



AGENDA

Utah Supreme Court Oversight Committee for the Office of Professional Conduct

Location: Webex
Date: January 25, 2021
Time: 4:00 p.m. to 5:30 p.m.

Action: Welcome and approval of the November 9, 2020 minutes. Tab 1: Draft meeting minutes for November 9, 2020.	Judge Diana Hagen
Action: Rule 11-501 introductions of each committee member and general practice area	Judge Diana Hagen
Discussion: Ethics and Disciplinary Committee Staff Counsel position Tab 2: Position Description	Judge Diana Hagen
Discussion & Action: Review of Sanction Rules 11-582 through 11-586 Tab 3: Redline of Rules 11-582–11-586 (with Supreme Court feedback) Tab 4: Prior Rule 14-605 Tab 5: ABA Model Rule 10 Tab 6: ABA Model Sanctions Standards Tab 7: Supreme Court Opinion: <i>In re Steffensen</i>	Judge Diana Hagen
Other business – Schedule next meeting	

Committee Webpage: <https://www.utcourts.gov/utc/opc/>

Tab 1



Utah Supreme Court Oversight Committee for the Office of Professional Conduct

Draft Meeting Minutes

November 9, 2020

Via Webex

4:00–5:30 p.m.

Judge Diana Hagen, presiding

Attendees:

Judge Diana Hagen, Chair
Magistrate Judge Brooke Wells
Margaret Plane
Roger Smith
Art Berger
John Baldwin, Ex-officio member

Staff:

Larissa Lee
Marina Kelaidis, Recording Secretary

Guests:

Billy Walker, Office of Professional Conduct

1. Welcome and approval of the October 26, 2020 minutes: (Judge Diana Hagen)

Judge Diana Hagen welcomed everyone to the meeting and asked for approval of the minutes.

Judge Diana Hagen moved to approve the October 26, 2020 minutes. Margaret Plane seconded the motion, and it passed unanimously.

2. Discussion & Action—Continue reviewing public comments and make any necessary amendments to the rule drafts: (Judge Diana Hagen)

Rule 11-537:

Failure to answer charges:

No further recommendations.

Rule 11-542(f)(2), (3):

Additional rules of procedure; Complaints against OPC Counsel, Committee members, the Bar Commission, or Lawyers employed by the Bar:

The Committee agreed to amend the time to appeal to 21 days.

Judge Hagen moved to approve the proposed changes to Rule 11-542(f)(3). Judge Wells seconded the motion, and it passed unanimously.

Rule 11-561(a):

Accessing disciplinary information; Confidentiality:

Margaret Plane recommended replacing “issues a public remand” with “publishes notice of a public remand” to paragraph (a).

Judge Hagen moved to approve the proposed changes to Rule 11-561(a). Margaret Plane seconded the motion, and it passed unanimously.

Rule 11-561(e) and (f):

Accessing disciplinary information; Request for nonpublic information; Notice to the Respondent:

No further recommendations.

Rule 11-561(i):

Accessing disciplinary information; Participants’ duty:

No further recommendations.

Rule 11-563(b) and (d):

Interim discipline for threat of harm:

No further recommendations.

Rule 11-565(d):

Discipline by consent; Unsworn declaration of consent:

No further recommendations.

Rule 11-569:

Noncompliance with child support order, child visitation order, subpoena or order relating to paternity, or child support proceeding:

Billy Walker provided some historical context for this rule, explaining that this rule was originally created as a part of the Child Welfare Act under the Clinton Administration.

No further recommendations.

Rule 11-581(g)(4):
Sanctions; Probation:

No further recommendations.

Rule 11-581(g):
Sanctions; Probation:

Margaret Plane recommended amending paragraph (g)(1)(B) by replacing “the period of rehabilitation” with “probation.” Billy Walker suggested amending paragraph (g)(1)(D) by replacing “and” with “or.”

Judge Hagen moved to approve the proposed changes to Rule 11-581(g). Art Berger seconded the motion, and it passed unanimously.

Rule 11-584:
Sanctions for violating duties owed to the public:

Judge Wells recommended removing the examples of serious criminal conduct listed in paragraph (a)(1)(A). Mr. Berger recommended adding “intentionally” to paragraph (a)(1)(A).

Judge Hagen moved to approve the proposed changes to Rule 11-584(a)(1)(A). Judge Wells seconded the motion, and it passed unanimously.

Judge Hagen recommended amending paragraph (a)(2) by removing the reference to the examples in paragraph (a)(1)(A), as they are no longer included.

Judge Hagen moved to approve the proposed changes to Rule 11-584(a)(2). Art Berger seconded the motion, and it passed unanimously.

Rule 11-590:
Reinstatement following a suspension of no more than six months or probation:

No further recommendations.

Rule 11-533:
General procedures:

The Committee recommended amending paragraph (b) by removing the references to specific paragraphs within Utah Rules of Civil Procedure 5 and 6.

Judge Hagen moved to approve the proposed changes to Rule 11-533(b). Art Berger seconded the motion, and it passed unanimously.

Rule 11-530(g)(2)(B):

Unprofessional conduct Complaints; Dismissing the Complaint:

Judge Hagen recommended removing the reference to a “written notice” as well as removing the last sentence of the paragraph.

Judge Hagen moved to approve the proposed changes to Rule 11-530(g)(2)(B). Art Berger seconded the motion, and it passed unanimously.

3. Other business—Schedule next meeting: (all)

The meeting adjourned at 5:30 p.m. The next meeting will be held Monday, January 11, 2021 from 4:00–5:30 p.m.

Tab 2

JOB TITLE: Ethics & Discipline Committee Chair / Staff Counsel

REPORTS TO: The Supreme Court Oversight Committee for the Office of Professional Conduct

STATUS: Exempt

EFFECTIVE DATE: [_____]

Basic Functions: Oversee and administer the Ethics & Discipline Committee of the Utah Supreme Court in accordance with applicable rules.

Outline of Responsibilities:

1. Supervise the Committee, including its vice chairs, screening panels, and general operations.
2. Ensure that the Committee's work proceeds expeditiously.
3. Ensure that the Committee's rulings and screening panel determinations have a uniform basis for the judgments rendered.
4. Supervise the Clerk of the Ethics and Discipline Committee.
5. Draft and distribute to all necessary parties rulings on:
 - a. Appeals from dismissals of complaints by the Office of Professional Conduct.
 - b. Exceptions to recommendations of screening panels.
 - c. Requests to place matters in or remove matters from abeyance.
 - d. Requests to continue screening panel hearings.
 - e. Requests for subpoenas submitted to the Committee.
 - f. Any other motions or requests submitted to the Committee.
6. Draft and issue final orders of discipline following exceptions or the expiration of the time to file exceptions or seek other relief following the completion of screening panel determinations.
7. Coordinate proceedings on complaints filed against members of the Committee, Office of Professional Conduct counsel, Bar Commission members, and Bar employees in accordance with all applicable rules.
8. Coordinate membership, meetings, and training for the Committee and its screening panels.
9. Provide the screening panels with information concerning ethics and judicial decisions necessary to their activities.
10. Conduct meetings of the Committee, including training meetings.
11. Make recommendations to the Supreme Court concerning appointments to and removals from the Committee and its screening panels.
12. Make reports to the Supreme Court concerning the screening panel activities and the overall work of the Committee.
13. Oversee the administration of and make recommendations to the Supreme Court regarding rules applicable to the Committee.
14. Attend Oversight Committee meetings or any other committee meetings required by the job.

Tab 3

1 **Rule ~~14-604~~11-582. Factors to be considered in imposing sanctions.**

2 (a) The Committee and the court must consider the following factors in imposing
3 sanctions after a finding of Lawyer misconduct.~~The following factors should be~~
4 considered in imposing a sanction after a finding of lawyer misconduct:

5 (1) the presumptive sanction based on:

6 (A) the duty violated;

7 (B) the Lawyer's mental state;

8 (C) the potential or actual injury caused by the Lawyer's misconduct;
9 and

10 (2) the existence of aggravating or mitigating factors.

11 **(b) Multiple charges of misconduct.**

12 (1) Where a Respondent is found to have committed multiple charges of
13 misconduct, the ultimate sanction imposed must at least be consistent with the
14 sanction for the most serious instance of misconduct among the violations, and
15 may be greater than the sanction for the most serious misconduct.

16 (2) Either a pattern of misconduct or multiple instances of misconduct should be
17 considered as aggravating factors.

18

Commented [DH1]: Aren't these factors already balanced (baked in) to the next four rules? This suggests that the committee and court should reweigh the factors that the rule has already taken into account. Perhaps:
(a) the Committee and the court must consider the presumptive sanction contained in these rules and the existence of any aggravating or mitigating factors when imposing sanctions after a finding of Lawyer misconduct."
(delete subsections)
OR maybe we have too many presumptive sanctions and this rule should say:
(1) the presumptive sanction contained in these rules, or if no presumptive sanction exists, then (A)-(C).

1 **Rule ~~14-60511-583. Imposition of sanctions.~~Sanctions for violating duties owed to**
2 **clients.**

3 **(a) Failing to preserve the client's property.** The following sanctions are generally
4 appropriate when a Lawyer fails to preserve client property:

5 (1) Delicensure is generally appropriate when a Lawyer knowingly converts
6 client property and causes injury or potential injury to a client.

7 (2) Suspension is generally appropriate when a Lawyer knows or should know
8 that the Lawyer is dealing improperly with client property and causes injury or
9 potential injury to a client.

10 (3) Reprimand is generally appropriate when a Lawyer is negligent in dealing
11 with client property and causes injury or potential injury to a client.

12 (4) Admonition is generally appropriate when a Lawyer is negligent in dealing
13 with client property and causes little or no actual or potential injury to a client.

14 **(b) Failing to preserve the client's confidences.** The following sanctions are generally
15 appropriate when a Lawyer improperly reveals information related to representing a
16 client:

17 (1) Delicensure is generally appropriate when a Lawyer, with the intent to
18 benefit the Lawyer or another, knowingly reveals information relating to
19 representation of a client not otherwise lawfully permitted to be disclosed, and
20 this disclosure causes injury or potential injury to a client.

21 (2) Suspension is generally appropriate when a Lawyer knowingly reveals
22 information relating to the representation of a client not otherwise lawfully
23 permitted to be disclosed, and this disclosure causes injury or potential injury to
24 a client.

25 (3) Reprimand is generally appropriate when a Lawyer negligently reveals
26 information relating to representation of a client not otherwise lawfully

1 permitted to be disclosed and this disclosure causes injury or potential injury to a
2 client.

3 (4) Admonition is generally appropriate when a Lawyer negligently reveals
4 information relating to representation of a client not otherwise lawfully
5 permitted to be disclosed and this disclosure causes little or no actual or potential
6 injury to a client.

7 (c) Failing to avoid conflicts of interest. The following sanctions are generally
8 appropriate in cases involving conflicts of interest:

9 (1) Delicensure is generally appropriate when a Lawyer, without the informed
10 consent of client(s):

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

14 (B) simultaneously represents clients that the Lawyer knows have adverse
15 interests with the intent to benefit the Lawyer or another, and causes
16 serious or potentially serious injury to a client; or

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

22 (2) Suspension is generally appropriate when a Lawyer knows of a conflict of
23 interest and does not fully disclose to a client the possible effect of that conflict,
24 and causes injury or potential injury to a client.

25 (3) Reprimand is generally appropriate when a Lawyer is negligent in
26 determining whether the representation of a client may be materially affected by

1 the Lawyer's own interests, or whether the representation will adversely affect
2 another client, and causes injury or potential injury to a client.

3 (4) Admonition is generally appropriate when a Lawyer engages in an isolated
4 instance of negligence in determining whether the representation of a client may
5 be materially affected by the Lawyer's own interests, or whether the
6 representation will adversely affect another client, and causes little or no actual
7 or potential injury to a client.

8 (d) Lack of diligence. The following sanctions are generally appropriate when a
9 Lawyer fails to act with reasonable diligence and promptness in representing a client:

10 (1) Delicensure is generally appropriate when:

11 (A) a Lawyer abandons the practice and causes serious or potentially
12 serious injury to a client;

13 (B) a Lawyer knowingly fails to perform services for a client and causes
14 serious or potentially serious injury to a client; or

15 (C) a Lawyer engages in a pattern of neglect with respect to client matters
16 and causes serious or potentially serious injury to a client.

17 (2) Suspension is generally appropriate when:

18 (A) a Lawyer knowingly fails to perform services for a client and causes
19 injury or potential injury to a client; or

20 (B) a Lawyer engages in a pattern of neglect and causes injury or potential
21 injury to a client.

22 (3) Reprimand is generally appropriate when a Lawyer is negligent and does not
23 act with reasonable diligence in representing a client, and causes injury or
24 potential injury to a client.

Commented [DH2]: What does "abandons the practice" mean?

1 (4) Admonition is generally appropriate when a Lawyer is negligent and does
2 not act with reasonable diligence in representing a client, and causes little or no
3 actual or potential injury to a client.

4 (e) Lack of competence. The following sanctions are generally appropriate when a
5 Lawyer fails to provide competent representation to a client:

6 (1) Delicensure is generally appropriate when a Lawyer's course of conduct
7 demonstrates that the Lawyer does not understand the most fundamental legal
8 doctrines or procedures, and the Lawyer's conduct causes injury or potential
9 injury to a client.

Commented [DH3]: What does "the most fundamental legal doctrines" mean? (Although the court was less concerned when it heard that this was in the model rules.)

10 (2) Suspension is generally appropriate when a Lawyer engages in an area of
11 practice in which the Lawyer knows the Lawyer is not competent, and causes
12 injury or potential injury to a client.

13 (3) Reprimand is generally appropriate when a Lawyer:

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

16 (B) is negligent in determining whether the Lawyer is competent to handle
17 a legal matter and causes injury or potential injury to a client.

18 (4) Admonition is generally appropriate when a Lawyer engages in an isolated
19 instance of negligence in determining whether the Lawyer is competent to
20 handle a legal matter, and causes little or no actual or potential injury to a client.

21 (f) Lack of candor. The following sanctions are generally appropriate in cases where a
22 Lawyer engages in fraud, deceit, or misrepresentation directed toward a client:

23 (1) Delicensure is generally appropriate when a Lawyer knowingly deceives a
24 client with the intent to benefit the Lawyer or another, and causes serious or
25 potentially serious injury to a client.

1 (2) Suspension is generally appropriate when a Lawyer knowingly deceives a
2 client, and causes injury or potential injury to the client.

3 (3) Reprimand is generally appropriate when a Lawyer negligently fails to
4 provide a client with accurate or complete information, and causes injury or
5 potential injury to the client.

6 (4) Admonition is generally appropriate when a Lawyer engages in an isolated
7 instance of negligence in failing to provide a client with accurate or complete
8 information, and causes little or no actual or potential injury to the client.

9 ~~Absent aggravating or mitigating circumstances, upon application of the factors set out~~
10 ~~in Rule 14-604, the following sanctions are generally appropriate.~~

11 ~~(a) **Disbarment.** Disbarment is generally appropriate when a lawyer:~~

12 ~~(a)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a),~~
13 ~~(d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the~~
14 ~~lawyer or another or to deceive the court, and causes serious or potentially~~
15 ~~serious injury to a party, the public, or the legal system, or causes serious or~~
16 ~~potentially serious interference with a legal proceeding; or~~

17 ~~(a)(2) engages in serious criminal conduct, a necessary element of which includes~~
18 ~~intentional interference with the administration of justice, false swearing,~~
19 ~~misrepresentation, fraud, extortion, misappropriation, or theft; or the sale,~~
20 ~~distribution, or importation of controlled substances; or the intentional killing of~~
21 ~~another; or an attempt or conspiracy or solicitation of another to commit any of~~
22 ~~these offenses; or~~

23 ~~(a)(3) engages in any other intentional misconduct involving dishonesty, fraud,~~
24 ~~deceit, or misrepresentation that seriously adversely reflects on the lawyer's~~
25 ~~fitness to practice law.~~

26 ~~(b) **Suspension.** Suspension is generally appropriate when a lawyer:~~

1 ~~(b)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a),~~
2 ~~(d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential~~
3 ~~injury to a party, the public, or the legal system, or causes interference or~~
4 ~~potential interference with a legal proceeding; or~~

5 ~~(b)(2) engages in criminal conduct that does not contain the elements listed in~~
6 ~~Rule 14-605(a)(2) but nevertheless seriously adversely reflects on the lawyer's~~
7 ~~fitness to practice law.~~

8 ~~(c) **Reprimand.** Reprimand is generally appropriate when a lawyer:~~

9 ~~(c)(1) negligently engages in professional misconduct as defined in Rule 8.4(a),~~
10 ~~(d), (e), or (f) of the Rules of Professional Conduct and causes injury to a party,~~
11 ~~the public, or the legal system, or causes interference with a legal proceeding; or~~

12 ~~(c)(2) engages in any other misconduct that involves dishonesty, fraud, deceit, or~~
13 ~~misrepresentation and that adversely reflects on the lawyer's fitness to practice~~
14 ~~law.~~

15 ~~(d) **Admonition.** Admonition is generally appropriate when a lawyer:~~

16 ~~(d)(1) negligently engages in professional misconduct as defined in Rule 8.4(a),~~
17 ~~(d), (e), or (f) of the Rules of Professional Conduct and causes little or no injury to~~
18 ~~a party, the public, or the legal system or interference with a legal proceeding,~~
19 ~~but exposes a party, the public, or the legal system to potential injury or causes~~
20 ~~potential interference with a legal proceeding; or~~

21 ~~(d)(2) engages in any professional misconduct not otherwise identified in this~~
22 ~~rule that adversely reflects on the lawyer's fitness to practice law.~~

1 Rule 11-584. Sanctions for violating duties owed to the public.

2 (a) Failing to maintain personal integrity. The following sanctions are generally
3 appropriate when a Lawyer commits a criminal act that reflects adversely on the
4 Lawyer's honesty, trustworthiness, or fitness as a Lawyer in other respects; or in cases
5 with involving conduct involving dishonesty, fraud, deceit, or misrepresentation.

6 (1) Delicensure is generally appropriate when a Lawyer intentionally or
7 knowingly engages in criminal conduct that would be a felony under applicable
8 law and the conduct:

9 (A) a Lawyer intentionally engages in serious criminal conduct involves
10 dishonesty, fraud, deceit, or misrepresentation, including but not limited
11 to theft, fraud, extortion, bribery, obstruction of justice, and false
12 statements; or

13 (B) a Lawyer engages in any other intentional conduct involving
14 dishonesty, fraud, deceit, or misrepresentation that seriously adversely
15 reflects on the Lawyer's fitness to practice poses a serious danger to public
16 safety, including but not limited to assault, homicide, kidnapping, sexual
17 offenses, and distribution of controlled substances.

18 (2) Suspension is generally appropriate when a Lawyer intentionally or
19 knowingly engages in other criminal conduct that seriously adversely reflects on
20 the Lawyer's honesty, trustworthiness, or fitness to practice as a Lawyer in other
21 respects.

22 (3) Either Reprimand or admonition is generally appropriate when a Lawyer
23 negligently engages in any other criminal conduct that involves dishonesty,
24 fraud, deceit, or misrepresentation and that adversely reflects on the Lawyer's
25 fitness to practice law, depending on the potential or actual injury to the public
26 trust.

Commented [DH4]: Re-written with Billy in response to these comments from the court:

1) They're still concerned that it's too hard to distinguish between intentional and knowing conduct for purposes of the presumptive sanction.

2) They've expressed some interest in listing certain crimes as presumptively triggering delicensure, while still making clear that the list is non-exhaustive and the ultimate standard is as stated in the proposed rule.

Commented [DH5]: Court thought suspension should still involve intentional or knowing conduct but less severe conduct than set forth above.

Commented [DH6]: Rewritten with input from the Court. No real distinction between reprimand and admonition once we remove "negligently." Final phrase was added to give the decision maker some guidance on how to choose between the two, referring back to subsection (a)(1)(C) of Rule 11-582 ("potential or actual injury") and the specific type of injury this rule addresses.

1 ~~(4) Admonition is generally appropriate when a Lawyer engages in any other~~
2 ~~conduct that reflects adversely on the Lawyer's fitness to practice law.~~

3 (b) Failing to maintain the public trust. The following sanctions are generally
4 appropriate in cases involving public officials who engage in conduct that is prejudicial
5 to the administration of justice or who state or imply an ability to influence improperly
6 a government agency or official:

7 (1) Delicensure is generally appropriate when a Lawyer in an official or
8 governmental position knowingly misuses the position with the intent to obtain
9 a significant benefit or advantage for himself or another, or with the intent to
10 cause serious or potentially serious injury to a party or to the integrity of the legal
11 process.

12 (2) Suspension is generally appropriate when a Lawyer in an official or
13 governmental position knowingly fails to follow proper procedures or rules, and
14 causes injury or potential injury to a party or to the integrity of the legal process.

15 (3) Reprimand is generally appropriate when a Lawyer in an official or
16 governmental position negligently fails to follow proper procedures or rules, and
17 causes injury or potential injury to a party or to the integrity of the legal process.

18 (4) Admonition is generally appropriate when a Lawyer in an official or
19 governmental position engages in an isolated instance of negligence in not
20 following proper procedures or rules, and causes little or no actual or potential
21 injury to a party or to the integrity of the legal process.
22

Commented [DH7]: This section has to be limited to the "practice of law" - otherwise we would be interfering simply because the public official happens to have a bar license. What about the separation of powers issue?

1 Rule 11-585. Sanctions for violating duties owed to the legal system.

2 (a) False statements, fraud, and misrepresentation. The following sanctions are
3 generally appropriate when a Lawyer's conduct is prejudicial to the administration of
4 justice or involves dishonesty, fraud, deceit, or misrepresentation to a court:

5 (1) Delicensure is generally appropriate when a Lawyer, with the intent to
6 deceive the court, makes a false statement, submits a false document, or
7 improperly withholds material information, and causes serious or potentially
8 serious injury to a party, or causes a significant or potentially significant adverse
9 effect on the legal proceeding.

10 (2) Suspension is generally appropriate when a Lawyer knows that false
11 statements or documents are being submitted to the court or that material
12 information is improperly being withheld, and takes no remedial action, and
13 causes injury or potential injury to a party to the legal proceeding, or causes an
14 adverse or potentially adverse effect on the legal proceeding.

15 (3) Reprimand is generally appropriate when a Lawyer is negligent either in
16 determining whether statements or documents are false or in taking remedial
17 action when material information is being withheld and causes injury or
18 potential injury to a party to the legal proceeding, or causes an adverse or
19 potentially adverse effect on the legal proceeding.

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

25 (b) Abuse of the legal process. The following sanctions are generally appropriate when
26 a Lawyer fails to expedite litigation or bring a meritorious claim, or fails to obey any

Commented [DH8]: Is this too broad?

Should "fails to expedite" be "unreasonably delays"?

Should fails to "bring a meritorious action" be "brings a frivolous action"? Even then, what does that mean and is delicensure really the appropriate presumptive sanction or should these types of actions be sanctioned by the court presiding over the case?

Should there have to be a pattern of abusing the legal process?

1 obligation under the rules of a tribunal except for an open refusal based on an assertion
2 that no valid obligation exists:

3 (1) Delicensure is generally appropriate when a Lawyer knowingly violates a
4 court order or rule with the intent to obtain a benefit for the Lawyer or another,
5 and causes serious or potentially serious injury to a party or causes serious or
6 potentially serious interference with a legal proceeding.

7 (2) Suspension is generally appropriate when a Lawyer knows that the Lawyer is
8 violating a court order or rule, and causes injury or potential injury to a client or
9 a party, or causes interference or potential interference with a legal proceeding.

10 (3) Reprimand is generally appropriate when a Lawyer negligently falls to
11 comply with a court order or rule, and causes injury or potential injury to a client
12 or other party, or causes interference or potential interference with a legal
13 proceeding.

14 (4) Admonition is generally appropriate when a Lawyer engages in an isolated
15 instance of negligence in complying with a court order or rule, and causes little
16 or no actual or potential injury to a party, or causes little or no actual or potential
17 interference with a legal proceeding.

18 (c) **Improper communications with individuals in the legal system.** The following
19 sanctions are generally appropriate when a Lawyer attempts to influence a judge, juror,
20 prospective juror, or other official by means prohibited by law:

21 (1) Delicensure is generally appropriate when a Lawyer:

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

25 (B) makes an ex parte communication with a judge or juror with intent to
26 affect the outcome of the proceeding, and causes serious or potentially

Commented [DH9]: Does knowingly violating a rule really merit suspension? Again, should this be limited to a pattern of misconduct?

1 serious injury to a party, or causes significant or potentially significant
2 interference with the outcome of the legal proceeding; or
3 (C) improperly communicates with someone in the legal system other
4 than a witness, judge, or juror with the intent to influence or affect the
5 outcome of the proceeding, and causes significant or potentially
6 significant interference with the outcome of the legal proceeding.

7 (2) Suspension is generally appropriate when a Lawyer engages in
8 communication with an individual in the legal system when the Lawyer knows
9 that such communication is improper, and causes injury or potential injury to a
10 party or causes interference or potential interference with the outcome of the
11 legal proceeding.

12 (3) Reprimand is generally appropriate when a Lawyer is negligent in
13 determining whether it is proper to engage in communication with an individual
14 in the legal system, and causes injury or potential injury to a party or interference
15 or potential interference with the outcome of the legal proceeding.

16 (4) Admonition is generally appropriate when a Lawyer engages in an isolated
17 instance of negligence in improperly communicating with an individual in the
18 legal system, and causes little or no: (A) actual or potential injury to a party, or
19 (B) actual or potential interference with the outcome of the legal proceeding.
20

1 Rule 11-586. Sanctions for violating duties owed as a professional.

2 The following sanctions are generally appropriate in cases involving false or misleading
3 communication about the Lawyer or the Lawyer's services, including improper
4 communication of fields of practice, improper solicitation of professional employment
5 from a prospective client, unreasonable or improper fees, unauthorized practice of law,
6 improper withdrawal from representation, or failure to report professional misconduct.

7 (a) Delicensure is generally appropriate when a Lawyer knowingly engages in
8 conduct that is a violation of a duty owed as a professional with the intent to
9 obtain a benefit for the Lawyer or another, and causes serious or potentially
10 serious injury to a client, the public, or the legal system.

11 (b) Suspension is generally appropriate when a Lawyer knowingly engages in
12 conduct that is a violation of a duty owed as a professional and causes injury or
13 potential injury to a client, the public, or the legal system.

14 (c) Reprimand is generally appropriate when a Lawyer negligently engages in
15 conduct that is a violation of a duty owed as a professional and causes injury or
16 potential injury to a client, the public, or the legal system.

17 (d) Admonition is generally appropriate when a Lawyer engages in an isolated
18 instance of negligence that is a violation of a duty owed as a professional, and
19 causes little or no actual or potential injury to a client, the public, or the legal
20 system.

Commented [DH10]: What does "as a professional" mean? Should it be "duties to the legal profession"?

The items included in the list don't all relate to false or misleading statements (like charging unreasonable fees or not reporting misconduct).

Are the presumptive sanctions proportionate or overinclusive? For instance, this rule includes failure to report professional misconduct - is delicensure really the appropriate presumptive sanction if a lawyer knowingly fails to report misconduct?

Commented [DH11]: Is this rule too broad? Does a knowingly violation of ANY rule - even failure to report a violation of the rules merit these sanctions?

Maybe it doesn't make sense to lay out presumptive sanctions for EVERYTHING - maybe set forth some presumptive sanctions that are narrow and make sense and, for everything else, balance the three general factors.

1 **Rule ~~14-606~~11-587. Prior discipline orders.**

2 The following sanctions are generally appropriate in cases involving prior discipline.

3 (a) Delicensure is generally appropriate when a Lawyer:

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

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

11 (b) Suspension is generally appropriate when a Lawyer has been reprimanded
12 for the same or similar misconduct and engages in further similar acts of
13 misconduct that cause injury or potential injury to a client, the public, the legal
14 system, or the profession.

15 (c) Reprimand is generally appropriate when a Lawyer:

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

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

22 (d) An admonition is generally not an appropriate sanction when a Lawyer
23 violates the terms of a prior disciplinary order or when a Lawyer has engaged in
24 the same or similar misconduct in the past.

1 ~~Absent aggravating or mitigating circumstances, upon application of the factors set out~~
2 ~~in Rule 14-604, the following principles generally apply in cases involving prior~~
3 ~~discipline.~~

4 ~~(a) The district court or Supreme Court may impose further sanctions upon a~~
5 ~~lawyer who violates the terms of a prior disciplinary order.~~

6 ~~(b) When a lawyer engages in misconduct similar to that for which the lawyer~~
7 ~~has previously been disciplined, the appropriate sanction will generally be one~~
8 ~~level more severe than the sanction the lawyer previously received, provided~~
9 ~~that the harm requisite for the higher sanction is present.~~

10

Tab 4

Rule 14-605. Imposition of sanctions.

Absent aggravating or mitigating circumstances, upon application of the factors set out in Rule 14-604, the following sanctions are generally appropriate.

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

(a)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct with the intent to benefit the lawyer or another or to deceive the court, and causes serious or potentially serious injury to a party, the public, or the legal system, or causes serious or potentially serious interference with a legal proceeding; or

(a)(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; or the sale, distribution, or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or

(a)(3) engages in any other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

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

(b)(1) knowingly engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury or potential injury to a party, the public, or the legal system, or causes interference or potential interference with a legal proceeding; or

(b)(2) engages in criminal conduct that does not contain the elements listed in Rule 14-605(a)(2) but nevertheless seriously adversely reflects on the lawyer's fitness to practice law.

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

(c)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes injury to a party, the public, or the legal system, or causes interference with a legal proceeding; or

(c)(2) engages in any other misconduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

(d) Admonition. Admonition is generally appropriate when a lawyer:

(d)(1) negligently engages in professional misconduct as defined in Rule 8.4(a), (d), (e), or (f) of the Rules of Professional Conduct and causes little or no injury to a party, the public, or the legal system or interference with a legal proceeding, but exposes a party, the public, or the legal system to potential injury or causes potential interference with a legal proceeding; or

(d)(2) engages in any professional misconduct not otherwise identified in this rule that adversely reflects on the lawyer's fitness to practice law.

Tab 5

Rule 10

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Model Rules for Lawyer Disciplinary Enforcement

- A. **1** Types of Sanctions. Misconduct shall be grounds for one or more of the following sanctions:
- (1) Disbarment by the court.
 - (2) Suspension by the court for an appropriate fixed period of time not in excess of three years.
 - (3) Probation imposed by the court not in excess of two years, or imposed by the board or counsel with the consent of the respondent not in excess of two years; provided, however, that probation may be renewed for an additional [two year] period by consent or after a hearing to determine if there is a continued need for supervision. If the respondent objects to the board or counsel's imposition of probation, the misconduct must either be made the subject of formal charges or a recommendation that probation be imposed must be filed with the court. The conditions of probation should be stated in writing. Probation shall be used only in cases where there is little likelihood that the respondent will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised. Probation shall be terminated upon the filing of an affidavit by respondent showing compliance with the conditions and an affidavit by the probation monitor stating that probation is no longer necessary and summarizing the basis for that statement.
 - (4) Reprimand by the court or the board. A reprimand shall be in writing and either imposed in person or served upon the respondent by certified mail. A reprimand issued by the court shall be published in the official reports for the guidance of other lawyers. A reprimand imposed by the board shall be published in the journal of the state bar and in a newspaper of general circulation in each judicial district in which the lawyer maintained an office for the practice of law.
 - (5) Admonition by disciplinary counsel imposed with the consent of the respondent and the approval of the chair of a hearing committee. An admonition cannot be imposed after formal charges have been issued. Admonitions shall be in writing and served upon the respondent. They constitute private discipline since they are imposed before the filing of formal charges. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should an admonition be imposed. A summary of the conduct for which an admonition was imposed may be published in a bar publication for the education of the profession, but the lawyer shall not be identified. An admonition may be used in subsequent proceedings in which the respondent has been found guilty of misconduct as evidence of prior misconduct bearing upon the issue of the sanction to be imposed in the subsequent proceeding.
 - (6) Upon order of the court or the board, or upon stipulation, restitution to persons financially injured, disgorgement of all or part of the lawyer's or law firm's fee, and reimbursement to the client security [protection] fund.
 - (7) Upon order of the court or the board, or upon stipulation, assessment of the costs of the proceedings, including the costs of investigations, service of process, witness fees, and a court reporter's services, in any case where discipline is imposed or there is a transfer to disability inactive status.
 - (8) Limitation by the court on the nature or extent of the respondent's future practice.
- B. **2** Conditions. Written conditions may be attached to an admonition or a reprimand. Failure to comply with such conditions shall be grounds for reconsideration of the matter and prosecution of formal charges against the respondent.
- C. **3** Factors to be Considered in Imposing Sanctions. In imposing a sanction after a finding of lawyer misconduct, the court or board shall consider the following factors, as enumerated in the ABA Standards for Imposing Lawyer Sanctions.
- (1) whether the lawyer has violated a duty owed to a client, to the public, to the legal system, or to the profession;
 - (2) whether the lawyer acted intentionally, knowingly, or negligently;

- (3) the amount of the actual or potential injury caused by the lawyer's misconduct; and
- (4) the existence of any aggravating or mitigating factors.

D. 4 Public Nature of Sanctions. Disposition of lawyer discipline shall be public in cases of disbarment, suspension, probation, and reprimand. In all cases of public discipline by the court, the court shall issue a written opinion setting forth its justification for imposing the sanction in that particular case.

Commentary

Since the court has exclusive responsibility to license lawyers, it has the sole authority to remove the license. The duration of a suspension should reflect the nature and extent of the lawyer's misconduct and any mitigating or aggravating circumstances involved. See Rule 10(C). Where the misconduct is so severe that even a three-year suspension is not adequate, the lawyer should be disbarred.

The court should not suspend a lawyer indefinitely. It should specify the minimum period of time which must elapse before the lawyer may seek reinstatement.

Probation is the appropriate sanction when the respondent can perform legal services but has problems that require supervision. Probation should be used only in those cases where there is little likelihood that the respondent will harm the public during the period of rehabilitation and the conditions of probation can be adequately supervised. Probation may be an appropriate sanction in certain cases of disability, if the condition is temporary or minor, and capable of treatment without transfer to disability inactive status.

The court, the board, or counsel may impose probation. If probation is imposed by the board or by counsel, the consent of the respondent is required. If the respondent objects, the misconduct must either be made the subject of formal charges or a recommendation that probation be imposed must be filed with the court. The terms of the probation should specify periodic review of the order of probation, and provide means to supervise the progress of the respondent. If the probation monitor does not file an affidavit supporting termination of probation, disciplinary counsel should investigate to determine whether the period of probation should be extended, other discipline should be imposed or other appropriate action taken.

The capacity and resources of the agency to effectively supervise respondents on probation is limited. Usually probation should not be renewed more than once; if the problem cannot be resolved by probation of two years or less, probation may be an inadequate sanction and a suspension may be more appropriate. In exceptional circumstances, however, probation may be renewed for a specified period of time.

A reprimand is imposed only in cases of relatively minor misconduct. It can be imposed only after the filing of formal charges and a hearing. A reprimand should be in writing and imposed either in person or served upon the respondent by certified mail. A reprimand issued by the court should be published in the official reports for the guidance of other lawyers. A reprimand imposed by the board shall be published in the journal of the state bar and in a newspaper of general circulation in each judicial district in which the lawyer maintained an office for the practice of law.

Certain kinds of minor misconduct can be adequately disposed of without a full trial if the parties concur. The determination that admonition is the appropriate sanction in a particular case requires not only consent by the respondent, but also approval by a hearing committee chair, which should be in writing and based on full understanding of the relevant facts. If the respondent refuses to accept an admonition, however, the admonition is vacated and the matter disposed of by formal charges.

Admonitions should be in writing and served upon the respondent. They constitute private discipline since they are imposed before the filing of formal charges. There are situations in which it may be appropriate to impose private discipline. A private sanction in those cases informs the lawyer that his or her conduct is unethical but does not unnecessarily stigmatize a lawyer from whom the public needs no protection. To deter other lawyers from such conduct, the bar should publish a report

describing the facts in cases where admonitions are imposed but omitting the names of the disciplined lawyers. An admonition may be used in subsequent proceedings in which the respondent has been found guilty of misconduct as evidence of prior misconduct bearing upon the issue of the sanction to be imposed in the subsequent proceeding.

Whenever possible, the disciplinary process should facilitate restitution to the victims of the respondent's misconduct without requiring victims to institute separate proceedings at their own expense. If the value of the client's loss resulting from the respondent's misconduct is established, the respondent should be ordered to make restitution in that amount as promptly as circumstances permit.

Restitution when ordered should be made a part of the disciplinary order as a condition of reinstatement. The respondent must present proof of restitution as part of any application for reinstatement. See Rule 25(I). Failure to comply with the order for restitution may itself warrant discipline.

Whenever a respondent is found to have engaged in misconduct warranting the imposition of discipline, he or she should be required to reimburse the agency for the costs of the proceedings, other than attorney fees.

Placement of limitations on practice under Rule 10(A)(8) is a form of probation which may only be imposed by the court.

The Standards for Imposing Lawyer Sanctions were adopted by the ABA in 1986. These standards provide a framework to guide the courts and disciplinary agencies, including disciplinary counsel, in imposing sanctions, thereby providing the flexibility to select the appropriate sanction in each particular case of lawyer misconduct. The sanction imposed may depend on the presence of aggravating or mitigating factors. The following lists of aggravating and mitigating circumstances are found in Standard 9. Aggravating factors include: prior disciplinary offenses; dishonest or selfish motive; a pattern of misconduct; multiple offenses; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency; submission of false evidence, false statements or other deceptive practices during disciplinary process; refusal to acknowledge wrongful nature of conduct; vulnerability of victim; substantial experience in the practice of law; and indifference to making restitution. Mitigating factors include: absence of prior disciplinary record, absence of dishonest or selfish motive; personal or emotional problems; timely good faith effort to make restitution or to rectify consequences of misconduct; full and free disclosure to disciplinary board or cooperative attitude toward proceedings; inexperience in the practice of law; character or reputation; physical or mental disability or impairment; delay in disciplinary proceedings; interim rehabilitation; imposition of other penalties or sanctions; remorse; and remoteness of prior offenses. The Standards for Imposing Lawyer Sanctions set forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct. Use of the Standards will help achieve the degree of consistency in the imposition of lawyer discipline necessary for fairness to the public and the bar.

Ultimate disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.

The purposes of lawyer sanctions can best be served, and the consistency of those sanctions enhanced, if courts and disciplinary agencies articulate the reasons for the sanctions imposed. Courts perform a valuable service for the legal profession and the public when they issue opinions in lawyer discipline cases that explain the imposition of a specific sanction. Written opinions of the court not only serve to educate members of the profession about ethical behavior, but also provide precedent for subsequent cases.

Next - [RULE 11. GENERALLY.](#)

[Table of Contents](#)

Tab 6

STANDARDS FOR IMPOSING LAWYER SANCTIONS

AS APPROVED, FEBRUARY 1986
AND AS AMENDED, FEBRUARY 1992

I. PREFACE

A. Background

In 1979, the American Bar Association published the Standards for Lawyer Discipline and Disability Proceedings. [The Standards for Lawyer Discipline and Disability Proceedings have been superseded by the ABA Model Rules for Lawyer Disciplinary Enforcement (MRLDE)]¹ That book [the Standards] was a result of work by the Joint Committee on Professional Discipline of the American Bar Association. The Joint Committee was composed of members of the Judicial Administration Division and the Standing Committee on Professional Discipline of the American Bar Association. The task of the Joint Committee was to prepare standards for enforcement of discipline in the legal community.

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

It became evident that additional analysis was necessary in one important area -- that of appropriate sanctions for lawyer misconduct. The American Bar Association Standards for Lawyer Discipline and Disability Proceedings (hereinafter "Standards for Lawyer Discipline") do not attempt to recommend the type of discipline to be imposed in any particular case. The Standards merely state that the discipline to be imposed "should depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances" (Standard 7.1) [See generally Rule 10, ABA MRLDE].

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

As an example of this problem of inconsistent sanctions, consider the range in levels of sanctions imposed for a conviction for failure to file federal income taxes. In one jurisdiction, in 1979, a lawyer who failed to file income tax returns for one year was suspended for one year,² while, in 1980, a lawyer who failed to file income tax returns for two years was merely censured.³ Within a two-year period, the sanctions imposed on lawyers who converted their clients' funds included disbarment,⁴ suspension,⁵ and censure.⁶ The inconsistency of sanctions imposed by different jurisdictions for the same misconduct is even greater.

An examination of these cases illustrates the need for a comprehensive system of sanctions. In many cases, different sanctions are imposed for the same acts of misconduct, and the courts rarely provide any explanation for the selection of sanctions. In other cases, the courts may give reasons for their decisions, but their statements are too general to be useful. In still other cases, the courts may list specific factors to support a certain result, but they do not state whether these factors must be considered in every discipline case, nor do they explain whether these factors are entitled to equal weight.

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

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

While these standards will improve the operation of lawyer discipline systems, there is an additional factor which, though not the focus of this report, cannot be overlooked. In discussing sanctions for lawyer misconduct, this report assumes that all instances of unethical conduct will be brought to the attention of the disciplinary system. Experience indicates that such is not the case. In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement (the Clark Committee), was charged with the responsibility for evaluating the effectiveness of disciplinary enforcement systems. The Clark Committee concluded that one of the most significant problems in lawyer discipline was the reluctance of lawyers and judges to report misconduct.⁷ That same problem exists today. It cannot be emphasized strongly enough that lawyers and judges must report unethical conduct to the appropriate disciplinary agency.⁸ Failure to render such reports is a disservice to the public and the legal profession.

Judges in particular should be reminded of their obligation to report unethical conduct to the disciplinary agencies. Under Rule 2.15 of the ABA Model Code of Judicial Conduct, a judge who receives information indicating a substantial likelihood that another judge or a lawyer has violated the applicable rules of professional conduct is obligated to take appropriate action. This action includes making a report of the violation to the appropriate authority when the violation raises a substantial question about the judge’s fitness or the lawyer’s honesty trustworthiness or fitness.⁹ Frequently, judges take the position that there is no such need and that errant behavior of lawyers can be remedied solely by use of contempt proceedings and other alternative means. It must be emphasized that the goals of lawyer discipline are not properly and fully served if the judge who observes unethical conduct simply deals with it on an ad hoc basis. It may be proper and wise for a judge to use contempt powers in order to assure that the court maintains control of the proceeding and punishes a lawyer for abusive or obstreperous conduct in the court’s presence. However, the lawyer discipline system is in addition to and serves purposes different from contempt powers and other mechanisms available to the judge. Only if all lawyer misconduct is in fact reported to the appropriate disciplinary agency can the legal profession have confidence that consistent sanctions are imposed for similar misconduct.

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

Finally, the purposes of lawyer sanctions can best be served, and the consistency of those sanctions enhanced, if courts and disciplinary agencies throughout the country articulate the reasons for sanctions

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

[The Standards for Imposing Lawyer Sanctions were amended by the ABA House of Delegates on February 4, 1992. The amendments were proposed by the ABA Standing Committee on Professional Discipline as a result of its ongoing review of the courts' use of the Standards in lawyer disciplinary cases to assure their consistency with the developing case law.]

B. Methodology

The Standards for Imposing Lawyer Sanctions have been developed after an examination of all reported lawyer discipline cases from 1980 to June, 1984, where public discipline was imposed.¹⁰ In addition, eight jurisdictions, which represent a variety of disciplinary systems as well as diversity in geography and population size, were examined in depth. In these jurisdictions - Arizona, California, the District of Columbia, Florida, Illinois, New Jersey, North Dakota, and Utah - all published disciplinary cases from January, 1974 through June, 1984, were analyzed. In each case, data were collected concerning the type of offense, the sanction imposed, the policy considerations identified, and aggravating or mitigating circumstances noted by the court.¹¹

These data were examined to identify the patterns that currently exist among courts imposing sanctions and the policy considerations that guide the courts. In general, the courts were consistent in identifying the following policy considerations: protecting the public, ensuring the administration of justice, and maintaining the integrity of the profession. In the words of the California Supreme Court: "The purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the lawyer to continue in that capacity for the protection of the public, the courts, and the legal profession."¹² However, the courts failed to articulate any theoretical framework for use in imposing sanctions.

In attempting to develop such a framework, the Sanctions Committee considered a number of options. The Committee considered the obvious possibility of identifying each and every type of misconduct in which a lawyer could engage, then suggesting either a recommended sanction or a range of recommended sanctions to deal with that particular misconduct. The Sanctions Committee unanimously rejected that option as being both theoretically simplistic and administratively cumbersome.¹³

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

The Committee adopted a model that looks first at the ethical duty and to whom it is owed, and then at the lawyer's mental state and the amount of injury caused by the lawyer's misconduct. (See Theoretical Framework, p. 5, for a detailed discussion of this approach.) Thus, one will look in vain for a section of this report which recommends a specific sanction for, say, improper contact with opposing parties who are represented by counsel [Rule 4.2/DR 7-104(A)(1)],¹⁴ or for any other specific misconduct. What one will

find, however, is an organizational framework that provides recommendations as to the type of sanction that should be imposed based on violations of duties owed to clients, the public, the legal system, and the profession.

To provide support for this approach, the Sanctions Committee has offered as much specific data and guidance as possible from reported cases.¹⁵ Thus, with regard to each category of misconduct, the report provides the following:

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

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

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

II. THEORETICAL FRAMEWORK

These standards are based on an analysis of the nature of the professional relationship. Historically, being a member of a profession has meant that an individual is some type of expert, possessing knowledge of high instrumental value such that the members of the community give the professional the power to make decisions for them. In the legal profession, the community has allowed the profession the right of self-regulation. As stated in the Preamble to the ABA Model Rules of Professional Conduct (hereinafter “Model Rules”), “[t]he legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”¹⁶

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

- (1) What ethical duty did the lawyer violate? (A duty to a client, the public, the legal system, or the profession?)
- (2) What was the lawyer's mental state? (Did the lawyer act intentionally, knowingly, or

negligently?)

- (3) What was the extent of the actual or potential injury caused by the lawyer's misconduct? (Was there a serious or potentially serious injury?) and
- (4) Are there any aggravating or mitigating circumstances?

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

- (a) the duty of loyalty which (in the terms of the Model Rules and Code of Professional Responsibility) includes the duties to:
 - (i) preserve the property of a client [Rule 1.15/DR9-102],
 - (ii) maintain client confidences [Rule 1.6/DR4-101], and
 - (iii) avoid conflicts of interest [Rules 1.7 through 1.13, 2.2, 3.7, 5.4(c) and 6.3/ DR5-101 through DR 5-105, DR9-101];
- (b) the duty of diligence [Rules 1.2, 1.3, 1.4/DR6-101(A)(3)];
- (c) the duty of competence [Rule 1.1/DR6-101(A)(1) & (2)]; and
- (d) the duty of candor [Rule 8.4(c)/DR 1-102(A)(4) & DR7-101(A)(3)].

In addition to duties owed to clients, the lawyer also owes duties to the general public. Members of the public are entitled to be able to trust lawyers to protect their property, liberty, and their lives. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice [Rules 8.2, 8.4(b)&(c)/DR 1-102(A)(3)(4)&(5), DR 8-101 through DR 8-103, DR 9-101(c)].

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

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

- (a) restrictions on advertising and recommending employment [Rules 7.1 through 7.5/DR2-101 through 2-104];
- (b) fees [Rules 1.5, 5.4 and 5.6/DR2-106, DR2-107, and DR3-102];
- (c) assisting unauthorized practice [Rule 5.5/DR3-101 through DR3-103];

(d) accepting, declining, or terminating representation [Rules 1.2, 1.14, 1.16/DR2-110]; and

(e) maintaining the integrity of the profession [Rules 8.1&8.3/DR1-101 and DR 1-103].

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

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

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

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

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

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

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

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

III. STANDARDS FOR IMPOSING LAWYER SANCTIONS: BLACK LETTER RULES

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

DEFINITIONS

“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.

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

“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.

“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 of care that a reasonable lawyer would exercise in the situation.

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

A. PURPOSE AND NATURE OF SANCTIONS

1.1 Purpose of Lawyer Discipline Proceedings.

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

1.2 Public Nature of Lawyer Discipline.

Upon the filing and service of formal charges, lawyer discipline should be public, and disposition of lawyer discipline should be public in cases of disbarment, suspension, and reprimand. Only in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer, should private discipline be imposed.

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 Model Rules of Professional Conduct (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 the Model 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 sanction 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 petitioner must show by clear and convincing evidence:**
 - (a) successful completion of the bar examination;**
 - (b) compliance with all applicable discipline or disability orders or rules; and**
 - (c) 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. Generally, suspension should be for a period of time equal to or greater than six months, but in no event should the time period prior to application for reinstatement be more than three years. Procedures should be established to allow a suspended lawyer to apply for reinstatement, but a lawyer who has been suspended should not be permitted to return to practice until he has completed a reinstatement process demonstrating rehabilitation, compliance with all applicable discipline or disability orders, and fitness to practice law.

2.4 Interim Suspension

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

- (a) suspension upon conviction of a "serious crime" or,**

- (b) 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 Reprimand

Reprimand, also known as censure or public censure, 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 Admonition

Admonition, also known as private reprimand, is a form of non-public 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 a reprimand, an admonition or immediately following a suspension. 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

In jurisdictions where disbarment is not permanent, procedures should be established to allow a disbarred lawyer to apply for readmission. Procedures should be 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, 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 generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client.**
- 4.12 Suspension is generally 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 Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.**
- 4.14 Admonition is generally appropriate when a lawyer is negligent in dealing with client property and causes little or no actual or potential injury to a client.**

4.2 Failure to Preserve the Client's Confidences

Absent aggravating or mitigating circumstances, 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 generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly 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 generally 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 Reprimand is generally 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 Admonition is generally 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, 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 generally appropriate when a lawyer, without the informed consent of 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 generally 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 Reprimand is generally 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 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence 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 actual or potential injury to a client.

4.4 Lack of Diligence

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

4.41 Disbarment is generally 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 generally 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 causes injury or potential injury to a client.

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

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

4.5 Lack of Competence

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

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

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

4.53 Reprimand is generally appropriate when a lawyer:

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

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

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

4.6 Lack of Candor

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

4.61 Disbarment is generally appropriate when a lawyer knowingly deceives a client with the intent

to benefit the lawyer or another, and causes serious injury or potential serious injury to a client.

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

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

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

5.0 Violations of Duties Owed to the Public

5.1 Failure to Maintain Personal Integrity

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

5.11 Disbarment is generally appropriate when:

- (a) a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another; or an attempt or conspiracy or solicitation of another to commit any of these offenses; or
- (b) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

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

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

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

5.2 Failure to Maintain the Public Trust

Absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving public officials who 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 generally appropriate when a lawyer in an official or governmental position knowingly misuses the position with the intent to obtain a significant benefit or advantage for himself or another, or with the intent to cause serious or potentially serious injury to a party or to the integrity of the legal process.

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

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

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

6.0 Violations of Duties Owed to the Legal System

6.1 False Statements, Fraud, and Misrepresentation

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

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

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

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

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

6.2 Abuse of the Legal Process

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

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

6.22 Suspension is generally appropriate when a lawyer knows that he or she is violating 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 Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

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

6.3 Improper Communications with Individuals in the Legal System

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

6.31 Disbarment is generally appropriate when a lawyer:

- (a) intentionally tampers with a witness and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or**
- (b) makes an ex parte communication with a judge or juror with intent to affect the outcome of the proceeding, and causes serious or potentially serious injury to a party, or causes significant or potentially significant interference with the outcome of the legal proceeding; or**
- (c) improperly communicates with someone in the legal system other than a witness, judge, or juror with the intent to influence or affect the outcome of the proceeding, and causes significant or potentially significant interference with the outcome of the legal proceeding.**

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

6.33 Reprimand is generally appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes

injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

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

7.0 Violations of Other Duties as a Professional

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

7.1 Disbarment is generally appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed 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 generally 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 Reprimand is generally 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 Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence that is a violation of 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, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving prior discipline.

8.1 Disbarment is generally appropriate when a lawyer:

- (a) intentionally or knowingly violates the terms of a prior disciplinary order and such violation causes injury or potential injury to a client, the public, the legal system, or the profession; or**
- (b) has been suspended for the same or similar misconduct, and intentionally or knowingly engages in further similar acts of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.**

8.2 Suspension is generally appropriate when a lawyer has been reprimanded for the same or similar misconduct 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 Reprimand is generally appropriate when a lawyer:

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

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

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;**
- (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) illegal conduct, including that involving the use of controlled substances.

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 disability;

(i) mental disability or chemical dependency including alcoholism or drug abuse when:

(1) there is medical evidence that the respondent is affected by a chemical dependency or mental disability;

(2) the chemical dependency or mental disability caused the misconduct;

(3) the respondent's recovery from the chemical dependency or mental disability is demonstrated by a meaningful and sustained period of successful rehabilitation; and

(4) the recovery arrested the misconduct and recurrence of that misconduct is unlikely.

(j) delay in disciplinary proceedings;

(k) imposition of other penalties or sanctions;

(l) remorse;

(m) remoteness of prior offenses.

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.**

Tab 7

2021 UT 1

IN THE
SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE DISCIPLINE OF BRIAN W. STEFFENSEN

BRIAN W. STEFFENSEN,

Appellant,

v.

OFFICE OF PROFESSIONAL CONDUCT,

Appellee.

No. 20190146-SC

Heard October 13, 2020

Filed January 7, 2021

On Direct Appeal

Third District, Salt Lake
The Honorable Todd M. Shaughnessy
No. 110917794

Attorneys:

Brian W. Steffensen, Salt Lake City, for appellant (*pro se*)

Billy L. Walker, Adam C. Bevis, Salt Lake City, for appellee

JUSTICE HIMONAS authored the opinion of the Court, in which
CHIEF JUSTICE DURRANT, ASSOCIATE CHIEF JUSTICE LEE,
JUSTICE PEARCE, and JUSTICE PETERSEN joined.

JUSTICE HIMONAS, opinion of the Court:

INTRODUCTION

¶1 The saga of the discipline of Brian W. Steffensen has continued for nearly a decade, now coming before this court for the third time. Though the matter has revealed numerous legal complexities over the years, it returns to us today primarily on the straightforward issue of the appropriateness of the district court's

Opinion of the Court

order disbaring Steffensen. We agree with the district court's analysis and affirm the disbarment order.

¶2 We also affirm the district court's denial of Steffensen's motions regarding disqualification, prosecutorial misconduct, and for a continuance, finding no abuse of discretion.

BACKGROUND

¶3 Brian Steffensen has been a licensed attorney in Utah since 1980. During his legal career, Steffensen incorporated a number of law firms and "repeatedly failed to maintain accounting practices that would keep his law firms viable." *In re Discipline of Steffensen*, 2018 UT 53, ¶ 3, 428 P.3d 1104. An investigation by the Utah State Tax Commission established that Steffensen had failed to properly file withholding tax returns, remit withholding taxes, and submit monies collected from his employees in payment of their income tax obligations. In 2009, Steffensen was criminally charged with Failing to Render a Proper Tax Return, Intent to Evade, and Unlawful Dealing of Property by a Fiduciary.¹

¶4 In response to these charges, the Office of Professional Conduct ("OPC") filed a complaint against Steffensen for professional misconduct under rule 8.4 of the Utah Rules of Professional Conduct.

¶5 The OPC, of course, may, in an appropriate case, "bring a formal complaint charging an attorney with professional misconduct before the district court." *In re Discipline of Steffensen*, 2018 UT 53, ¶ 19 (citing SUP. CT. R. PROF'L PRAC. 14-511(a)). Rule 8.4 outlines professional misconduct, which includes "(b) commit[ting] a criminal act that reflects adversely on the lawyer's

¹ The Utah State Tax Commission's investigation established that Steffensen, in collecting his employees' income taxes, owed those employees a fiduciary duty and breached that duty by retaining the monies. In 2010, Steffensen entered into a diversion agreement with the State. The charges were reduced to an attempted crime pursuant to § 76-4-101 (the crime attempted being a violation of Utah Code § 76-801-1101(1)(c)(i), declaring guilty of a third degree felony any person who "knowingly and intentionally, and without a reasonable good faith basis, fails to make, render, sign or verify any [tax] return within the time required by law"). See *In re Discipline of Steffensen*, 2018 UT 53, ¶ 9. Steffensen then paid all taxes and penalties owed. *Id.*

Opinion of the Court

honesty, trustworthiness or fitness as a lawyer” and “(c) engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation.” UTAH R. PROF’L CONDUCT 8.4(b), (c). Once misconduct under rule 8.4 is established, the case proceeds to a determination of the appropriate sanction. *See* SUP. CT. R. PROF’L PRAC. 14-511(f). Rule 14-605 provides the standards by which a court shall impose sanctions; subsection (a) provides the circumstances under which disbarment is “generally appropriate.” Applicable to this case, rule 14-605(a)(3) allows disbarment when a lawyer “engages in . . . intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice law.” Notably, the language of subsection (a)(3) is nearly identical to that of rule 8.4(c).

¶6 In its complaint, the OPC charged that Steffensen’s “fail[ure] to make, render, sign, or verify any withholding tax return” in his fiduciary role was both a “criminal act that reflected adversely on his honesty, trustworthiness or fitness as a lawyer” under rule 8.4(b) and constituted “conduct involving dishonesty, fraud, deceit or misrepresentation” under rule 8.4(c).

¶7 In 2016, Steffensen filed before this court an interlocutory appeal in which we affirmed the district court’s determination of the proper burden of proof. *See In re Discipline of Steffensen*, 2016 UT 18, ¶¶ 1, 17, 373 P.3d 186. The Third District Court then found the evidence provided by the OPC of Steffensen’s misconduct sufficient to establish violations of rule 8.4(b) and (c) and thus entered an order to disbar Steffensen under rule 14-605(a)(1) and (a)(2) of the Supreme Court Rules of Professional Practice.

¶8 Steffensen appealed the decision to this court. On September 24, 2018, we affirmed the district court’s findings of misconduct under rule 8.4(b) and (c) but remanded the case for a new determination of the appropriate sanctions, finding reliance on rule 14-605(a)(1) and (a)(2) inappropriate.² *See In re Discipline of*

² Rule 14-605(a)(1) specifically enumerates the 8.4 violations to which it applies; subsections (b) and (c) are absent from this list. *See In re Discipline of Steffensen*, 2018 UT 53, ¶ 47. Rule 14-605(a)(2) requires that “a necessary element of [the crime] includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation,
(continued . . .)

Opinion of the Court

Steffensen, 2018 UT 53, ¶¶ 61–63. Having affirmed Steffensen’s rule 8.4 violations, our mandate on remand expressly precluded the district court from reopening the proceedings to new evidence. *Id.* at ¶ 60.³

¶9 On December 20, 2018, the district court held a scheduling conference during which the remanded sanctions hearing was scheduled for February 7, 2019. Steffensen participated actively in this conference as an attorney of record along with his attorney, Larry Reed. During this meeting, Steffensen noted that, for financial reasons, he expected to “take the laboring oar on this [matter] and not rely so much on Mr. Reed.” Despite this expectation, Steffensen agreed to the scheduling of the sanctions hearing on February 7. At no point in the conversation did Steffensen raise concerns about emotional difficulties regarding the case. Though under no obligation to do so, the district court then requested that each party submit proposed findings and “a short brief on the legal issues” by February 1, 2019. A week later, on December 27, Reed filed a motion for leave to withdraw as counsel. The district court granted the unopposed motion to withdraw on January 11, 2019. But the district court also ordered the February 7 date for the sanctions hearing remain in place.

¶10 On January 18, 2019, Steffensen sent a letter by email to the district court judge, stating that he had not yet received a notice to appear or appoint. Additionally, Steffensen expressed that he was struggling to find replacement counsel but did not feel he could represent himself *pro se* because of emotional complications he experienced in dealing with the case. On January 22, 2019, the judge’s clerk responded to Steffensen’s email and confirmed that the previously scheduled sanctions hearing date had not changed. Thereafter, Steffensen entered a limited appearance *pro se* on January 31, 2019, to file a motion under rule 63 of the Utah Rules of Civil Procedure to disqualify the district court judge. The motion to disqualify the district court judge was referred to the Associate Presiding Judge, who denied the motion

or theft,” none of which were a necessary element of Steffensen’s criminal acts. *See id.* at ¶ 54.

³ The mandate rule limits the district court on remand to act only within the scope of the appellate court’s order and enjoins deviation except in the most extreme circumstances. *See infra* ¶ 29.

Opinion of the Court

for failure to demonstrate extrajudicial bias on February 6, 2019, the day before the scheduled sanctions hearing.

¶11 On February 1, before his motion to disqualify was denied, Steffensen filed a motion to vacate the deadline for filing post-remand memoranda (which were due that day) and the February 7 sanctions hearing. Though the district court did not directly respond to this motion, it entered a minute entry on February 6, following the Associate Presiding Judge’s denial of the motion to disqualify, allowing Steffensen an extension.

¶12 Steffensen failed to respond to the February 6 minute entry, so the parties appeared for the originally-scheduled sanctions hearing on February 7, 2019. At the hearing, Steffensen stated that he had not seen the minute entry, which would have provided him with the additional time he had repeatedly requested. The hearing was then rescheduled for February 14, 2019, with Steffensen’s approval.

¶13 On February 7, Steffensen filed a post-remand memorandum stating that the OPC’s proposed findings and conclusions were inaccurate and unsupported. Specifically, the OPC’s proposed findings and conclusions stated that Steffensen had “prepared and signed W2s for his employees” when, in fact, completed W2s do not include signatures. Deeming this inaccuracy to reflect unethical conduct by the OPC, Steffensen morphed the February 7 memorandum into a motion for relief for prosecutorial misconduct. This motion was filed on February 13, one day before the rescheduled sanctions hearing.

¶14 The sanctions hearing finally took place on February 14, 2019. Steffensen took the opportunity to address the arguments made in his recent motions, but he did not request more time to submit his own findings and conclusions, nor did he make any new objections during the hearing.

¶15 Ultimately, the district court declined to consider the OPC’s proposed findings and conclusions and issued an independently-prepared ruling and order on February 19, 2019. The district court concluded that presumptive disbarment under rule 14-605(a)(3) was inappropriate for Steffensen’s rule 8.4(b) violation but *was* appropriate for his rule 8.4(c) violation. According to the district court, Steffensen’s breach of his fiduciary duties, failure to remit tax monies, and misrepresentation of his mishandling of those monies “seriously adversely reflect[ed] on [his] fitness to practice law.” (Second alteration in original). Steffensen now appeals this decision. We have jurisdiction

Opinion of the Court

pursuant to article VIII, section 4 of the Utah Constitution and Utah Code section 78A-3-102(3)(c).

STANDARD OF REVIEW

¶16 The Utah Constitution squarely places the authority to “govern the practice of law, including . . . the conduct and discipline of persons admitted to practice law,” within our sphere. UTAH CONST. art. VIII, § 4. As a result, professional discipline cases have taken on “a unique standard of review.” *In re Discipline of Steffensen*, 2018 UT 53, ¶ 14, 428 P.3d 1104. This unique standard allows us to pay deference to the determinations made by the district court but requires that we “make an independent determination of the correctness of the discipline the district court imposed.” *In re Discipline of Lundgren*, 2015 UT 58, ¶ 9, 355 P.3d 984 (citation omitted) (internal quotation marks omitted).

ANALYSIS

¶17 The focal issue in this appeal is whether the district court imposed an appropriate sanction of disbarment upon Steffensen. The district court was required, on remand, to elaborate on and clarify “its findings of fact and conclusions of law in its order regarding Mr. Steffensen’s sanctions for professional misconduct under rule 8.4(b) and (c)” of the Utah Rules of Professional Conduct. *In re Discipline of Steffensen*, 2018 UT 53, ¶ 60, 428 P.3d 1104. Importantly, we asked the district court to make this limited determination “[w]ithout reopening the proceedings.” *Id.* In response, the district court determined that presumptive disbarment under rule 14-605(a)(3) of the Supreme Court Rules of Professional Practice was appropriate for Steffensen’s rule 8.4(c) violation. We concur with the district court’s determination and affirm.

¶18 Related to the sanctions question are Steffensen’s appeals of the denial of his motions regarding disqualification, prosecutorial misconduct, and continuance. These motions do not violate the narrow mandate as they were filed in response to the district court’s invitation for proposed findings and conclusions, a process that did not “reopen[] the proceedings.” Accordingly, we address each of those issues too and affirm the district court’s denial, finding no abuse of discretion.

¶19 Finally, Steffensen appeals the district court’s denial of his “oral and written motions to stay these proceedings, reopen the evidence, and vacate prior orders.” The district court denied these motions because they improperly sought to “reopen the

Opinion of the Court

proceedings” and thus fell outside the scope of the narrow mandate. Again, we affirm, finding no abuse of discretion.

¶20 We begin with an analysis of the motions that do not go directly to the order of disbarment. Finding no abuse of discretion, we affirm the district court’s disposition of these motions and then proceed to an analysis of the district court’s substantive order of disbarment, which we also affirm.

I. STEFFENSEN’S TECHNICAL ARGUMENTS

¶21 Following our order of remand, the district court solicited proposed findings of fact and conclusions of law from each party to aid in the court’s determination of the appropriate sanction. This is when the maxim that no good deed goes unpunished kicked in. The district court’s apparent effort to “be fair [and] give all [parties] an opportunity to respond” with their own proposed findings and conclusions quickly “mushroomed,” as the district court aptly noted, “into something that seems to be far beyond what the Supreme Court ever intended.” Transcript of Sanctions Hearing, *Off. of Prof’l Conduct v. Steffensen*, No. 110917794 at 9:3-6 (Feb. 14, 2019). While the OPC timely submitted its proposed findings and conclusions, Steffensen took this as an opportunity to submit all manner of requests and motions but not his own findings and conclusions. Three of his motions are reviewable for abuse of discretion, given that they arose in response to the district court’s invitation for each party’s findings and conclusions and did not seek to reopen the proceedings; as such, they are not governed by our narrow mandate. The rest of Steffensen’s motions, however, are beyond the scope of our mandate and are inappropriate for review on appeal.

A. The District Court Did Not Abuse Its Discretion in Denying Steffensen’s Motions regarding Disqualification, Prosecutorial Misconduct, and for a Continuance

¶22 In response to the district court’s December 20, 2018 invitation for proposed findings and conclusions, Steffensen raised three issues: (1) the motion to disqualify; (2) prosecutorial misconduct; and (3) request for a continuance. None of these issues are governed by the narrow mandate on remand; they are independent of the already-determined and binding issues on remand as they have arisen in response to the district court’s request for findings and conclusions and do not seek to reopen the proceedings. Nevertheless, this court affirms the district court’s treatment of these issues as they are inadequately briefed, constitute (at best) harmless error, or are otherwise properly decided.

Opinion of the Court

¶23 In response to Steffensen’s motion to disqualify, the district court judge referred the motion to the associate presiding judge for resolution. *See* UTAH R. CIV. P. 63(c). The associate presiding judge then denied Steffensen’s motion to disqualify, finding that Steffensen failed to “demonstrate that the alleged bias stems from an extrajudicial source.” Steffensen’s appeal before this court does not seek to address whether the associate presiding judge abused his discretion in denying the motion to disqualify; rather, Steffensen seeks to rewrite rule 63 of our rules of civil procedure with a more favorable standard for disqualification. His argument exceeds the scope of rule 63 and is inadequately briefed to challenge the articulated standard of a rule of civil procedure.⁴ We therefore affirm the denial of Steffensen’s motion to disqualify, seeing no abuse of discretion.

¶24 The district court also properly denied Steffensen’s motions alleging prosecutorial misconduct by the OPC. Steffensen developed his theory of prosecutorial misconduct based on the OPC’s incorrect statement in its proposed findings and conclusions that Steffensen had signed the W2s at issue. These motions attempted to raise a matter that is not at issue in this disciplinary proceeding. Further, even if the matter were at issue, the denial of the motions was harmless error. In defining “harmless error,” rule 61 of the Utah Rules of Civil Procedure provides that “[t]he court . . . must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” *See also State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992) (defining a harmless error as an error that is “sufficiently inconsequential that we conclude there is no reasonable likelihood that the error affected the outcome of the proceedings” (citation

⁴ Steffensen provides no legal support for his argument that this court must amend the standard of disqualification in this setting from “actual bias” to “appearance of bias.” His argument rests on policy concerns that the “actual bias” standard is “impossible to ever be met.” But stronger policy considerations cut against Steffensen’s argument: for example, lowering the standard for disqualification would create an incentive for litigants to misbehave in litigation and then seek to remove the judge based on her adverse rulings. Indeed, while we often flag interesting rule-based issues for review by our relevant committees, there is nothing in Steffensen’s argument on this point that causes us to think this is a real issue. Accordingly, we decline to flag this issue for committee review.

Opinion of the Court

omitted) (internal quotation marks omitted). Here, Steffensen’s substantial rights have not been violated: the district court acknowledged the OPC’s error, noted that it had been corrected in an amended proposed findings and conclusions, and stated that “neither [the district court]’s original findings nor the Supreme Court’s opinion” say Steffensen had signed the W2s. The error amounted, essentially, to an “inconsequential” typo (later corrected) upon which no court had relied. As such, we find the district court did not abuse its discretion here.

¶25 Finally, we find that the district court did not abuse its discretion in denying Steffensen’s request for more time to obtain counsel. Steffensen’s request was neither adequately briefed nor properly submitted as a motion for continuance. Instead, Steffensen made his pitch by letter sent by email to the district court judge.⁵ Because the request was not properly briefed and submitted, the OPC had no opportunity to respond. This alone is a sufficient basis to deny the request.

¶26 Even if we were to consider the merits, we would find that the district court did not abuse its discretion in denying his request. The district court has “substantial discretion in deciding whether to grant continuances . . . and [its] decision will not be overturned unless that discretion has been clearly abused.” *Brown v. Glover*, 2000 UT 89, ¶ 43, 16 P.3d 540 (quoting *Christenson v. Jewkes*, 761 P.2d 1375, 1377 (Utah 1988)) (internal quotation marks omitted). Given this broad discretion in the district court, “we adhere to our standard level of deference and ‘[s]o long as there is some evidence, including reasonable inferences, from which findings . . . can reasonably be made, our inquiry stops.’” *In re Discipline of Steffensen*, 2018 UT 53, ¶ 29, 428 P.3d 1104 (alterations in original) (quoting *State v. Booker*, 709 P.2d 342, 345 (Utah 1985)).

⁵ Rule 7(b) of the Utah Rules of Civil Procedure requires that “[a] request for an order must be made by motion.” Rule 7(c) lays out the required elements of a motion, including that the motion be titled “substantially as: ‘Motion [short phrase describing the relief requested].’” UTAH R. CIV. P. 7(c). Per rule 7(g), the moving party must file a request to submit the motion for decision (otherwise, it will not be considered by the court). *Id.* 7(g). Steffensen’s letter, emailed directly to the district court’s clerk rather than submitted by eFiling, did not adhere to any of these procedural rules.

Opinion of the Court

¶27 Despite the district court’s broad discretion and this court’s deference to the findings of the court below, abuse of discretion is found “if [the district court’s] decision is ‘clearly unreasonable and arbitrary.’” *Clarke v. Clarke*, 2012 UT App 328, ¶ 19, 292 P.3d 76 (citation omitted). For example, courts have found abuse of discretion in the denial of a motion for continuance when a party “has made timely objections, given necessary notice, and has made a reasonable effort to have the . . . date changed for good cause.” *Griffiths v. Hammon*, 560 P.2d 1375, 1376 (Utah 1977). Steffensen, however, has provided this court no reason to depart from our standard deference to the district court’s discretion. He delayed objecting to the scheduling of the sanctions hearing and providing notice of his need for more time to obtain counsel, despite knowing for several weeks that Reed had filed a motion for leave to withdraw as counsel. Further, nothing in the record suggests that Steffensen had begun a search for new counsel upon the filing of Reed’s motion to withdraw on December 27, 2018, which indicates that Steffensen’s January 18, 2019 request for more time to obtain counsel was not made for good cause.⁶ We also note that Steffensen was an attorney of record on this case prior to Reed’s withdrawal.⁷ *See, e.g., In re*

⁶ The timeline of events following the withdrawal of Steffensen’s attorney is important in understanding why the district court did not abuse its discretion in denying his request for continuance. First, Steffensen knew at least as early as December 27, 2018, of his attorney’s intent to withdraw as counsel when Reed filed his Motion for Leave to Withdraw as Counsel. Though it was not until January 11, 2019, when the court granted Reed’s motion, Steffensen had at least two weeks-notice prior to that date, time in which he could have begun seeking counsel. As mentioned above, Steffensen provides no proof that he had begun such a search in good faith. Instead, he waited until January 18 to informally request more time, a request the district court had no obligation to grant. *See, e.g., Layton City v. Longcrier*, 943 P.2d 655, 659 (Utah Ct. App. 1997).

⁷ Steffensen engaged actively in his role as counsel of record as late as the December 20, 2018 scheduling conference. Notably, Steffensen admitted during that conference that he was anticipating “tak[ing] the laboring oar . . . and not rely[ing] so much on Reed for financial issues” even before Reed’s withdrawal, which suggests to this court that Steffensen was prepared to continue representing himself *as early as December 20*,
(continued . . .)

Opinion of the Court

Discipline of Steffensen, 2018 UT 53 (listing Steffensen as the attorney for himself); Transcript of Scheduling Conference, *Off. of Prof'l Conduct v. Steffensen*, No. 110917794 at 2 (Dec. 20, 2018). This fact further abets our conclusion that his efforts to delay the proceedings were not for good cause because he was already actively representing himself before Reed's withdrawal and thus cannot argue in good faith that he was ever without counsel.⁸

2018, fifty-four days prior to the ultimate sanctions hearing. Indeed, Steffensen was proceeding "for oneself, on one's own behalf" as the Latin translation of *pro se* suggests, *Pro se*, *Cornell L. Sch. Legal Info. Inst.*, https://www.law.cornell.edu/wex/pro_se (last visited Dec. 4, 2020), but he cannot be said to have been "proceed[ing] without legal counsel," *id.*, when he actively represented his own interests and listed himself as counsel of record.

⁸ Steffensen attempts to buttress his argument for additional time to obtain counsel by noting his emotional incapacity on this disciplinary matter. On numerous occasions, Steffensen has cited extreme emotional difficulty in dealing with this case, suggesting he was unable to effectively represent himself *pro se*. This court does not doubt such an experience can take an emotional toll. However, Steffensen did not raise this concern with the district court in a timely or effective manner. First, Steffensen made no mention of emotional difficulties in representing himself during the December 20, 2018 scheduling conference. To the contrary, he participated in his own defense as counsel of record. And he said that he would be handling more of his defense for financial reasons. He first raised the issue with the district court in his January 18, 2019 letter, in which he likened his experience to "having a form of PTSD." Yet at this point, as the hearing date neared, he did not file a motion to continue. Instead, he turned his attention to disqualify the judge, which was unavailing. Six days before the hearing, when the parties' post-remand memoranda were due, Steffensen finally filed a motion to continue (and to vacate the memoranda due date). The court continued the hearing for a week. This may not have been everything Steffensen wanted, but it was far from an abuse of discretion, especially in light of the delayed manner in which Steffensen raised the issue. We also note that attorneys have the opportunity to claim inability to defend themselves in disciplinary proceedings, wherein the proceedings are deferred and the attorneys are retained on disability status. *See* SUP. CT. R. PROF'L PRAC. 14-523(b). We note that Steffensen has not

(continued . . .)

Opinion of the Court

Thus, because Steffensen did not timely object, give necessary notice, or make reasonable efforts to postpone the sanctions hearing for good cause, we cannot find that the district court abused its discretion in denying his request for continuance.⁹

¶28 For these reasons, we hold the district court did not abuse its discretion in denying Steffensen’s motions regarding disqualification, prosecutorial misconduct, and continuance.

B. The Mandate Rule Precludes Adjudication of Steffensen’s “Oral and Written Motions to Stay These Proceedings, Reopen the Evidence, and Vacate Prior Orders”

¶29 In remanding cases to lower courts, appellate courts utilize a law-of-the-case doctrine known as the mandate rule, which “dictates that a prior decision of a district court becomes mandatory after an appeal and remand.” *IHC Health Servs., Inc. v. D & K Mgmt., Inc.*, 2008 UT 73, ¶ 28, 196 P.3d 588. In other words, “a decision made on an issue during one stage of a case is binding in successive stages of the same litigation.” *Id.* ¶ 26 (citation omitted) (internal quotation marks omitted). Notably for this case,

sought this opportunity, as he continues to represent clients in other matters.

⁹ It is important to note that the OPC failed to defend the district court’s decision to deny Steffensen’s request for continuance in its briefing. The OPC painted with too broad a brush in arguing that *all* of Steffensen’s motions and requests were “correctly denied . . . because of the mandate rule.” As discussed above, *supra* ¶¶ 22-28, Steffensen’s motion for continuance arose from the district court’s request for findings and conclusions and did not seek to “reopen the proceedings,” *Steffensen*, 2018 UT 53, ¶ 60, in violation of the mandate rule. The OPC does not advance an argument, independent of the mandate rule, supporting the denial of this motion, which places this court in a difficult position. However, the district court’s findings are supported by the evidence, *see supra* ¶ 27, ¶ 27 n. 6-8, and our decision is ultimately guided by our deference to the district court. *See, e.g., In re Discipline of Reneer*, 2014 UT 18, ¶ 11, 325 P.3d 104 (explaining that in disciplinary proceedings this court must “presume that the [lower tribunal’s] findings of fact are correct, although we may set those findings aside if they are not supported by the evidence” (alteration in original) (citation omitted) (internal quotation marks omitted)).

Opinion of the Court

“[w]hen an appeals court vacates a judgment with narrowing instructions which direct the district court to consider certain issues, the district court does not have a mandate to reconsider other issues.” *Wasatch Cnty. v. Okelberry*, 2015 UT App 192, ¶ 32, 357 P.3d 586 (alteration in original) (citation omitted) (internal quotation marks omitted). Further, issues decided by an appellate court “generally bind [the appellate] court should the case return on appeal after remand.” *Id.* ¶ 30 (quoting *Gildea v. Guardian Title Co. of Utah*, 2001 UT 75, ¶ 9, 31 P.3d 543) (internal quotation marks omitted).

¶30 The remand ordered by this court in 2018 is no exception to the mandate rule. We ordered the district court solely to make a “new determination of the appropriate sanctions,” *In re Discipline of Steffensen*, 2018 UT 53, ¶ 63, instructing the district court to “be detailed in [its] findings and to be clear in tying the sanction imposed to the professional misconduct found.” *Id.* ¶ 60. We were specific in directing the court to reconsider its order “[w]ithout reopening the proceedings.” *Id.*

¶31 Despite this narrow mandate, Steffensen made numerous “oral and written motions to stay these proceedings, reopen the evidence, and vacate prior orders.” These motions were, at best, thinly-veiled efforts to reopen the case to new evidence despite this court’s binding determinations of Steffensen’s violations of rule 8.4(b) and (c). The district court found it had “no jurisdiction to entertain these requests” under its mandate on remand, an entirely correct conclusion.

II. DISBARMENT IS APPROPRIATE UNDER RULE
14-605(A)(3)

¶32 This court recognizes the severity of disbarment, understanding it to be “the harshest sanction available in the realm of attorney misconduct.” *In re Discipline of Lundgren*, 2015 UT 58, ¶ 11, 335 P.3d 984. We do not impose—or, in this case, affirm—a sanction of disbarment without serious and thoughtful consideration. Our commitment to this approach is reflected in our 2018 order: after scrutinizing the case, we found that presumptive “disbarment [was] unwarranted under” rule 14-605(a)(1) and (a)(2) of the Supreme Court Rules of Professional Practice, *see supra* ¶ 8 n.2, and “implore[d] [the district court and] all state district courts to be detailed in their findings and to be clear in tying the sanction imposed to the professional misconduct found.” *In re Discipline of Steffensen*, 2018 UT 53, ¶¶ 61, 60, 428 P.3d 1104.

Opinion of the Court

¶33 We also recognize that we are tasked with “maintain[ing] the high standard of professional conduct required of those who undertake the discharge of professional responsibilities as lawyers.” SUP. CT. R. PROF’L PRAC. 14-602(b). This duty allows us to impose disbarment in order to protect those seeking legal services from “the most egregious types of misconduct.” *In re Discipline of Lundgren*, 2015 UT 58, ¶ 11. Such misconduct includes intentional misappropriation of client funds, *see id.*; *see also In re Discipline of Babilis*, 951 P.2d 207, 217 (Utah 1997), false swearing, *see In re Discipline of Tanner*, 960 P.2d 399, 401 (Utah 1998), and, as we find here, intentional failure to remit tax withholdings when acting as fiduciary for those funds.

¶34 In 2018, this court remanded this matter with a narrow mandate to provide “clarification of its findings of fact and conclusions of law in its order regarding Mr. Steffensen’s sanctions for professional misconduct.” *In re Discipline of Steffensen*, 2018 UT 53, ¶ 60. Specifically, we asked the district court to identify the correct standard under rule 14-605. *Id.* ¶ 62. This mandate was accompanied by our determination that “there was no clear error in concluding that Mr. Steffensen had violated rule 8.4(b) and (c) of the Utah Rules of Professional Conduct.” *Id.* ¶ 61. Rule 8.4 provides that “[i]t is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer . . . [or] (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.” UTAH R. PROF. CONDUCT 8.4. In response, the district court explained that rule 14-605(a)(3) was the appropriate standard under which to impose presumptive disbarment for a violation of rule 8.4(c). Rule 14-605(a)(3) provides that disbarment is appropriate where a lawyer “engages in any . . . intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice law.” SUP. CT. R. PROF’L PRAC. 14-605(a)(3).

¶35 The district court rejected the OPC’s proposed conclusion that Steffensen’s violation of rule 8.4(b) was criminal conduct warranting presumptive disbarment under rule 14-605(a)(1) or (a)(2), a decision bound by this court’s determination in 2018. *See In re Discipline of Steffensen*, 2018 UT 53, ¶ 56. At most, the district court concluded, Steffensen’s 8.4(b) violation “c[ould] be the basis for . . . suspension.”

¶36 The district court’s analysis of Steffensen’s violation of rule 8.4(c) under the rule 14-605(a)(3) standard, however, is precisely what this court requested in 2018. The district court first

Opinion of the Court

identified Steffensen’s misconduct as his “represent[ation] to his employees that funds had been withheld from their paychecks and paid to the State of Utah to satisfy the employee’s state tax obligations when no such payments were made.” It was misconduct that “involved multiple instances over a period of many years.” Further, Steffensen had remitted all of his employees’ federal taxes, indicating to the district court that Steffensen was “fully aware of what was required.” What appears to be the most determinative factor in the district court’s analysis was Steffensen’s fiduciary role in regards to his employees’ tax withholdings:

Importantly, the money at issue—funds owed to the State on behalf of his employees—was not the property of Mr. Steffensen or the firms he was operating. The money was owed to the State of Utah for an [sic] on behalf of his employees. Because Mr. Steffensen and his firms did not own these funds, and were required to pay them to the State, Mr. Steffensen was holding this money (or should have been holding it) in trust. He was acting as a fiduciary, or in a fiduciary-like capacity, with respect to those funds.

The district court recognized that the conduct amounting to Steffensen’s 8.4(c) violation was not simply that Steffensen failed to remit tax monies but rather that, in doing so, he breached his fiduciary duty to his employees. It was this breach in particular that called for presumptive disbarment under rule 14-605(a)(3), which applies when a lawyer “engages in . . . intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer’s fitness to practice law.” According to the district court:

An attorney who holds funds as a fiduciary, or in a fiduciary-like capacity, and then intentionally and knowingly fails to pay those funds to the party to whom they are owed engages in conduct that . . . *seriously adversely reflects on the attorney’s fitness to practice law* Such conduct seriously and fundamentally undermines the legal profession and its perception in the community. It causes the public to believe that lawyers hold themselves above the law and not subject to it. A failure to impose serious sanctions in response to this misconduct also erodes the public’s trust and confidence in the Bar’s self-regulation and its confidence in the courts.

Opinion of the Court

(Emphasis added). As such, the district court determined that Steffensen's misconduct falls squarely under rule 14-605(a)(3). We find that the district court provided sufficient detail and was clear in tying Steffensen's misconduct to an appropriate sanction.

¶37 Though we do not take this matter lightly, we are completely satisfied with the clarification provided by the district court in response to our narrow mandate on remand. Although the district court previously erred in imposing presumptive disbarment under rule 14-605(a)(1) and (a)(2), it has convincingly demonstrated that disbarment is the appropriate sanction and may be properly imposed under subsection (a)(3) for Steffensen's violation of rule 8.4(c).¹⁰ As such, we affirm.

CONCLUSION

¶38 The Utah Rules of Professional Conduct exist to uphold the legitimacy of the legal profession in the public eye, and attorneys must abide by them. Violations of the rules suggest to the public "that lawyers hold themselves above the law and not subject to it." *In re Discipline of Steffensen*, No. 110917794 at 8 (Feb. 19, 2019). While attorneys are responsible for their own behavior, it is this court's obligation to enforce the rules, knowing that "[a]

¹⁰ Steffensen, the OPC, and the district court have all noted tension in the interplay between rule 8.4(c) and rule 14-605(a)(3), which we now flag for review by our Advisory Committee on the Rules of Professional Conduct. Disbarment is the presumptive sanction under rule 14-605(a)(2) for crimes that have as a necessary element the "intentional interference with the administration of justice, false swearing, misrepresentation, fraud," etc., and under (a)(3) for "other intentional misconduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law." Yet suspension is the presumptive sanction under rule 14-605(b)(2) for "criminal conduct that does not contain the elements listed in Rule 14-605(a)(2) but nevertheless seriously adversely reflects on the lawyer's fitness to practice law." This seems odd, in that non-criminal conduct is seemingly treated more harshly than criminal conduct under rule 14-605: For non-criminal conduct, a finding that the conduct "seriously adversely reflects on the lawyer's fitness to practice law" triggers presumptive disbarment under (a)(3). Yet the same finding (absent a "necessary element") triggers only a presumptive sanction of suspension for criminal conduct under (b)(2).

Opinion of the Court

failure to impose serious sanctions in response to . . . misconduct . . . erodes the public's trust and confidence" in the legal profession. *Id.* It is a duty that requires a careful balancing of interests of all affected parties. With this opinion, we bring to a close this decade-long adjudication of Steffensen's conduct, comfortable in having left no legal or factual stones unturned in reaching this ultimate resolution. We affirm the district court's order of disbarment.