

SECTION I.

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, “the legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.”

This view of the professional relationship requires lawyers to observe the ethical requirements that are set out in the Rules of Professional Conduct of the Alabama State Bar, hereinafter referred to as Rules. While the Rules define the ethical guidelines for lawyers, they do not provide any method for assigning discipline for ethical violations. These standards adopt a model that requires the Disciplinary Board or the Disciplinary Commission 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?

ETHICAL DUTIES.

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

- (a) The duty of loyalty, which includes the duties to:
 - (i) Preserve the property of a client [Rule 1.15],
 - (ii) Maintain client confidences [Rule 1.6], and
 - (iii) Avoid conflicts of interest [Rules 1.7 through 1.13, 2.2, 3.7,

5.4(c) and 6.3];

(b) The duty of diligence [Rules 1.2, 1.3, and 1.4];

(c) The duty of competence [Rule 1.1], and

(d) The duty of candor [Rule 8.4(c)].

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, their liberty, and their lives. The community expects lawyers to exhibit the highest standards of honesty and integrity, and lawyers have a duty not to engage in conduct involving dishonesty, fraud, or interference with the administration of justice [Rules 8.2, 8.4(b) and (c)].

Lawyers also owe duties to the legal system. Lawyers are officers of the court and must abide by the rules of substance and procedure that 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, and 8.4(d), (e) and (f)].

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];

(b) Fees [Rules 1.5, 5.4 and 5.6];

(c) Assisting unauthorized practice [Rule 5.5];

(d) Accepting, declining, or terminating representation [Rules 1.2, 1.14 and 1.16]; and

(e) Maintaining the integrity of the profession [Rules 8.1 and 8.3].

MENTAL STATE.

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 but 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.

INJURY.

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.

OPERATION OF THE DISCIPLINARY MODEL.

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 assess discipline however, it is necessary to go further, and to examine each lawyer's mental state and the extent of the injuries caused by the lawyer's actions.

In the first case, assume that the client gave the lawyer \$500.00 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 discipline -- disbarment -- would be appropriate.

Contrast this with the case of a second lawyer, whose client delivered \$500.00 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, the Disciplinary Board may impose, in its discretion, less serious discipline or, after consideration of mitigating circumstances, as explained below, no discipline.

In each case, after making the initial determination as to appropriate discipline, the Disciplinary Board 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 Board, could increase the appropriate discipline. The presence of mitigating

factors, such as absence of prior discipline or inexperience in the practice of law, could make lesser discipline appropriate.

While there may be particular cases of lawyer misconduct that are not easily categorized, the standards are not designed to propose specific discipline for each of the myriad of fact patterns in cases of lawyer misconduct. Rather, the standards are guidelines that provide a theoretical framework to guide the Disciplinary Board in imposing discipline. The ultimate discipline 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 that give Disciplinary Boards the flexibility to select the appropriate discipline in each particular case of lawyer misconduct.

The standards do not account for multiple charges of misconduct. The ultimate discipline imposed should at least be consistent with the discipline for the most serious instance of misconduct among a number of violations; it might well be and generally should be greater than the discipline 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).