



## AGENDA

### Utah Supreme Court Oversight Committee for the Office of Professional Conduct

Location: Webex

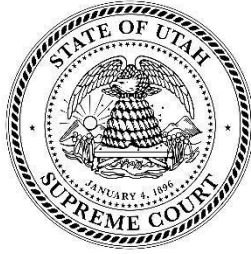
Date: January 24, 2022

Time: 4:00 p.m. to 5:30 p.m.

<b>Action:</b> Welcome and approval of the October 13, 2021 minutes. <b>Tab 1:</b> Draft meeting minutes for October 13, 2021.	Judge Diana Hagen
<b>Discussion:</b> Discuss proposed caretaker rules <b>Tab 2:</b> Memorandum and redline rules USB 14-107.5 and RGLDD 11-538	Nancy Sylvester
<b>Action:</b> Introductions of each Committee member and general practice area (Rule 11-503(a)(2))	Judge Diana Hagen
<b>Discussion:</b> Update on Screening Committee rule changes	Christine Greenwood
<b>Discussion:</b> Update on Presumptive Sanction Rules <b>Tab 3:</b> Redline of rules 11-582–11-586 <b>Tab 4:</b> Supreme Court feedback on Sanction Rules	Judge Diana Hagen
<b>Discussion:</b> Private Probation under Rule 11-581	Billy Walker
<b>Action:</b> Conduct needs assessment and development of 3-5 year funding plan (Rule 11-503(b)(2)(C))	Judge Diana Hagen
<b>Action:</b> Committee member term end dates (Rule 11-503(a)(2))	Judge Diana Hagen
<b>Other business</b> – Schedule next meeting	All

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

Tab 1



## Utah Supreme Court Oversight Committee for the Office of Professional Conduct

### Draft Meeting Minutes

October 13, 2021

Via Webex

4:00–5:30 p.m.

*Judge Diana Hagen, presiding*

#### **Attendees:**

Judge Diana Hagen, Chair  
Roger Smith  
Art Berger

#### **Staff:**

Marina Kelaidis, Recording Secretary

#### **Guests:**

Billy Walker, Office of Professional Conduct  
Christine Greenwood, Ethics and Discipline Committee

#### **Excused:**

Magistrate Judge Brooke Wells  
Margaret Plane  
Elizabeth Wright, Ex-officio member  
Nick Stiles, Staff, Appellate Court Administrator

### **1. Welcome and approval of the May 24, 2021 minutes:** (Judge Diana Hagen)

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

*Judge Hagen moved to approve the May 24, 2021 minutes. Roger Smith seconded the motion, and it passed unanimously.*

### **2. Discussion—Discuss proposed changes to rule 11-510 and 11-511:** (Judge Diana Hagen, Christine Greenwood)

Rule 11-510:  
Ethics and Discipline Committee composition:  
No further recommendations.

Rule 11-511:  
Screening panel composition; responsibilities:

Judge Hagen proposed amending paragraph (b) by replacing the consent provision with “, including a panel chair or vice chair and a public member.” and removing “must be present at each screening panel hearing.”

Roger Smith recommended amending paragraph (d) by removing the second and third sentences.

Judge Hagen recommended rejecting the proposed changes to paragraph (e), to which the Committee agreed. Judge Hagen also recommended rejecting the proposed change, “they obtain or that is timely presented by a complainant, respondent, witness, or the OPC”, in paragraph (g)(1), to which the Committee agreed.

*Judge Hagen moved to approve the proposed changes to Rule 11-510 and Rule 11-511(a), (b), (d), and (g)(1). Art Berger seconded the motion, and it passed unanimously.*

3. **Discussion—Update on proposed sanction rules:** (Judge Diana Hagen)

Judge Hagen gave a brief overview of the sanction comparison chart, prepared by Christine Greenwood. This chart provides a comparison between the prior sanction rules and the proposed rules before the Court.

4. **Other business—Schedule next meeting:**

Judge Hagen will contact the Committee via email to schedule the next meeting.

5. **Adjournment:**

The meeting adjourned at 4:50 p.m.

# Tab 2

# Utah State Bar®

## M E M O R A N D U M

**TO:** Oversight Committee for the Office of Professional Conduct and the Well-Being Committee for the Legal Profession

**FROM:** Nancy Sylvester

**RE:** Caretaker rules

**DATE:** January 12, 2022

---

In November 2021, Utah's Well-being Committee for the Legal Profession (WCLP) presented a comprehensive CLE on succession planning. The CLE told the story of Craig and Nancy Johnson's experiences confronting Craig's brain cancer and the preparation and resources they wish they had done and had for the unexpected. The CLE was well-attended and received rave reviews for its practical application and messaging.<sup>1</sup>

OPC was one of the presenters and described its role when succession planning has not occurred. Unfortunately, when OPC must get involved, there is generally a lot to unpack, physically and metaphorically, and a trustee must be appointed by the court. In fact, at the time of the CLE, OPC was in the process of assisting a lawyer's daughter with wrapping up the lawyer's affairs. Her father had suddenly and tragically died in a motorcycle accident and had done no advance planning. So the young woman, who

---

<sup>1</sup> The CLE and its content now reside permanently on the WCLP website [here](#).

was not a lawyer, was left to figure out how to not only move on without her father, but to also ensure that his clients were not harmed by his death.

When I spoke with Barbara Townsend about this after receiving a phone message from the young woman, she mentioned that other states have required that a caretaker be named in such events. I found the same in my research. I have proposed the attached rules, which have been adapted from Florida's.

The caretaker rule, new rule 14-107.5, requires that licensees certify annually at licensing that they have named a caretaker in the event of death, disability, disappearance, de-licensure, or suspension. It also describes when a licensee must be assisted by a caretaker, the role of the caretaker, and their responsibilities when they must assume the role. Rule 11-538, OPC's trustee rule, contains a coordinating amendment.

The caretaker rule is not meant to be punitive to the licensee. At this point, there are no consequences for failing to name a caretaker. It is simply intended to be an annual reminder to our licensees of the need to think ahead. Ultimately, the requirement could be made part of the Rules of Professional Conduct, but for now my preference is to encourage practitioners to take advantage of the Bar's succession planning resources. Ultimately, the goal of licensee follow-through is to reduce the burden not just on OPC, but also on our licensees and their families, in the event of the unexpected.

Billy Walker has reviewed and approved the drafts on behalf of the OPC. I am now looking for feedback and endorsements from both the OPC Oversight Committee

and the Well-Being Committee for the Legal Profession. If both committees are in favor of the proposal, it will go on to the Board of Bar Commissioners and then to the Utah Supreme Court.

I have attached proposed drafts and welcome the opportunity to speak to each committee about this proposal. Thank you for your consideration.



1 **Rule 14-107.5. Caretaker designation, role, and responsibilities.**

2 **(a) Definitions.**

3 (1) **Caretaker.** A caretaker is a partner, executor, or other responsible party capable  
4 of conducting an assisted licensee's affairs in the event of the assisted licensee's  
5 disappearance, death, suspension, delicensure, or disability. The caretaker must be a  
6 lawyer or licensed paralegal practitioner.

7 (2) **Assisted licensee.** An assisted licensee is a lawyer or licensed paralegal  
8 practitioner who has disappeared, died, been suspended or delicensed, or been  
9 placed on disability status.

10 (b) **Mandatory designation of caretaker.** All Utah State Bar licensees must designate a  
11 caretaker in the event of the licensee's disappearance, death, suspension, delicensure, or  
12 disability. Licensees must certify annually during the licensing process that the licensee  
13 has designated a caretaker.

14 (c) **Role of a caretaker.** The role of a caretaker is to protect the clients of the assisted  
15 licensee and, to the extent possible and not inconsistent with the protection of such  
16 clients, to protect the interests of the licensee to whom this rule applies.

17 (d) **Caretaker petition for appointment.** Upon learning of an assisted licensee's  
18 disappearance, death, suspension, delicensure, or disability status, or upon request of  
19 the Office of Professional Conduct, a designated caretaker must petition the district  
20 court for appointment as a caretaker. If the designated caretaker is unwilling or unable  
21 to fill the caretaker role, the procedures governing appointment of a trustee under Rule  
22 11-538 of the Supreme Court Rules of Professional Practice will control.

23 (e) **Caretaker responsibilities.** A caretaker appointed by the court must enter the offices  
24 of the assisted licensee and may, with the assistance of that licensee if possible, do the  
25 following, as authorized by the court:

26 (1) prepare an inventory of the matters being handled by the licensee;

27 (2) protect the clients' rights, files, and property;

28 (3) notify all clients represented in pending matters of the appointment of the  
29 caretaker as promptly as possible, personally or by mail, or both, and, unless the  
30 practice is likely to be sold or the assisted licensee is likely to resume practice, advise  
31 them to seek counsel of their choice;

32 (4) act as interim counsel upon the request of a client, and in the case of a licensed  
33 paralegal practitioner caregiver, in accordance with the caretaker's license;

- 34 (5) deliver files and property to the clients upon their request, subject to the assisted  
35 licensee's right to retain copies of such files;
- 36 (6) collect outstanding fees, costs, and expenses, and make arrangements for the  
37 prompt resolution of any disputes concerning outstanding fees, costs, and expenses;
- 38 (7) collect any moneys and safeguard any assets in the office of the assisted licensee  
39 and hold the moneys and assets in trust pending their disposition upon order of the  
40 court;
- 41 (8) to the extent possible, assist and cooperate with the assisted licensee and their  
42 representative in the transition, sale, or windup of the licensee's practice;
- 43 (9) act as signatory on trust, escrow, IOLTA, special, and operating accounts,  
44 disburse funds to clients or other persons entitled to funds, and otherwise safeguard  
45 such funds.
- 46 (10) submit such accountings as the court may require.
- 47 (d) A caretaker must maintain or procure professional liability coverage with a carrier  
48 admitted to doing insurance business in Utah, which coverage must insure their work  
49 as a caretaker under these rules and, if requested, must present proof of such coverage  
50 to the court appointing the caretaker.
- 51 (e) A caretaker must not disclose any information pertaining to any matter so  
52 inventoried or handled without the consent of the client to whom such matter relates,  
53 except as necessary to carry out the order of the appointing court.
- 54 (f) In the event of the disappearance, death, or incapacity of assisted licensee, the  
55 caretaker and their law firm:
- 56 (1) must not, except upon approval of the court, serve in any other capacity as  
57 counsel for the assisted licensee, or as executor or administrator of, or counsel to, the  
58 assisted licensee's estate;
- 59 (2) may assist the assisted licensee's personal representative, guardian, conservator  
60 or other representative, or the licensee's estate, in the termination or sale of the law  
61 practice;
- 62 (3) must not without the permission of the court represent a client, other than to  
63 temporarily protect the interests of the client, except and until the caretaker  
64 purchases the law practice;
- 65 (4) may be eligible to purchase the law practice, but only upon the court's approval  
66 of such sale.

67 (5) must provide such accountings to the personal representative and assisted  
68 licensee as the court may direct.

69 (f) A caretaker is governed by the Utah Rules of Professional Conduct with respect to  
70 client matters or files.

71 (g) The caretaker will be liable to the clients of the assisted licensee and third parties for  
72 acts and omissions outside the scope of these rules or the court order appointing the  
73 caretaker.

1 **Rule 11-538. Appointment of trustee to protect clients' interest when Lawyer**  
2 **disappears, dies, is suspended or delicensed, or is transferred to disability status.**

3 (a) **Protective appointment of trustee.** If a Lawyer has died or cannot be located, or if a  
4 Respondent has been suspended, delicensed, or transferred to disability status, and if  
5 there is evidence that the Lawyer or Respondent has not complied with the provisions  
6 of Rule 11-570 and no caretaker under Utah State Bar Rule 14-107.5, partner, executor,  
7 or other responsible party capable of conducting the Lawyer's or Respondent's affairs is  
8 known to exist or is able or willing to serve, a district judge of the judicial district in  
9 which the Lawyer or Respondent maintained a principal office may, on the OPC's  
10 request, appoint a trustee to inventory the Lawyer's or Respondent's files, notify the  
11 Lawyer's or Respondent's clients, distribute the files to the clients, return unearned fees  
12 and other funds, and take any additional action the judge authorizes.

13 (b) **Confidentiality.** No attorney-client relationship exists between the client and the  
14 trustee except to the extent necessary to maintain and preserve the client's  
15 confidentiality. The trustee may not disclose any information contained in the files so  
16 inventoried without the consent of the client to whom such files relate, except as  
17 necessary to carry out the court's order making the appointment.

18 (c) **Immunity.** Any person appointed as a trustee has the immunity granted by Rule 11-  
19 540.

20

# 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 as contained in these rules or, if there is no  
6 presumptive sanction, the appropriate sanction based on: ~~based on:~~

7 (A) the duty violated;

8 (B) the Lawyer's mental state;

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

10 and

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

12 (b) Multiple charges of misconduct.

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

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

1 **Rule ~~14-605~~11-583. Imposition of sanctions. Presumptive Ssanctions for violating**  
2 **duties owed to 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 in violation of Rule 1.15:

5 (1) Delicensure is generally appropriate when a Lawyer knowingly converts  
6 client property, with the intent to benefit the Lawyer or another, and causes  
7 serious injury or potentially serious injury to a client.

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

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

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

15 **(b) Failing to preserve the client's confidences.** The following sanctions are generally  
16 appropriate when a Lawyer improperly reveals information related to representing a  
17 client in violation of Rules 1.6: and 1.9:

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

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

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

**Commented [DH1]:** The court would like us to identify the substantive rules to which these presumptive sanctions relate.

**Commented [CG2R1]:** Yes

**Commented [DH3]:** Should the mens rea and degree of injury be consistent in each rule for each level of discipline (e.g. delicensure always requires specific intent and serious injury, suspension always requires knowing conduct and injury, etc.) or are there reasons for drawing the lines differently?

**Commented [DH4]:** Correct?

**Commented [CG5R4]:** Only Rule 1.6 under ABA Standards. 1.9

1 permitted to be disclosed and ~~theis~~ disclosure causes injury or potential injury to  
2 a 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 ~~theis~~ disclosure causes little or no actual or  
6 potential 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 in violation of Rules 1.7 through, 1.8,  
9 1.9, 1.10, 1.11, 1.10, 1.11, 1.12, 1.13, 3.7, 5.4(c), or 6.3:

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

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

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

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

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

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

Commented [DH6]: Correct?

Commented [CG7R6]: Under ABA Standards, also:  
Rule 3.7 (Lawyer as Witness)  
Rule 5.4(c) (Professional Independence of Lawyer) (Fee sharing with nonlawyers)  
Rule 6.3 (Membership in Legal Services Organization)



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 in  
10 violation of Rules 1.2(a), 1.2(b), 1.2(c), 1.2(e), 1.3, or and 1.4.

11 (1) Delicensure is generally appropriate when:

12 (A) a Lawyer abandons the practice of law and thereby causes serious or  
13 potentially serious injury to a client.;

14 (2) Delicensure or suspension is generally appropriate when a (B) a Lawyer  
15 engages in a substantial pattern of neglect or knowingly fails to perform  
16 significant services for a client or substantial and thereby causes serious or  
17 potentially serious injury to a client.; depending on the nature and significance of  
18 the services and the seriousness of the injury to the client. or

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

21 (2) Suspension is generally appropriate when:

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

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

**Commented [DH8]:** Correct?

**Commented [CG9R8]:** Under ABA Standards, also:

**Rule 1.2(a) (Scope of Representation - abide by client decisions)**

**Rule 1.2(b) (Scope of Representation - representation does not mean endorsement of client's views or activities)**

**Rule 1.2(c) (Scope of Representation - may limit scope of representation with informed consent)**

**Rule 1.2(e) (Scope of Representation - LPP must display notice that not licensed lawyer)**

**Commented [DH10]:** The court suggests combining delicensure and suspension, limiting the application of those preemptive sanctions to failure to perform "significant" services, and identifying the factors that would differentiate when delicensure and suspension would be appropriate. Should "a pattern" be part of the factors or should it remain as alternative conduct, i.e., "knowingly fails to perform" OR "engages in a pattern of neglect"?

**Commented [CG11R10]:** Maybe "substantial pattern of neglect"?

**Commented [DH12R11]:** Pattern is already an aggravating factor so it doesn't need to be included in the factors at the end.

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

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

7 (e) Lack of competence. The following sanctions are generally appropriate when a  
8 Lawyer fails to provide competent representation to a client in violation of Rule 1.1:

9 (1) Delicensure or suspension is generally appropriate when a Lawyer's course of  
10 conduct demonstrates that the Lawyer:

11 (A) does not understand the most fundamental legal doctrines or  
12 procedures, and the Lawyer's conduct causes injury or potential injury to  
13 a client; or :

14 (B) substantially

15 (2) Suspension is generally appropriate when a Lawyer engages in an  
16 areas of practice central to the representation of a client in which the  
17 Lawyer knows the Lawyer is not competent, and thereby causes injury or  
18 potential injury to a client, depending on the scope and significance of the  
19 incompetent representation and the seriousness of the injury to the client.

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

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

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

Commented [DH13]: Correct?

Commented [CG14R13]: Yes

Commented [DH15]: The court suggests combining delicensure and suspension, limiting the application of those presentive sanctions to "serious" injury caused when the lawyer "substantially engages" in an area of practice where the lawyer knowingly lacks competence (to eliminate situations where the lawyer lacks copentence to pursue a minor claim or handle side issues that arises in litigation over which the lawyer is competent), and identifying the factors that would differentiate when delicensure and suspension would be appropriate.

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

4 (f) Lack of candor. The following sanctions are generally appropriate in cases where a  
5 Lawyer engages in fraud, deceit, or misrepresentation directed toward a client in  
6 violation of Rules 1.5 or 8.4(c)???

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

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

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

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

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

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

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

**Commented [DH16]:** What rule does this relate to? Rule 4.1 Truthfulness in Statements to Others?

**Commented [CG17R16]:** Under ABA Standards, Rule 1.5 (can also fall under Standard 7.0) Rule 8.4(c) (Misconduct) (can also fall under Standard 5.1)

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

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

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

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

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

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

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

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

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

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

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

1 **Rule 11-584. Presumptive ~~S~~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 in violation  
5 of Rules 8.1, 8.4(b), or 8.4(c). ~~or in cases with involving conduct involving dishonesty,~~  
6 ~~fraud, deceit, or misrepresentation.~~

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

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

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

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

24 (3) ~~Either Reprimand or admonition is generally~~ appropriate when a Lawyer  
25 negligently engages in any other non-felony criminal conduct that involves  
26 dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the

Commented [DH18]: Correct?

Commented [CG19R18]: Under ABA Standards:  
Rule 8.1 (Bar Admission and Disciplinary Matters) (can also  
fall under Rule 7.0)  
Rule 8.4(b) (Misconduct)  
Rule 8.4(c) (Misconduct) (can also fall under Standard 4.6)

Commented [DH20]: Court would like this to say "non-felony" to make the distinction between delicensure and suspension clear. Same below.

1 Lawyer's fitness to practice law, depending on the potential or actual injury to  
2 the public trust.

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

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

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

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

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

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

**Commented [DH21]:** The court would like to omit this entire section and instead add it to the aggravating circumstances rule (i.e. abuse of an official or governmental position). Doesn't seem to relate to any substantive rule.

**Commented [CG22R21]:** Under ABA Standards, the rule for this standard is intended to accompany is **Rule 3.8 (Special Responsibilities of a Prosecutor)**

**Commented [DH23R21]:** Recommend we keep this subsection and limit to rule 3.8 (alternative is to add 3.8 to 11-585(b) (but doesn't fit neatly there). Recommend not adding to aggravating factors.

**Rule 11-585. Presumptive Ssanctions for violating duties owed to the legal system.**

**(a) False statements, fraud, and misrepresentation.** The following sanctions are generally appropriate when a Lawyer’s conduct is prejudicial to the administration of justice or involves dishonesty, fraud, deceit, or misrepresentation to a court in violation of Rules 1.2(d), 3.3, or 4.1+.

(1) Delicensure 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.

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

(3) 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.

(4) 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.

**Commented [DH24]:** Correct?

**Commented [CG25R24]:** See above

**Commented [DH26]:** The court would like this rule (and others) to specifically refer to the substantive duties in the rules of professional conduct that are implicated. Intent is to make clear that these rules do not create new duties but merely offer a presumptive sanction when a violation of a substantive rule is proven. This one would be Rule 3.3. Candor to the Tribunal.

**Commented [CG27R26]:** Under ABA Standards, Rule 1.2(d) (Scope of Representation – lawyer must not counsel client to engage in criminal or fraudulent conduct) Rule 3.3 (Candor Toward the Tribunal) Rule 4.1 (Truthfulness to Others)

**Commented [DH28]:** The court thinks these two rules should distinguish between a lawyer who is actively trying to deceive the court and a lawyer who knows that others are trying to deceive and takes no action.

**Commented [DH29R28]:** Passive voice was used to include the lawyer failing to correct her own misstatement that she later learns is false. Should be: ...learns that false statements or documents have been submitted or material information improperly withheld...



1 (b) Abuse of the legal process. The following sanctions are generally appropriate when  
2 a Lawyer ~~fails to expedite~~ ~~unreasonably delays~~ fails to expedite litigation, ~~or bring a~~  
3 ~~meritorious claim~~ ~~brings a frivolous action~~ brings a meritorious claim, 3.4, 3.6, 3.9, 4.4,  
4 8.4(e), or 8.4(f) or ~~fails to obey any obligation under the rules of a tribunal~~ except for an  
5 ~~open refusal based on an assertion that no valid obligation exists~~ in violation of Rules  
6 3.1, 3.2, 3.4, 3.6, 3.9, 4.4, 8.4(e), or 8.4(f):

7 (1) Delicensure is generally appropriate when a Lawyer ~~engages in a pattern or~~  
8 ~~practice of knowingly violates a court order or rule~~ abuses the legal process with  
9 the intent to obtain a benefit for the Lawyer or another, and causes serious or  
10 potentially serious injury to a party or causes serious or potentially serious  
11 interference with a legal proceeding.

12 (2) Suspension is generally appropriate when a Lawyer ~~knows that the Lawyer is~~  
13 ~~violating a court order or rule~~ knowingly abuses the legal process, and causes  
14 injury or potential injury to a client or a party, or causes interference or potential  
15 interference with a legal proceeding.

16 (3) Reprimand is generally appropriate when a Lawyer negligently ~~fails to~~  
17 ~~comply with a court order or rule~~ abuses the legal process, and causes injury or  
18 potential injury to a client or other party, or causes interference or potential  
19 interference with a legal proceeding.

20 (4) Admonition is generally appropriate when a Lawyer ~~engages in an isolated~~  
21 ~~instance of negligence in complying with a court order or rule~~ negligently abuses  
22 the legal process in an isolated instance, and causes little or no actual or potential  
23 injury to a party, or causes little or no actual or potential interference with a legal  
24 proceeding.

25 (c) Improper communications with individuals in the legal system. The following  
26 sanctions are generally appropriate when a Lawyer attempts to influence a judge, juror,

**Commented [DH30]:** What rule does this relate to? Should this be punished by contempt of court rather than disciplinary action?

**Commented [DH31]:** To make clear that these sanctions are for violations of the rules of professional conduct, and does not displace rule 16 or other sanctions for conduct in the context of litigation, the court would like us to identify the particular rule violations that are at issue here. If the only rules at issue are 3.1 and 3.2, do we still want to call it "abuse of the legal process"?

**Commented [CG32R31]:** Under ABA Standards, also applies to all of the following:

Rule 3.4 (Fairness to Opposing Party and Counsel)  
Rule 3.6 (Trial Publicity)  
Rule 3.9 (Advocate in Nonjudicial Proceedings)  
Rule 4.4 (Respect for Rights of Third Persons)  
Rule 8.4(e) (Misconduct – state or imply ability to improperly influence government agency or official to achieve results in violation of rules or other law)  
Rule 8.4(f) (Misconduct – knowingly assist judge or judicial officer in violation of rules of judicial conduct or other law)

**Commented [DH33]:** The court suggests that delicensure is only appropriate if the behavior is part of a pattern.

**Commented [DH34R33]:** In terms of presumptive sanction, pattern of practice is appropriate (extreme cases can be dealt with individually).

**Commented [DH35]:** We should define "abuses the legal process" or more precisely identify the rules at issue here. Is it just rules 3.1 and 3.2? If so, we probably need to limit this to a pattern of conduct. Isolated instances could be addressed by the court in a particular case.

1 prospective juror, or other official by means prohibited by law in violation of Rule 3.5,  
2 4.2, or 4.3:

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

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

7 (B) makes an ex parte communication with a judge or juror with intent to  
8 affect the outcome of the proceeding, and causes serious or potentially  
9 serious injury to a party, or causes significant or potentially significant  
10 interference with the outcome of the legal proceeding; or

11 (C) improperly communicates with someone in the legal system other  
12 than a witness, judge, or juror with the intent to influence or affect the  
13 outcome of the proceeding, and causes significant or potentially  
14 significant interference with the outcome of the legal proceeding.

15 (2) Suspension is generally appropriate when a Lawyer engages in  
16 communication with an individual in the legal system when the Lawyer knows  
17 that such communication is improper, and causes injury or potential injury to a  
18 party or causes interference or potential interference with the outcome of the  
19 legal proceeding.

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

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

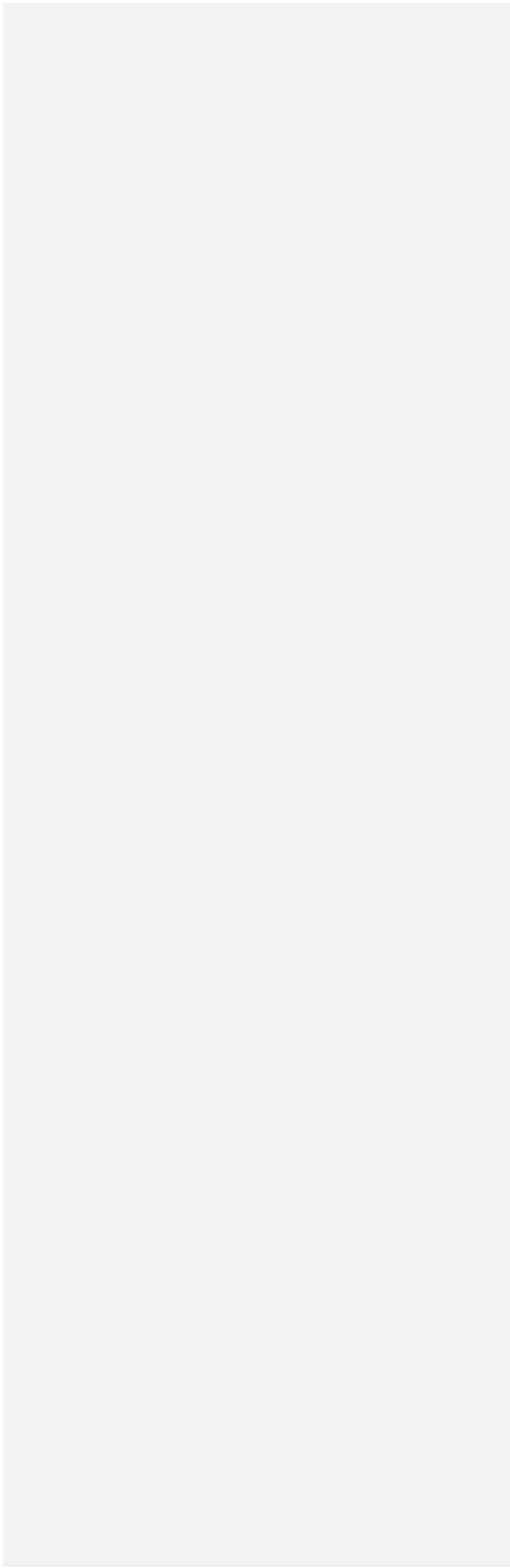
**Commented [DH36]:** Correct?

**Commented [CG37R36]:** Under ABA Standards, also:  
**Rule 4.2 (Communications with Represented Persons)**  
**Rule 4.3 (Dealing with Unrepresented Persons)**

|

| 1

Draft: [January 20, 2021](#)[December 17, 2021](#)



**Rule 11-586. Sanctions for violating duties owed as a member of ~~as a professional to~~ the legal profession.**

~~The following sanctions are generally appropriate in cases involving false or misleading communication about the Lawyer or the Lawyer's services, including 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 in violation of Rules 1.5, 1.14, 1.16, 2.1, 2.3, 5.1, 5.2, 5.3, 5.4(a), 5.4(b), 5.4(d), 5.5, 5.6, 6.2, 7.1, 8.1, and 8.3, the appropriate sanction will vary based on the Lawyer's mental state and the potential or actual injury to a client, the public, or the legal system. -~~

~~(a) Delicensure 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.~~

~~(b) 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.~~

~~(c) 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.~~

~~(d) 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.~~

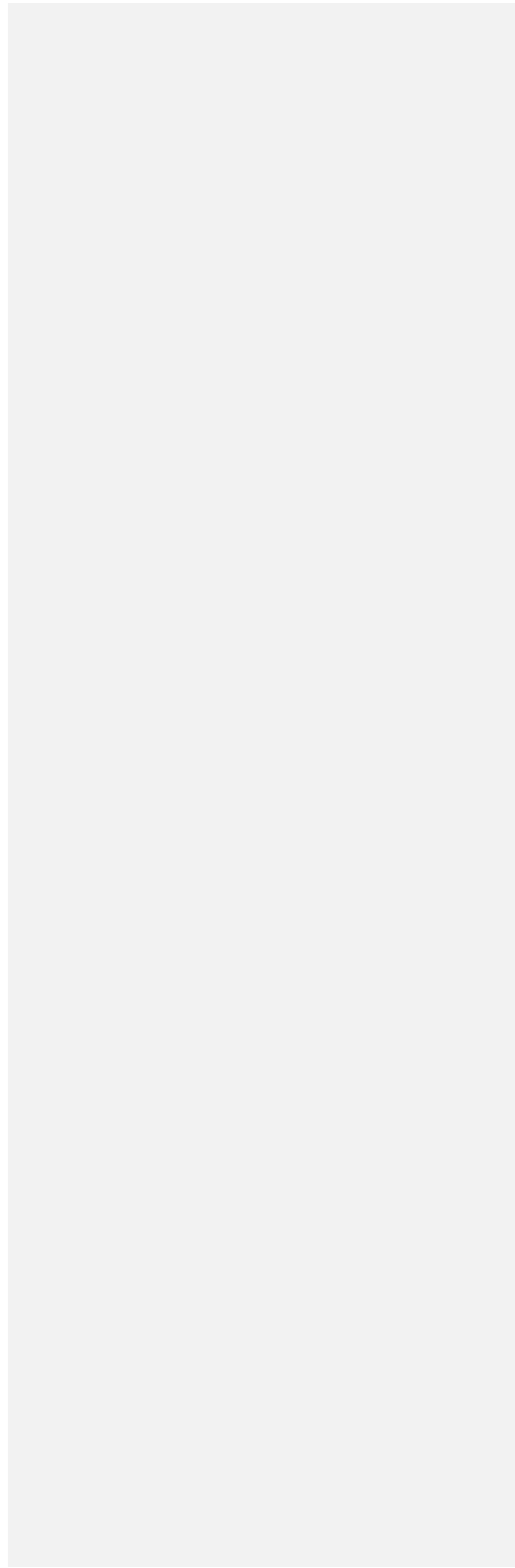
**Commented [DH38]:** Should this identify specific rules?

**Commented [CG39R38]:** ABA Standards identify all of the following:  
Rule 1.5 (Fees) (can also fall under Standard 4.60)  
Rule 1.14 (Disabled Client)  
Rule 1.16 (Declining or Terminating Representation)  
Rule 2.1 (Advisor)  
Rule 2.3 (Evaluation for Use by Third Persons)  
Rule 5.1 (Responsibilities of a Partner or Supervisory Lawyer)  
Rule 5.2 (Responsibilities of a Subordinate Lawyer)  
Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants)  
Rule 5.4(a), (b), (d) (Professional Independence of Lawyer)  
Rule 5.5 (Unauthorized Practice of Law)  
Rule 5.6 (Restrictions on Right to Practice)  
Rule 6.2 (Accepting Appointments)  
Rule 7.1 (Communications Concerning a Lawyer's Services)  
Rule 7.1 (Comment) (Firm Names and Letterheads)  
**Rule 7.2 (Communications Concerning a Lawyer's Services: Specific Rules)**  
**Rule 7.2(c) (Communication of Fields of Practice)**  
Rule 8.1 (Bar Admission and Disciplinary Matters) (can also fall under Standard 5.1)  
Rule 8.3 (Reporting Professional Misconduct)

|

- | 1
- | 2
- | 3

Draft: [January 20, 2021](#)[December 17, 2021](#)



1 **Rule 14-60611-587. 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





---

## Supreme Court Feedback on Sanction Rules

1 message

---

**Judge Diana Hagen**

Fri, Dec 17, 2021 at 4:59 PM

To: Billy Walker <bwalker@opcutah.org>, Christine Greenwood <Chair@utahethicscomm.org>

Hi Billy and Christine,

I met with the Supreme Court again on Monday. They found the comparison chart extremely helpful, so thank you Christine! I have added some suggested revisions and comments throughout the attached document, but I wanted to let you know a few themes from our discussion:

- One of the first questions they asked me was whether there is any conduct that is now sanctionable that wasn't sanctionable before. I explained that these presumptive sanction rules don't create any duties; the panel/court would not be referring to these rules unless OPC first proved that the lawyer had violated one of the rules of professional conduct. With that explanation, the court thought it would be helpful if we referenced the substantive rules at issue. (I know that Larissa taught us that cross-referencing is frowned upon, but the court thinks it would be helpful to drive home the point that these are not stand-alone rules identifying conduct subject to discipline.) I have gone through and tried to add the appropriate rule numbers, but I would appreciate it if you could make sure those are correct or whether they should be changed or expanded.

- In a few places, the court wanted to combine delicensure and suspension and then list the factors that the panel/court would consider in deciding which level of sanction was appropriate. I have taken a stab at that, but I would appreciate your thoughts on what factors should be included.

- The court remained very concerned about the presumptive sanctions for abusing a government or other official position in rule 11-584(b). Because it doesn't relate to a specific rule of professional conduct and is more of an aggravating factor, I suggested moving it to the aggravating/mitigating factors rule. They loved that solution because they didn't want to suggest that there was a heightened standard of conduct that applies to government officials, but agreed that it should be an aggravating factor.


- The court was also concerned about the presumptive sanction for what we have termed "abuse of the legal process" in rule 11-585(b). When I tried to match that rule up to conduct prohibited by the RPC, all I came up with was rules 3.1 and 3.2. And I don't see any rules of professional conduct that relate to failure to follow a court order or rules of a tribunal. Unless I'm missing something, we need to rethink how we characterize the conduct covered by 11-585(b) and consider what level of conduct merits presumptive disciplinary sanctions as opposed to litigation consequences.

- One of the justices expressed concern that the rules are not consistent in always having the different sanction levels require the same mens rea and degree of injury. For instance, delicensure doesn't always require specific intent and serious bodily injury, suspension doesn't always require knowing conduct and injury, etc. We just need to make sure that it is either consistent or that the inconsistency is intentional. Do you see any potential problems there?

No need to look at this until after the holidays, but I thought it would be helpful for the three of us to get together before our next OPC Oversight meeting on January 24th so that I can circulate suggested redline changes to the Committee. If you could just take a look and share your thoughts with me then, that would be great. I am completely open on Thursday, January 13th -- any chance you are both free for a webex meeting for sometime that day?

Thank you for all your help with this. I honestly think we are close to the finish line!

---

 **Rules 11-582 to 11-586 12.17.21 revisions.docx**  
58K