6 Public reprimand is appropriate:

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

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

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

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

(d) when a direct mail communication:

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

13.7 Suspension is appropriate:

- (a) when a lawyer knowingly fails to file multiple direct mail communications (for this standard "multiple" shall include the same direct mail communication sent to more than one party) for review and the direct mail communications are otherwise in compliance with the applicable rules.
- (b) when a lawyer negligently fails to file a direct mail communication for review, the direct mail communication involves fraud, deceit, or misrepresentation, and results in actual injury.

13.8 Rehabilitation suspension is appropriate:

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

Solicitation Violations

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

13.9 Diversion is appropriate:

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

13.10 Public reprimand is appropriate:

- (a) when a lawyer is negligent in supervising employees or agents who engage in solicitation involving fraud, deceit, or misrepresentation regardless of whether actual injury occurs.
- (b) when a lawyer knowingly and personally engages in solicitation that does not involve fraud, deceit, or misrepresentation or through an employee or agent, and results in no actual injury.

13.11 Suspension is appropriate:

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

13.12 Rehabilitation suspension is appropriate:

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

INFORMATION ON REQUEST

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

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

(a) when information provided on request:

- (1)** fails to disclose the name of at least 1 lawyer responsible for the content;
- (2)** fails to disclose the location of 1 or more bonafide office locations of lawyer or law firm;
- (3)** fails to disclose all jurisdictions in which the lawyers or members of the law firm are licensed to practice in a website or homepage sponsored by the lawyer or law firm;
- (4)** contains an illustration that is not objectively relevant to the need for legal services in specific matters, provided the illustration does not involve fraud, deceit, or misrepresentation;
- (5)** contains a verbal or visual description, depiction, or portrayal that is not objectively relevant to the selection of an attorney, provided that the description, depiction, or portrayal does not involve fraud, deceit, misrepresentation or manipulation; or
- (6)** contains a statement concerning fees for legal services but does not disclose the responsibility for costs associated with legal services;
- (7)** contains an illustration that is not objectively relevant to the need for legal services in specific matters, provided the illustration does not involve fraud, deceit, or misrepresentation;
- (8)** contains a verbal or visual description, depiction, or portrayal that is not objectively relevant to the selection of an attorney, provided that the description, depiction, or portrayal does not involve fraud, deceit, misrepresentation or manipulation;
- (9)** contains a statement concerning fees for legal services but does not disclose the responsibility for costs associated with legal service;
- (10)** contains information concerning an area practice in which the lawyer does not currently engage in the practice of law;
- (11)** states or implies that the lawyer is a specialist, unless

the lawyer is certified by The Florida Bar or an organization whose certification program has been accredited by the ABA;

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

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

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

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

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

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

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

(19) contains a testimonial;

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

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

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

13.14 Public Reprimand is appropriate:

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

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

(b) when information on request:

- (1)** contains a material misrepresentation or omission of facts necessary to avoid a material misrepresentation;
- (2)** contains statements or implications that the lawyer

- may achieve results by means of violation of the Rules Regulating The Florida Bar;
- (3)** contains statements that are directly or impliedly false or misleading;
- (4)** contains unfair or deceptive statements or claims.

13.15 Suspension is appropriate:

- (a)** when information on request involves a violation that constitutes fraud, deceit, or misrepresentation, and knowingly:
 - (1)** fails to disclose the name of at least 1 lawyer responsible for the content;
 - (2)** fails to disclose the location of 1 or more bonafide office locations of lawyer or law firm; or
 - (3)** fails to disclose all jurisdictions in which the lawyers or members of the law firm are licensed to practice in a website or home page sponsored by the lawyer or law firm.

FORFEITURE OF FEES

13. 19 In addition to any sanction provided by these standards, the fee obtained from legal representation secured by use of an advertisement or direct mail communication that contains any knowing violation of applicable rules, other than knowing failure to file, or involves fraud, deceit, or misrepresentation may be forfeited as provided in the Rules Regulating The Florida Bar.

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

MITIGATION AND AGGRAVATION

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

- (a)** the respondent had a good faith claim or belief that the advertisement or direct mail communication was exempt from the filing requirements;
- (b)** no prior guidance in the form of a court order or opinion interpreting the applicable advertising or solicitation rules was available when the respondent disseminated the advertisement or direct mail communication in question and ethics counsel was unable to render an opinion.
- (c)** the respondent sought guidance from The Florida Bar and followed the advice given in respect of advertising, direct mail communications, or solicitation, even though such advice may have ceased to be accurate or may have been erroneous at the time it was given.

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