

DISTRICT
COMMITTEE

DECISION
GUIDELINES

I. General Considerations

A. Purpose of Discipline For Misconduct

The Lawyer Regulation system is established to carry out the Supreme Court's constitutional responsibility to supervise the practice of law and protect the public from misconduct by persons practicing law in Wisconsin. Preamble to SCR Chapter 21. Discipline for lawyer misconduct is not intended as punishment for wrong doing; it is for the protection of the public, the courts and the legal profession from further misconduct by the offending attorney, to deter other attorneys from engaging in similar misconduct and to foster the attorney's rehabilitation. Disciplinary Proceedings Against Kelsay, 155 Wis, 2d 480, 455 N.W.2d 871 (1990).

B. What is misconduct?

In order to conclude that misconduct has occurred, there must be a finding that the attorney has violated one or more of the Rules of Professional Conduct.

It is professional misconduct for a lawyer to:

1. violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
2. commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
3. engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
4. state or imply an ability to influence improperly a government agency or official;
5. knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
6. violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers; or
7. violate the attorney's oath

(SCR 20:8.4)

C. Considerations in Dispositions

When a violation of the Rules of Professional Conduct is found, the disposition should reflect the circumstances and context in which the violation occurred. The Office of Lawyer Regulation seeks to achieve fairness and impartiality in its disciplinary dispositions. Thus, dispositions should be consistent: similarly

situated lawyers should receive the same disposition. In seeking to be consistent, the Office of Lawyer Regulation is guided by the following considerations:

1. whether the attorney knew, or should have known, that his or her conduct would harm a client, the legal system or the profession;
2. whether the misconduct involved deliberate dishonesty;
3. the number of persons harmed and the degree to which each was damaged;
4. whether the misconduct was an isolated act or part of a pattern;
5. whether the attorney has persisted in misconduct despite receiving previous discipline;
6. whether the public needs protection from possible future misconduct of a similar kind;
7. whether the attorney has demonstrated that he or she appreciates the importance of professional ethics;
8. whether the attorney fully cooperated with the Office of Lawyer Regulation's investigation of his or her conduct;
9. mitigating factors, such as inexperience, severe illness,¹ and restitution.

Such considerations may affect the disposition as aggravating or mitigating factors:

- a. Aggravating Factors:
 - bad faith obstruction of disciplinary process
 - chemical dependency, no recovery
 - alcohol
 - cocaine
 - other drugs
 - dishonest motive
 - elderly/vulnerable client
 - failure to cooperate
 - harm to client
 - lack of contrition
 - length of practice

¹ The Court has ruled that proof of a casual connection between alcoholism and misconduct will be considered in mitigation in the disciplinary proceeding, but does not afford the respondent a recognizable defense to the misconduct charges. Disciplinary Proceedings Against Fay, 123 Wis. 2d 73, 76, 365 N.W.2d 13 (1985).

- multiple violations
- no restitution/monetary payment
- pattern of misconduct
- prior discipline/related/unrelated conduct
- public officer or the public is the client

b. Mitigating Factors:

- absence of dishonesty or selfish motive
- causally-related chemical dependency, recovery in progress
 - alcohol
 - cocaine
 - other drugs
- community service
- contrition
- cooperation
- correction of problem arising from misconduct/positive changes to prevent future incidents
- delay in disciplinary proceedings
- imposition of other penalties or sanctions (not by Office of Lawyer Regulation)
- inexperience
- no client harm
- no disciplinary history
- personal problems
- physical illness
- pro bono work
- psychological illness/treatment in progress
 - bi-polar disorder
 - depression
- restitution/monetary payment
- unrelated to practice
- unintentional misconduct
- voluntary disclosure of misconduct

c. ABA Standards for Imposing Lawyer Sanctions:

A valuable resource for use in evaluating disciplinary sanctions is the American Bar Association's *Standard for Imposing Lawyer Sanctions*. On December 7, 1987, the Board of Attorneys Professional Responsibilities (BAPR)/now the Office of Lawyer Regulation (OLR) adopted a policy approving the use of the *American Bar Association's Standards for Imposing Lawyer Sanctions*, approved by the ABA House of Delegates in February, 1986, as an aid to assist the BAPR in seeking appropriate discipline in instances where lawyer misconduct is found. The ABA *Standards* serve as guidelines for the Office of Lawyer Regulation, but are not binding on the Office of Lawyer Regulation. In each case, the Office of Lawyer Regulation considers prior applicable Supreme Court decisions

and BAPR/Office of Lawyer Regulation precedent, as well as the ABA *Standards*, and all relevant aggravating and mitigating factors in arriving at a disposition. The purpose of this policy is to promote consistency. The determination in each case must address the particular circumstances and context within which a violation of the Rules of Professional Conduct occurs.

I. Types of Dispositions

A. No Rule Violation

1. Determination that No Investigation Needed: “IFOR” or Summary Closure without Investigation

Screening:

Before commencing an investigation of the allegations of a grievance, the investigator must screen the matter to determine whether the allegations, if proved by clear, satisfactory and convincing evidence, constitute possible violations of the Rules of Professional Conduct for Attorneys (the “Rules”).² The grievance is reviewed to determine if the allegations allege conduct within the scope of the Rules. In some instances, additional clarifying information may be sought from the Grievant. Where the conduct alleged may constitute a possible violation of the Rules, a response, and in some cases, additional clarifying information, will be sought from the Respondent attorney. At these various stages of the screening process, a disposition of the grievance may be made without an investigation, in the following instances.

a. “IFOR”

If a grievance makes allegations concerning conduct that, even if true and provable by clear, satisfactory and convincing evidence, is not within the scope of the Rules of Professional Conduct, such grievance is deemed to be an Inquiry Falling Outside the Rules (“IFOR”), no investigation is conducted, and the file is closed.

Examples:

The Grievant alleged the Respondent, an attorney hired by the Grievant to represent him in a criminal matter, had an unconcerned attitude in that the Respondent failed to bring a business card to their first meeting, but did bring a written fee agreement.

² The Wisconsin Supreme Court has held that allegations in a disciplinary proceeding must be proved by clear and convincing evidence. State v. Posterino, 53 Wis. 2d 412, 193 N.W.2d 1 (1972).

The Respondent attorney represented a creditor seeking payment of a debt from a person with a name very similar to the Grievant's name. The Respondent erroneously wrote to the Grievant seeking collection of a debt. After the Grievant complained to the Respondent that he was not the debtor, the Respondent attorney apologized.

The Grievant, the beneficiary of a trust, filed a grievance against the Trustee, alleging that the Respondent trustee refused to increase her monthly allowance, after being requested to do so, and to give the Grievant copies of bank statements and other documents showing the activity in the trust's bank accounts. The Respondent Trustee had provided an accounting that meets basic trust requirements. The Grievant can raise these legal issues in court.

b. Summary of Closure without Investigation

Similarly when,

- i.) the facts alleged would constitute a possible violation of the Rules, but sufficient information is supplied by the Grievant to establish that no investigation is needed and a dismissal should result ("SIG"); or
- ii.) the facts alleged might constitute a possible violation of the Rules, but the Grievant fails to respond to a request for additional information ("NRG"); or
- iii.) the facts alleged might constitute a possible violation of the Rules but sufficient information is voluntarily provided by the Respondent to establish that no investigation is needed ("SIR"),

the file is closed without investigation.

Grievance files are retained for at least three years where it is determined that the matter is an "IFOR" or should be summarily closed SCR 21.03(9). The determination that the grievance is an IFOR or should be summarily closed has no negative effect whatsoever in the status of the lawyer's license or professional responsibility record.

Examples:

"SIG"/Sufficient Information from Grievant

The grievant alleged that the Respondent attorney failed to keep him informed about his case. However, the Grievant

supplied the Respondent's itemized bill, sent one month after the Respondent was retained, showing three conferences with the Grievant within the first ten days of the representation, an appearance in court, a review of a previous file involving the Grievant at the courthouse, and numerous phone calls to opposing counsel and witnesses. The Grievant provided no information substantiating that the Respondent had failed to keep him informed.

"NRG"/No Response from Grievant

The Grievant hired the Respondent to represent her in an employment discrimination matter. Prior to hiring the Respondent, the Grievant had filed her own complaint with the EEOC and obtained a finding of probable cause against her employer. The Grievant alleged that the Respondent "misrepresented" her and discouraged her from taking the case to trial to try to regain her former position, although the Respondent did assist her in obtaining back pay. The Grievant failed to respond to two requests for additional information from the staff investigator, seeking an explanation as to how the Respondent had "misrepresented" her, a summary of what the Respondent had told her about the retaining her former job, and a copy of any settlement agreement.

"SIR"/Sufficient Information from Respondent

The Grievant alleged that Respondent, his attorney in his divorce, was too slow, failed to file various contempt motions requested by the Grievant, took settlement money in partial satisfaction of his bill without permission, and overcharged the Grievant. The documents provided by the Respondent demonstrated that: the case was delayed for reasons beyond the Respondent's control (other party changed lawyers twice, the Grievant was in the hospital on one of the scheduled hearing dates, etc.); that the Respondent declined to file motions against the Grievant's wife because the cost of doing so outweighed the benefit and because the Grievant was equally in contempt for failure to comply with the trial court's order's; and that the trial court ruled that the application of settlement proceeds to the Respondent's fees was with the Grievant's consent and that the fees were reasonable.

2. Dismissals

If an investigation of a grievance against an attorney is conducted, and, after investigation, a determination is made that the grievance should be

dismissed, because the evidence establishes that no violation of the Rules has occurred, or any possible violation is not supported by credible clear and convincing evidence, the matter will be dismissed. Grievance files are destroyed three years following the end of the year in which the closure or dismissal occurred. The determination that the grievance should be dismissed has no negative effect whatsoever on the status of the lawyer's license or professional responsibility record.

Examples:

Counseling Client to Engage in Criminal Conduct, False Statement to Court, Failure to Disclose to Court, Incompetent Representation

Grievant, opposing counsel in a post-judgment paternity dispute, alleged that the Respondent had counseled his client to engage in criminal or fraudulent conduct, made a false statement of law to the court, failed to disclose a necessary fact to the court, and provided incompetent representation to his client, the mother of a minor child whom she had moved from the State of Wisconsin. The Respondent's client had given timely notice of her intent to relocate, and the father had brought a motion to modify the existing visitation, but did not file an objection, nor was there an order in existence prohibiting the move. The client did relocate out of state, but filed her new address with the Clerk of Court before leaving. Thus, the client's actions were neither criminal nor fraudulent. While the Respondent argued to the court that his client's leaving the state was justified under the circumstances, there was insufficient evidence that the Respondent made a false statement of the law to the court. The respondent advised the Court of his client's new address within two days of learning it, thus he did not fail to disclose a necessary fact to the tribunal. The Respondent did not advise his client that there was a statutory prohibition against her moving out of state during the pendency of the father's motion, per sec.767.087, Stats. However, such an isolated error or omission does not rise to the level of a rule violation.

Reckless Statement Concerning Integrity of Judge/Violation of Attorney's Oath (Maintain Respect Dues to Courts)

The Grievant, a judge, alleged that in an interview with a local newspaper, the Respondent attorney was correctly quoted as stating that the Judge in a case acted "without authority," "broke the law," and the "Judge never saw the records before..." he issued his ruling. Because the legal questions involved are ones on which reasonable lawyers may disagree, and can be viewed as commentary on the soundness of the judge's legal reasoning, as opposed to the Judge's integrity, there is insufficient evidence of a violation of SCR 20:8.2(a). Because the statements were not made during a proceeding, were not spoken directly to the judge, and were not personally derogatory or demeaning, there was no violation of SCR 40.15.

Neglect (Delay in Preparing Judgement), Failure to Respond to Phone Calls from Attorney

The Grievant, the opposing party in a divorce case, alleged that the Respondent delayed preparation of the divorce judgement due within 30 days of final hearing, and failed to respond to calls from the Grievant's attorney. The Respondent provided evidence that the delay, about 60 days, was the result of his waiting for opposing counsel to provide information from the Grievant. When opposing counsel left a phone message requesting that the Judgment be prepared by the time opposing counsel returned from vacation, the Respondent prepared the Judgment, although he had not received the requested information, and forwarded it to opposing counsel as requested. A 60-day delay does not rise to the level of disciplinable neglect; especially where the Grievant and his attorney did not provide requested information.

3. Dismissal with Advisory Letter

As a part of the Office of Lawyer Regulation's educational efforts, where a grievance is dismissed but raises a concern about future conduct that may constitute a violation, an advisory note may be provided to the lawyer ("Dismissal with Advisory Letter") in the letter dismissing the grievance. For example, if the investigation demonstrates insufficient evidence of a failure to communicate with a client so as to constitute a violation of SCR 20:1.4(a), but the lawyer's conduct borders on a violation, an advisory statement about that concern may be included in the letter of dismissal.

Examples:

"No merit Criminal Appeal"/Communication with Client

An attorney was appointed to represent a defendant in a criminal appeal. Six months later, after reviewing the transcripts and other documents, the attorney advised the defendant that the attorney did not believe that the case had any viable appellate issues, and offered the defendant three options: drop the appeal; pursue the appeal pro se; or have the attorney file a "no merit brief" to which the client could then respond. The client responded immediately, albeit somewhat ambiguously, asking the attorney to review the matter further and requesting a meeting, but agreeing that if the attorney was still convinced that there was no appellate issue after further review that the attorney would file a "no merit brief." The client heard nothing from the attorney, and wrote to the attorney five months later inquiring as to the status of the appeal. The attorney did not respond. After the client filed a grievance and after determining that the client wanted the attorney to file a "no merit brief," the attorney did so, and the client filed a response, both of which were not timely filed; the appellate court considered both. The Office of Lawyer Regulation dismissed the grievance and issued an advisory letter

suggesting that the attorney promptly respond to correspondence from a client, and when uncertain as to the client's decision as to a course of action, take steps to clarify, and further that the attorney comply with statutory deadlines in the future.

Court-Ordered Discovery/Communication with Represented Party

An attorney, acting under the authority of a court order giving the attorney's client access to records located at the opposing party's place of business, accompanied the client to view the records and, while there, spoke with the opposing party regarding the records, without consent from the opposing party's attorney. The Office of Lawyer Regulation found no clear and convincing evidence that the attorney had violated any disciplinary rule, but issued an advisory letter suggesting that, in similar circumstances in the future, the attorney either contact the opposing party's attorney in advance to obtain consent to communicate with the opposing party, or refrain from any communication with the opposing party whatsoever.

Child Support Obligation/Adherence to Court Orders

An out-of-state attorney owed child support to a former spouse who filed a grievance alleging that the attorney had failed to pay child support for more than one year and had failed to appear at a hearing in Wisconsin concerning child support arrearages. The attorney responded that he had been having financial difficulties, had negotiated a settlement for the payment of child support and attorney fees with the former spouse's lawyer, and had paid \$25,000 to clear up the child support obligation, as well as \$1500 to the former spouse's lawyer, an amount exceeding the court ordered attorney fees. The former spouse claimed that the attorney still owed \$900 in unreimbursed medical expenses and interest. The Office of Lawyer Regulation found no clear and convincing evidence of any violation of the Rules, and issued an advisory letter suggesting that the attorney take care to follow court orders, including those directed to the attorney individually and requiring that personal obligations be met.

B. Rule Violation: Clear, Satisfactory and Convincing Evidence

If the Office of Lawyer Regulation finds clear and convincing evidence that an attorney has engaged in a violation of the Rules of Professional Conduct, the director must determine what disposition is appropriate under the circumstances: a private reprimand, a public reprimand, a suspension, or a revocation.

1. Private Reprimand

A private reprimand is issued in the form of a letter to the respondent that summarizes the Office of Lawyer Regulation's factual findings, and cites the disciplinary rule(s) violated. The Office of Lawyer Regulation offers

the respondent attorney an opportunity to consent to the imposition of a private reprimand that must be reviewed by a referee. If the attorney accepts a private reprimand, his or her reprimand will be disclosed to the grievant. Further, the reprimand will be disclosed whenever the disciplined attorney applies for admission to the bar of another jurisdiction or seeks a judicial or other governmental appointment. If the attorney refuses to accept the private reprimand, the director may then present the matter to the Preliminary Review Committee for a determination of cause to proceed to file a public complaint, seeking the private reprimand as the disposition to be ordered by the Court.

a. When to Impose a Private Reprimand

The director generally recommends a private reprimand where an attorney has committed an isolated act of misconduct that may have caused minor harm. The director may also recommend a private reprimand for more serious misconduct if the director finds substantial, mitigating circumstances. All consensual private reprimands must be reviewed by a referee.

b. Examples:

Multiple Grievances, Failure to Protect Client's Rights on Termination, Failures to Discuss Fee Terms, Failure to Inform and Respond to Client

In the first of three grievance, an attorney had withdrawn from representing a client in an appeal three weeks before the appellate deadline, and did not return the client's file for three months thereafter. SCR 1.16(d) violation. In the second case, the attorney accepted \$500 to represent a client but failed to discuss whether this was the total fee, a retainer fee, or a deposit against an hourly fee. A few weeks later the client discharged the attorney, and the attorney refused to refund any of the \$500, claiming that it was non-refundable and he had done sufficient work to warrant the fee. SCR 20:1.5(b) violation. In the third case, the client's father paid \$2,500 to the attorney to represent his son on two felony charges. The client complained that the attorney failed to answer phone calls, failed to keep him informed, unnecessarily requested postponements, and failed to return the unearned fee on discharge. The client went to the Fee Arbitration Panel which found that an appropriate fee would be \$1,000. The attorney refused to participate in the arbitration, and refused to voluntarily refund any fees. SCR 20:1.4(a) and 1.5(b) violations. The attorney had no prior discipline. A private reprimand conditioned on refund of the unearned fee was imposed.

Conflict of Interest-Client with Adverse Interests, No Prior Discipline

An attorney who represented the seller in a land sale transaction also represented the purchaser in different matters. The purchaser failed to make scheduled payments on the note to the sellers; the attorney prepared and obtained a release of the sellers' second mortgage so the purchaser could obtain new financing. The attorney continued to represent the purchaser in numerous unrelated matters over the next few years, and to represent the sellers in unsuccessful attempts to collect the debt. The sellers claimed that the attorney never advised them that he also represented the purchaser. The attorney contended that the sellers did know about the representation, but acknowledged he had never obtained written consent. Eventually, the sellers obtained a new attorney, who was successful in obtaining full payment, including a payment from the attorney's malpractice carrier.

It was found that the attorney had violated SCR 20:1.7(a) by representing a client with interests directly adverse to another client without first obtaining each client's written consent, as well as SCR 20:1.7(b), by representing a client when the representation may have been materially limited by the lawyer's responsibilities to another client, without obtaining written consent from both client. Attorney had no prior discipline.

Neglect, Misrepresentation to Client, No Prior Discipline

An attorney was retained to represent an injured party on a personal injury claim. Almost three years later, and one-and-one half months before the statute of limitations would expire, the attorney so informed the client and requested money for filing fees. The client gave the attorney \$100 cash ten days later and received a receipt. The attorney did not file the complaint and the statute of limitations expired. Almost two months later, the client paid an additional \$30 for costs. The attorney did not inform the client that the statute of limitations had expired until the client later confronted him. The attorney repeatedly denied meeting with the client before expiration of the statute of limitations or receiving \$100. It was found that the attorney violated SCR 20:1.3, 1.4(a), and 8.4(c), and a private reprimand was issued. The attorney had no prior discipline.

Practice While Administratively Suspended

On September 30, an attorney received a notice from the State Bar that he would be suspended for non-payment of dues within the next month if he has still failed to pay his dues by that time. On November 5, the attorney received a certified letter from the State Bar advising him that he had been suspended for non-payment of dues. On January 27, a client of the attorney, who had checked

with the State Bar, confronted the attorney about his suspension. The next day, the attorney paid his dues and was immediately reinstated. The attorney acknowledged that the letters from the State Bar were brought to his attention, and that he had practiced law while administratively suspended. He claimed that he did not read the letters until his client confronted him. It was found that the attorney's failure to read the State Bar letters was not a fact in mitigation, and that the attorney had violated SCR 20:5.5(a) and 22.26(2).

Neglect, Some Harm to Client, Prior Discipline

An attorney represented a client in a post-divorce matter, and accepted responsibility to draft an order to reflect the parties' settlement in the issue. However, the attorney never drafted the order in spite of repeated requests to do so from the opposing party and opposing counsel over the ensuing year. As a result of the neglect to draft the order when problems arose three years later, there was no signed order or court record to substantiate either party's recollection of the earlier proceeding. The attorney had a prior private reprimand for neglect and failure to communicate. A private reprimand was issued for a violation of SCR 20:1.3.

Conflict of Interest, Self-Dealing

An attorney advised a client concerning the refinancing of a land contract and the client asked the attorney, who held a license to broker mortgages, to find a source of funds. The attorney could not find conventional financing, and the land contract went into foreclosure. The attorney located a private investor who agreed to make the loan. The client was reluctant to agree to the loan, which included a broker's fee for the attorney and a premium for the lender. The attorney told her that he could not guarantee that the loan would be available thereafter. A violation of SCR 20:1.8(a) was found because the attorney acted as the client's mortgage broker at the same time that he was defending her in a foreclosure action, as well as a violation of SCR 20:1.7(b) because he represented the client at a loan closing that he had brokered, without her written consent, where his \$5,000 broker's fee was contingent on the closing, and after the client had expressed reservations about the loan. A private reprimand was imposed conditioned upon submission of a written plan as to how the attorney would avoid conflicts in the future, and notifying clients and the public of the distinction between his law practice and his mortgage brokerage business.

2. Public Reprimand

A public reprimand may be imposed either by the director with referee review and approval or by the Supreme Court. At the director's discretion, and if the attorney consents, the Office of Lawyer Regulation may forego a hearing and publish a summary of the reprimand in the *Wisconsin Lawyer* and the newspaper(s) circulated in the county where the lawyer maintains his/her office. At the director's discretion, or if the attorney will not consent to a public reprimand, the Office of Lawyer Regulation may present the matter to the Preliminary Review Committee for finding of cause to proceed to file a complaint with the Supreme Court seeking a public reprimand. The Court then appoints a referee to conduct a hearing. If the referee recommends a public reprimand and the Court concurs, the court's reprimand is published in the official reports, the *Wisconsin Lawyer* and the newspaper(s) circulated in the county where the lawyer maintains offices.

a. When to Impose a Public Reprimand

The Office of Lawyer Regulation imposes public reprimands where public notice of the violation of the Rules by a lawyer is required to protect the public, the court system, or the legal profession, but does not require a license suspension.

b. Examples:

Dishonesty, Fraud, Deceit, and Misrepresentation of Status of Matter to Client, No Prior Discipline

An attorney represented three clients in a potential defamation or harassment claim by the client's employer. The Respondent proposed legal action against the employer. One of the grievants also requested that the Respondent file an appeal of the denial of her unemployment claim. In October 1993, the respondent prepared a Notice of Claims and a "Chronology and Factual Basis of the Claims" and provided claims to the grievants. The Grievants received no further paperwork and when they confronted the respondent, the attorney stated that he had been in contact with the magistrate's office, the court, the county's insurance representative and the opposing counsel. However, in April 1998, the Grievants learned that no case had ever been filed on their behalf and that there had been no efforts to mediate a settlement. The Respondent acknowledged fabricating explanations to Grievants regarding the status of their claims. The BAPR determined that the Respondent failed to competently represent the Grievants, violating SCR 20:1.1, neglected Grievants' legal matter violating SCR 20:1.3, failed to keep Grievants adequately informed as to the status of their matter violating 20:1.4(a), and failed to explain the

matter to the extent reasonably necessary to permit Grievants to make informed decisions regarding the representation violating SCR 20:1.4(b). The committee further found that Respondent engaged in conduct involving dishonesty, fraud, deceit and misrepresentation violating SCR 20:8.4(c). As a result, the BAPR imposed a public reprimand. The attorney had no prior discipline. *Board Public Reprimand of Daniel F. Snyder*, imposed with consent on June 8, 1999.

Practicing Law While Administratively Suspended

An attorney was suspended from the practice of law in November 1992 for nonpayment of Bar dues and has remained under suspension since then. The attorney signed the receipt for a certified letter from the Bar warning her that she would be suspended if she did not pay her dues, but the attorney denies ever receiving a second certified letter informing her that she had been suspended. The attorney states that she is currently under treatment for depression and has periodically received treatment for that condition in the past. The attorney continued to practice law during her suspension. The attorney stated that although she should have known her license was suspended, she didn't know until it was brought to her attention in June 1997. The District Investigative Committee concluded that in providing legal services to clients while she was under suspension for nonpayment of dues, she violated SCR 20:5.5(a) and that by failing to cooperate with the BAPR she violated SCR 21.03(4) and 22.07(1). The BAPR imposed a public reprimand on the attorney and stated that she would have to file a petition for reinstatement based on the issue of whether or not she is successfully controlling her depression. *Board Public Reprimand of M. Joanne Wolf*, imposed with consent on May 5, 1999.

Misrepresentation to Public, Conflict of Interest, Failure to Cooperate, Prior Discipline

The attorney was a solo practitioner who ceased practicing in or about 1997. When he closed his practice he did not leave a forwarding address with the Post Office or file a change of address with the State Bar. At about this time three grievances were filed against him when clients were unable to contact him. After initially failing to cooperate he finally did meet with the District Committee Investigator and provide sufficient information to determine that he had failed to return the file alleged by the second grievant, violating SCR 20: 1.16(d). Also the BAPR determined that he failed to cooperate with the staff and the Committee as to the investigation of all three grievances, violating SCR 21.03(4) and 22.07(3). The court imposed a public reprimand. The attorney had a prior six-

month suspension and a 60-day suspension, retroactive to the beginning of the six-month suspension. *Board Public Reprimand of John R. Figlesthler*, consented to on April 6, 1999.

Frivolous Claim, Misrepresentation to Court, Discovery Non-cooperation, Prior Disciplinary History

An attorney who represented a client in a personal injury case obtained a default judgment against an uninsured motorist, and filed a claim against his client's insurer. The insurance policy provided for dispute resolution by arbitration, and that default judgements against uninsured motorists were not binding on the insurer. The attorney contended the default judgement was binding on the insurance company and that the arbitration clause was not enforceable. The Court of Appeals found that the attorney's arguments were frivolous, under sec. 802.05 Stats. In his brief to the court, the attorney omitted the fact that there was an arbitration clause in the policy, substituting ellipses for the relevant language. He also failed to make a reasonable diligent effort to comply with a request by his adversary for discoverable information. The BAPR found violations of SCR 20:3.3(a)(1) and 20:3.4(d). The attorney had received a prior private reprimand and a 60-day suspension. *Board Public Reprimand of Robert Weidenbaum*, consented to on September 13, 1996.

3. Suspension

A suspension is effected by a Supreme Court order after a hearing before a referee, or based upon a stipulation filed by the Office of Lawyer Regulation and the respondent. A disciplinary suspension requires an attorney to cease practice for a stated period. Further, it requires an attorney to notify all clients that he or she is under suspension and to notify all courts and administrative agencies before which he or she has matters pending. SCR 22.26. The Court's order of suspension appears in the official reports, is published in the *Wisconsin Lawyer* and in the newspaper(s) circulated in the county in which the lawyer has offices.

a. Types of:

- i.) Less Than Six Months. An attorney suspended for less than six months is reinstated at the end of the suspension period upon filing the proper documents and the Office of Lawyer Regulation's confirmation regarding compliance during the suspension period. See SCR 22.28(2).

- ii.) Six Months or More. An attorney suspended for six months or more may not resume practice until reinstated by order of the Supreme Court. SCR 22.28(3).
- iii.) Temporary Suspension. The Court may impose a “temporary suspension” of an attorney’s license where it appears that the attorney’s continued practice of law poses a threat to the interests of the public and the administration of justice. See SCR 22.21
- iv.) Summary Suspension. The Court may also summarily suspend an attorney’s license, pending final disposition of a disciplinary proceeding, or upon receiving satisfactory proof that the attorney has been found guilty or convicted of a serious crime. See SCR 22.20(1).
- v.) Medical Incapacity Suspension. A medical incapacity suspension, imposed pursuant to SCR 22.34, is different from a disciplinary suspension in two respects: first, it is imposed upon a finding by the Court that the attorney has a medical incapacity which presents a danger to the interest of his/her clients or the public, as distinguished from a finding of misconduct by the attorney; and second, the period of suspension is indefinite rather than fixed, and the attorney can be reinstated at such time as he or she proves by clear, satisfactory and convincing evidence that the medical incapacity has been removed. All of the other requirements in SCR 22.26 regarding suspended attorneys apply in cases of medical incapacity suspension.

b. When to Impose a Suspension

A suspension may be imposed for some of the same types of rule violations that result in a public reprimand. A suspension, rather than a public reprimand, may be warranted due to the presence of one or more additional circumstances:

- ? the rule violation has caused greater harm;
- ? the attorney has established a pattern of misconduct and/or has received previous public discipline;
- ? the attorney has failed to cooperate with the investigation; with the length of suspension varying based on the amount of actual losses;
- ? the attorney has engaged in a criminal act not substantially related to the practice of law.

The length of the suspension recommended will depend on the seriousness of the misconduct and aggravating factors.

c. Examples:

Sixty-Day Suspension:

Multiple Grievances, Failure to Follow Court Rules, Failure to Advise and Inform Client, Neglect, Misrepresentation to Court, Misrepresentation to Client, Failure to Refund Unearned Fee, Misrepresentation to the BAPR, Prior Discipline for Similar Conduct

An attorney failed to comply with a court's rule requiring him to tender witness and travel fees to a person he had subpoenaed. In a separate matter, the attorney failed to advise a client charged with an ordinance violation of the charge, failed to prepare the client for trial, and failed to inform the client that he had entered a no contest plea to the charge until after he had done so. He also misrepresented to the court and to the prosecutor that he had taken steps to withdraw the appeal he filed from the client's conviction. In the third case, he misrepresented to a client that he had made a demand on counsel for an adverse party, failed to act with reasonable diligence in pursuing the client's claims, failed to keep the client reasonably informed in the matter, failed to refund an unearned fee to the client, and misrepresented in his testimony and his whereabouts at a time when he claimed to have had a conversation with the client. The attorney had a prior private reprimand for some of the same misconduct, namely, agreeing with a prosecutor to enter a no contest plea on his client's behalf without first consulting with the client. The attorney's license was suspended for 60 days. *Disciplinary Proceedings Against Koehn*, 208 Wis. 2d 128, 559 N.W.2d 908 (1997).

90-Day Suspension:

Neglect, Misrepresentation to the Client, Misrepresentation and Failure to Communicate with the BAPR

In February 1997, Jeffery C. Nelson was sentenced to prison following revocation of his probation. Nelson states that his attorney in the probation matter never informed him of his appeal rights and that the time limits for an appeal expired. Nelson filed his own appeal and then sought representation from the public defender's office. In June 1997, Attorney Baehr was appointed to represent Nelson on his appeal from the conviction and his claim of ineffective assistance of counsel. In December 1997, Nelson filed a grievance alleging that Baehr had no communication with him nor had he preformed any legal services on his behalf. During the five months following Baehr's appointment, Nelson had written to Baehr twice and Nelson's mother had called Baehr's office twice and left messages, but Baehr made no response. During the investigation of Nelson's grievance, Baehr failed to provide

a written response to the grievance and he failed to respond to calls and letters from the District 10 committee investigator to whom the grievance was assigned. The board concluded that Attorney Baehr violated SCR 20:1.3 proscribing neglect, SCR 20:1.4(a) and (b), regarding communicating with a client, and SCR 21.14(4) and 22.03 concerning cooperating with the BAPR investigation. The court ordered that Attorney Baehr's license to practice law be suspended for 90-days. *Disciplinary Proceedings Against Baehr*, 232 Wis. 2d 606, 605 N.W.2d 523 (2000).

Six-Month Suspension:

Misrepresentation to Client, Misrepresentation and Failure to Communicate with the BAPR, Failure to Return Retainer

The Rock County Bar Association notified the BAPR of Respondent's alleged abandonment of his practice. Apparently, they had received several indirect reports of clients who had appeared for various court proceedings at which the Respondent failed to appear. The Respondent provided no response to letters from the BAPR staff or the Committee. The Respondent also failed to appear at the committee hearing on March 13, 1998. The BAPR concluded that there was clear, satisfactory and convincing evidence that Respondent failed to cooperate with the committee's investigation, contrary to SCR 22:03(2) and (4) and SCR 21.14(4).

In 1995, Tanya Walter retained the Respondent to file a bankruptcy petition for her and paid him \$800 to do so. Walter alleged that Respondent thereafter failed to file the bankruptcy and failed to respond to her inquiries regarding the status of her case. The BAPR found that the Respondent's failure to file the bankruptcy petition constituted conduct contrary to SCR 20:1.3; that the Respondent's failure to respond to grievant's attempts to reach him regarding the status of her case constituted a violation of SCR 20:1.4(a); and that the Respondent's failure to refund the \$800 retainer paid by grievant constitutes a violation of SCR 20:1.16(d).

In September 1997, Court of Appeals Judge Charles Dykman notified the BAPR of Respondent's conduct in representing grievant. The grievant retained the respondent to represent him in a criminal proceeding that resulted in Mr. Jones being convicted on May 20, 1997. The grievant requested that Respondent file a Notice of Intent to Pursue Postconviction Relief. Respondent failed to file the Notice, and the grievant was required to request an extension of time with the Court of Appeals. By orders dated June 17 and July 31, 1997, the Court of Appeals requested that Respondent provide a response. Respondent failed to respond to the court's orders. In an order dated August 19, 1997, the Court of Appeals again requested that

Respondent provide a response. This order was sent by certified mail. The envelope was returned to the Court of Appeals marked "unclaimed," and the respondent failed to provide a response. The Respondent's failure to file a Notice of Intent to Pursue Postconviction Relief constituted conduct contrary to SCR 20:1.3; and the Respondent's failure to respond to orders from the Court of Appeals constitutes conduct contrary to SCR 20:3.4(c).

In February 1997, the grievant retained the Respondent to handle his divorce. In June 1997, the Respondent informed the grievant that a hearing had been scheduled for June 30, 1997. The Respondent also informed the grievant that he had closed his office but if the grievant need to speak to him, the grievant could call him at his home. On June 30, 1997, the court notified the grievant that the Findings of Fact, Conclusions of Law and Judgement and Vital Statistics Form had not been filed with the court. The grievant retained other counsel to prepare and file the documents. The BAPR concluded that the Respondent's failure to respond to staff's letter constituted a failure to cooperate with the BAPR's investigation, contrary to SCR 22.03(2) and (4) and SCR 21.14(4) and that the Respondent's failure to prepare and file the Findings of Fact, Conclusions of Law and Judgement and the Vital Statistics form to finalize the grievant's divorce, constituted conduct contrary to SCR 20:1.3.

As a result of these Supreme Court Rule violations the court ordered Attorney Martin's license suspended for 6 months. *Disciplinary Proceedings Against Martin*, 227 Wis. 2d 349 595 N.W.2d 707 (1999).

One-Year Suspension:

Felony Conviction

An attorney was convicted of the felony manufacture of a controlled substance, THC in an amount of ten or fewer plants, contrary to sec. 961.41(1)(h)1, Stats. The conviction provides evidence of a violation of SCR 20:8.4(b). The court stated that the conduct for which Attorney Kanera was convicted constitutes a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer. The Supreme Court suspended Kanera's license for one year. *Disciplinary Proceedings Against Kanera*, 225 Wis. 2d 483, 592 N.W.2d 636 (1999).

One-Year Suspension:

Failure to Act with Reasonable Diligence and Promptness, Failure to Gain Permission to Split Attorneys fees, Failure to Send Opposing Counsel a Copy of the Request for Substitution, Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation, Failure to Maintain Communication with the BAPR

Less than two months before the personal injury action trial, without notice to or approval of the grievants, Attorney Dumke assisted Attorney Polito with the case, and agreed to split the attorneys' fees. Dumke allegedly filed a request for substitution of judge via regular mail, rather than faxing or hand-delivering it so that it would be received within the 24-hour legal deadline. He also failed to send copies to the opposing counsel or directly to the judge. Therefore, the judge and the defendants appeared for trial, but no one appeared on behalf of the grievants. The case was subsequently dismissed for failure to prosecute. Attorney Dumke failed to provide competent representation to the grievants contrary to SCR 20:1.1, failed to act with reasonable diligence and promptness, contrary to 20:1.3(2), and had ex parte communication with the court contrary to SCR 20:3.5(b).

Attorney Dumke was hired by the grievants to represent her in post-divorce matters. Dumke did no work for the grievants over a period of one year. The grievants also alleges that Dumke made misrepresentations about the status of her case by telling her he had received two court dates on her matters when no court dates had been scheduled. At the committee meeting Dumke admitted the allegations of neglect, misrepresentation, and failure to cooperate with an investigation. Dumke was charged with neglecting legal matter contrary to SCR 20:1.3, conduct involving dishonesty, fraud, deceit or misrepresentation contrary to SCR 20:8.4(c), and failure to cooperate with the BAPR contrary to SCR 21.14(4) and 22.07(2).

The court ordered a one-year suspension of Attorney Dumke's license to practice law. *Disciplinary Proceedings Against Dumke*, 227 Wis. 2d 340, 595 N.W.2d 703 (1999).

Eighteen-Month Suspension:
Conversion of Law Firm Funds

An attorney misappropriated funds of his law firm, over a period of years, misrepresenting his personal expenses as law firm expenses and obtaining reimbursements for them, obtaining an advance that was accounted for as a miscellaneous office expense, purchasing computer equipment for personal use which was accounted for as a miscellaneous office expense and as a prepaid bonus not authorized by the firm, using his law firm credit card for personal expenses that did not appear as advances or prepaid bonuses, providing legal services that he failed to report to the firm, retaining for himself the fees he received, and receiving employee benefit reimbursements to which he was not entitled. The attorney and the BAPR stipulated to the facts and to an eighteen-month suspension based upon violations of SCR 20: 8.4(c), which was approved by the Court. The Court also ordered that the attorney demonstrate restitution in the event he seeks

reinstatement, or explain the failure to do so. *Disciplinary Proceedings Against Russell*, 216 Wis. 2d 487, 574 N.W.2d 247 (1998).

Two Year Suspension:

Failure of Safekeeping property and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation

Edgar represented the grievant in her divorce. When the homestead was sold in July 1997 the proceeds were turned over to Edgar. On July 24, 1997 Edgar deposited \$100,000 of the proceeds into a savings account which she opened and entitled as an “escrow” account. In or about April, of 1998, the grievant’s ex-husband realized that the interest on the account did not match the amount of funds that should be on the deposit or the interest rate statement. When this was brought to Edgar’s attention, she wrote a detailed letter to Charles’ attorney stating that she had “mistakenly” withdrawn \$11,000 from the escrow account. She then replaced the funds on April 21, 1998, with interest. When staff initiated an investigation, Edgar admitted that the withdrawals were not made in error, violating SCR 20:1.15(a) and SCR 20:8.4(c). During the staff’s investigation, it was determined that Edgar did not have a client trust account. Instead she used a single checking account for receipt and disbursement of client funds, for a business account, and for what appears to be personal expenses, violating SCR 20:15(a). Edgar admitted that she did not keep any of the required client trust account records, although she certified that she did so on the annual State Bar Dues statement, violating SCR 20:1.15(e). The court imposed a two-year suspension of Attorney Edgar’s license to practice law. *Disciplinary Proceedings Against Edgar*, 230 Wis. 2d 205, 601 N.W.2d 284 (1999).

Temporary Suspension:

Multiple Trust Account Violations

Where an audit to Respondent’s Trust Account revealed numerous unexplained irregularities involving funds belonging to eighteen clients and a medical care provider, leading to the conclusion that the Respondent’s continued practice of law during the pendency of his disciplinary proceeding poses a threat to the interests of the public, the Supreme Court ordered temporary suspension of Respondent’s license, pursuant to SCR 22.21. *Disciplinary Proceedings Against Martinez*, 225 Wis. 2d 433, 591 N.W.2d 866 (1999).

Summary Suspension:

Federal Conviction of Felony Embezzlement and Theft from Welfare Benefit Plan

On receipt of a copy of the Respondent’s criminal judgment of conviction in Federal Court, SCR 22.20 provides basis for summary suspension of Respondent’s license pending disciplinary proceedings

seeking revocation. *Disciplinary Proceedings Against Kortsch*, 225 Wis. 2d 235, 591 N.W.2d 841 (1999).

Medical Incapacity Suspension:

Where the Respondent attorney had multiple grievances filed against him for neglect and failure to communicate, and a claim of fraud for accepting \$5,000 retainer to represent a prisoner and then performed no services. The Respondent admitted to federal court judge that he was “in the process of recovering from a lengthy bout of clinical depression” and intending to take the next two months off to recuperate while traveling. The Respondent did not cooperate in the investigation of his alleged incapacity. Supreme Court ordered medical incapacity suspension and restitution to client. *Medical Incapacity Proceedings Against Kerley*, Case No. 97-3326-D (1998).

5. Revocation:³

A revocation is effected by a Supreme Court order. The order may result from a voluntary petition under SCR 22.12, or may be the consequence of a hearing before a referee. A revocation requires an attorney to cease practice indefinitely, to notify all clients that his or her license had been revoked, and to notify all courts and agencies before which he or she has matters pending. See SCR 22.26. The Supreme Court’s order is published in the official reports, the *Wisconsin Lawyer* and in the newspaper(s) circulated in the county in which the attorney maintains offices. An attorney whose license has been revoked can be reinstated only by order of the Court. He or she may not file a petition for reinstatement until five years have elapsed. See SCR 22.28(3). The attorney then has burden of demonstrating by clear, satisfactory and convincing evidence that he or she is fit to resume practice. See 22.29 and 22.33.

a. When to Impose Revocation

Revocation may be imposed for aggravated neglect. However, the majority of revocations are imposed for illegal and dishonest conduct, such as forgery and theft of client funds.

b. Examples:

One Count of Misdemeanor Theft, One Count of Felony Burglary, and Seven Counts of Misdemeanor Practicing Law Without a License in Milwaukee County Circuit Court, Branch 42

In 1993, Attorney Konnor forged the endorsement of an escrow check belonging to the city treasurer’s office and deposited it in his own checking account. In 1997, Konnor broke into the home of an

³ The term “revocation” has the same meaning as “disbarred.” The lawyer whose license is revoked cannot petition for reinstatement for five years. SCR 22.28(3).

acquaintance and removed various pieces of musical equipment. The acquaintance caught Konnor in the act and all the stolen items were recovered. In 1997, Konnor was suspended for failure to pay dues and comply with CLE requirements and continuing to practice law during this period. In 1997 Konnor also stole several oil paintings from a club in Chicago, however, no charges were issued after he returned the paintings when confronted with the theft by the police. The Court found that Konnor committed criminal acts that reflected adversely on his honesty, trustworthiness, or fitness as a lawyer, in violation of SCR 20:8.4(b), that Konnor engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, in violation of SCR 20:8.4(c), and that Konnor engaged in the practice of law where doing so violated the regulation of the legal profession in that jurisdiction, in violation of SCR 20:5.5(a). The court revoked Attorney Konnor's license to practice law. *Disciplinary Proceedings Against Konnor*, 230 Wis. 2d 769, 602 N.W.2d 534 (1999).

Felony Embezzlement

Attorney Kortsch pled guilty to a federal charge of one count of felony embezzlement and theft from a union welfare benefit plan. Kortsch had been retained as the collections attorney for the Teamsters Welfare Fund in Detroit, MI. Between 9/91 and 7/93, Kortsch fraudulently billed the Fund a total of \$48,563 for litigation services and filing fees for 42 cases in which no lawsuit was ever filed. On 8/19/97, he was placed on probation for 5 years with the following conditions: 1) electronically monitored home confinement for a period of 14 months; 2) participation in a substance abuse program; and 3) restitution of \$48, 563 to the Fund. The Court determined that the conviction constitutes clear and convincing evidence that Kortsch committed a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer, in violation of SCR 20:8.4(b) and (c). The Court ordered the revocation of Attorney Kortsch's license to practice law. *Disciplinary Proceeding of Kortsch*, 225 Wis. 2d 235, 591 N.W.2d 841 (1999).

Failure of Property Safekeeping, Failure to Consult Client as to the Matters Being Pursued, Making of False Statements of a Material Fact or Law, Misconduct, Misrepresentation and Failure to Cooperate with the BAPR

Attorney Martinez' client trust account was audited as a result of the BAPR's discovery of a NSF check that had been written on the trust account. The audit uncovered multiple trust account violations relating to his handling of funds belonging to 18 clients and a medical care provider. It also revealed numerous irregularities, including the following: a) repeatedly failing to hold the funds of clients and a care provider in trust for each of the respective clients and the care

provider; b) disbursing funds belonging to individual clients to one or more other clients on multiple occasions; c) disbursing to himself, his firm and/or to “cash,” on multiple occasions, funds that appear to be in excess of the fee to which he was entitled; d) failing to promptly disburse personal injury settlements to clients, following his receipt of those settlements; e) repeatedly identifying disbursements as being related to particular clients’ legal matters, when there were no funds in the account belonging to those clients at the time of the disbursement; f) taking cash withdrawals from client’s settlements (that appear to be in excess of the fee to which he was entitled) at the time he deposited the personal injury settlement drafts; and g) overdrawing the account on numerous occasions.

In addition, Martinez failed to maintain the trust account records required by SCR 20:1.15(e) and for the five preceding years filed false certifications with the State Bar, indicating that he had maintained the trust account records required by SCR 20:1.15(e), Martinez misrepresented and failed to cooperate with the BAPR’s investigations. The Court ordered the revocation of Martinez’ license to practice law. *Disciplinary Proceeding Against Martinez*, 225 Wis. 2d 433, 591 N.W.2d 866 (1999).

Lack of Diligence, Engaged in Conduct Involving Dishonesty, Fraud, Deceit, or Misrepresentation, Failed to Return Unearned Portion of the Retainer, Failed to Decline or Terminate Representation After Suspension of License to Practice Law, Failure to Cooperate with Office of Lawyer Regulation

Attorney Jereczek agreed to provide post-conviction representation to a criminal defendant who already had representation through the Public Defender’s office. The representation was arranged through the client’s sister. Jereczek did nothing to advance the client’s interests, violating 20:1.3. Jereczek made misrepresentations to the sister and other members of the client’s family as to work purportedly done, violating SCR 20:8.4. Jereczek failed to inform the client of his law license suspension, which commenced during the period of representation, violating SCR 22.26(1). Jereczek failed to return any portion of the retainer paid by the sister, violating SCR 20:1.16(d). The attorney also did not cooperate with the BAPR in the grievance investigation, violating SCR 21.14(4) and 22.07.

In a second matter Attorney Jereczek, prior to the May 27, 1996 suspension of his law license, failed to advance his clients’ interest in a bankruptcy, violating SCR 20:1.3. The attorney failed to inform the clients of his license suspension, in violation of SCR 22.26(1). Jereczek subsequent to his license suspension, appeared on behalf of one of the clients in a small claims case, once again violating SCR

22.26(2) and 22.26(4)(c). Jereczek again failed to return the unearned portion of the retainer to the clients, violating SCR 20:1.16(d). Furthermore, the attorney did not cooperate with the BAPR in the grievance investigation, violating SCR 21.03(4) and 22.07.

The Court imposed a revocation of Attorney Jereczek's license to practice law in the state of Wisconsin. *Disciplinary Proceedings Against Jereczek*, 218 Wis. 2d 455, 578 N.W.2d 595 (1998).

II. Other Dispositional Measures

The Office of Lawyer Regulation may seek imposition of other dispositional measures, usually in connection with a public reprimand, suspension or revocation.

A. Conditions on the Continued Practice of Law

Definition: Conditions are a type of discipline that the Supreme Court at times imposes following an attorney's misconduct. A condition on the continued practice of law means that an attorney's reinstatement depends on his or her follow through of a specific set of court ordered circumstances.

1. Discipline Proceedings Against Fay, 123 Wis. 2d 73, 365 N.W.2d 13 (1985). Attorney Fay failed to pursue postconviction remedies on behalf of his client and made misrepresentations concerning this matter. The court found that Fay's unprofessional conduct was precipitated by alcoholism, rather than by intent to injure his client. The court ordered that the license of Attorney Fay be suspended for 60 days pending on his compliance of the following conditions for a period of two years:
 - a. Shall maintain active participation in Alcoholics Anonymous and Lawyers Concerned for Lawyers, attending at least one meeting of either group weekly.
 - b. Shall designate a member of the State Bar satisfactory to the BAPR, who shall report to the BAPR, quarterly during the next two years, that Attorney Fay is maintaining an acceptable level of professional responsibility.
 - c. Shall provide the BAPR with quarterly reports from a qualified chemical dependency treatment agency or counselor that he is maintaining a satisfactory recovery program.

- d. Every six months for the next two years Attorney Fay shall have a medical examination by a physician acceptable to the Board, the reports of which shall be submitted to the Board and shall specifically address Attorney Fay's rehabilitation from alcoholism.

Upon satisfactory proof that Attorney Fay has failed to comply with these conditions during the two-year period commencing the date of this order, the court shall rescind the stay of the suspension and forthwith suspend Attorney Fay's license to practice law in Wisconsin for sixty days. It is also ordered that within six months of the date of this order Attorney Fay pay to the BAPR the cost of this disciplinary proceeding in the amount of \$2,069.74. Provided that if the cost are not paid within the time specified and absent a showing by Attorney Fay of his inability to pay those costs within that time, the license of Attorney Fay to practice law in Wisconsin shall be suspended until further order of the court.

- 2. Disciplinary Proceedings Against Gruenwald, 141 Wis. 2d 691, 416 N.W.2d 289 (1987). Attorney Gruenwald (n/k/a Grunewald) was charged with the neglect of four legal matters and failure to cooperate with the BAPR. In response, the court decided to suspend Attorney Gruenwald's license to practice law in Wisconsin for six months, pending his compliance of the following conditions for a period of two years:
 - a. Abstinance from all prescription drugs other than or in amounts greater than that specifically prescribed for him by a physician.
 - b. Random periodic urine testing at least bi-weekly for the presence of drugs, with reports thereof to be made to the BAPR at such times as the Board may direct.
 - c. Upon reinstatement of his license, supervision of his practice of law by an attorney acceptable to the BAPR, with reports to be made by that supervising attorney to the BAPR quarterly concerning Attorney Gruenwald's professional responsibility in his practice.
 - d. Within one year of the date Attorney Gruenwald refund the retainer to the client.
 - e. Within one year of the date of this order Attorney Gruenwald pay to the BAPR the costs of this disciplinary proceeding.

Provided that the costs are not paid within the time specified and absent a showing of his inability to pay the costs within that time, his license shall remain suspended until further order of the court.

- f. Attorney Gruenwald shall comply with the provisions concerning the duties of a person whose license to practice law in Wisconsin has been suspended.
3. Disciplinary Proceedings Against Smith, 183 Wis. 2d 721, 515 N.W.2d 711 (1994). Three drug-related misdemeanors lead to the discovery of Attorney Smith's use of illegal drugs over the five-year period of time in which he served as an attorney in the trial division in the office of the State Public Defender. Although Attorney Smith's drug use did not interfere with his competent practice of the law or harm his clients, his drug abuse comprised criminal acts adversely reflecting on his honesty, trustworthiness and fitness as a lawyer. The court ordered that Attorney Smith's license be suspended for three months pending on the following:
 - a. Commencing on the date of his license reinstatement from the suspension and for one year thereafter, Attorney Smith shall submit to random periodic screening for controlled substances, as directed by the BAPR, with test results furnished to the BAPR upon its request.
 - b. Attorney Smith shall participate in weekly outpatient programs, with his attendance verified to the BAPR at its request.
 - c. Attorney Smith shall pay to the BAPR, within 60 days of the date of this order, the costs of this disciplinary proceeding, provided that the costs are not paid within the time specified and absent a showing to this court of inability to pay the costs within that time. Attorney Smith's license shall be suspended until further order of the court.
 - d. Attorney Smith shall comply with the provisions concerning the duties of a person whose license to practice law in Wisconsin has been suspended.
 4. Disciplinary Proceedings Against Burke, 180 Wis. 2d 14, 508 N.W.2d 505 (1995). Attorney Burke's license was suspended for one year based upon his misconduct which consisted of failing to keep client informed about status of client's criminal action,

misrepresenting to client actions he had taken on the client's son's behalf in criminal matter, failing to diligently pursue that client's matter, failing to comply with client's request for information and return client's file upon request, failing to keep another client reasonably informed of status of clients matter, failing to return documents and legal papers to client following termination of clients representation, failing to return unearned portion of retainer to client, failing to respond to requests from the BAPR for information concerning client grievances and engaging in conduct which led to attorney's conviction of misdemeanor charge of disorderly conduct. Although Attorney Burke did not offer abuse or chemical dependency as a defense to the charges of misconduct, the Court determined that Attorney Burke's negligence was a direct result of his alcohol and cocaine abuse. The court ordered, as a condition of reinstatement of Attorney Burke's license to practice law, that he be suspended for one year, required to return the unearned proportion of the client's retainer, as well as pay costs of disciplinary proceeding.

The license of Attorney Burke to practice law in Wisconsin was reinstated under the following conditions:

- a. he abstains from use of alcohol and controlled substances;
- b. he continues to participate in some form of after-care treatment for alcohol and substance abuse other than, and in addition to any voluntary attendance at Alcoholics Anonymous;
- c. he submits quarterly reports regarding his progress in after-care treatment to the BAPR;
- d. he submits to random laboratory testing for cocaine and other controlled substances pursuant to terms and conditions set forth in stipulation of parties filed in this proceeding, 211 Wis. 2d 166, 564 N.W.2d 340 (1997).

B. Restitution-"Monetary Payment"

Definition: Restitution refers to the term "monetary payment," which does not include fines. It may be imposed in cases where the court has found an unreasonable fee, an unearned fee, or a misappropriation of a client's funds or the funds of a third person.

1. Disciplinary Proceedings Against Gilbert, 227 Wis. 2d 444, 595 N.W.2d 715 (1999). Attorney Gilbert engaged in professional misconduct during her representation of a client over a six month period of time. This misconduct consisted of submitting bill to the client that contained misrepresentations and were fraudulent, misrepresenting her use of her client's funds, engaging in dishonesty, fraud, deceit, or misrepresentation in videotaping what purported to be the client's execution of an agreement, failing to keep the client reasonably informed of the status of his financial affairs and explain them to the extent reasonably necessary for him to make an informed decision. The court decided that the license of Attorney Gilbert shall be suspended for two years. In addition, that Attorney Gilbert pay restitution of \$ 84,800 plus interest within sixty days for the excessive and unreasonable fees she charged and collected. Also, that within sixty days she pay to the BAPR the cost of this proceeding, provided that if the costs are not paid within the time specified and absent a showing to the court of her inability to pay the costs within that time, the license if Attorney Gilbert shall remain suspended until further notice.
2. Disciplinary Proceedings against Martinez, 225 Wis. 2d 433, 591 N.W.2d 866 (1999). Attorney Martinez engaged in professional misconduct, which consisted of conversion of some \$158,000 of funds held in trust for 27 different clients, failing to maintain appropriate trust account records and falsely certifying on his State Bar dues statements that he maintained those records, failing to deliver funds to a third person entitled to them, misstating material facts to a client and to a third person regarding the status of legal proceedings, endorsing settlement checks, and signing releases without the knowledge, approval or consent of the clients, and making misrepresentations to the BAPR and failing to cooperate in its investigation of his conduct. As a result, the court has ordered that Attorney Martinez's license shall be revoked and that he pay the BAPR the cost of this disciplinary proceeding. In addition, Attorney Martinez is required to make restitution totaling \$157,907.96 to the 27 former clients and to others who are entitled to a portion of the funds he converted.

IV. Medical Incapacity

A. General Considerations

1. Definition

"Medical incapacity means a physical, mental, emotional, social or behavioral condition that is recognized by experts in medicine or psychology as a principal factor which substantially prevents a person

from performing the duties of an attorney to acceptable professional standards. SCR 22.001(8).

2. Possible Dispositions

An attorney's license to practice law is subject to conditions or indefinite suspension upon a finding that the attorney has a medical incapacity as defined in SCR 22.001(8) and SCR 21.16.

3. Purpose

Medical conditions and suspensions are to protect the interests of clients and the public. If there is a reasonable belief that an attorney has a medical incapacity, that may be proved by clear, satisfactory and convincing evidence, the director shall determine whether a suspension is necessary or whether conditions on the respondent attorney's license will suffice. Medical dispositions are also to promote treatment and rehabilitation of attorneys who have become impaired.

B. Procedures

1. Generally

The procedures that govern medical incapacity investigations, public proceedings and reinstatements are set forth in SCR 22.35. As detailed below, these procedures differ somewhat from those that apply to possible misconduct matters.

2. Screening and Investigation

Generally, the Director screens and investigates allegations of possible medical incapacity in the same manner in which he or she handles possible misconduct. SCR 21.03(5)(a), SCR 22.34(2). In some instances of alleged incapacity, Office of Lawyer Regulation staff may request a release from the respondent attorney to obtain treatment records. Also, staff may request that a respondent obtain an independent evaluation of his or her medical condition from a qualified health-care professional.

3. Standard for Office of Lawyer Regulation Review

As in matters involving alleged misconduct, the Preliminary Review Committee determines whether there is cause to proceed in the matter. If the Office of Lawyer Regulation believes that an attorney has a medical incapacity and should not be practicing law because of a recognized medical condition that prevents him/her from performing the duties of an attorney to acceptable standards, the Office of Lawyer Regulation shall file a petition with the Supreme Court seeking a medical incapacity suspension. SCR 22.34. If the Office of Lawyer Regulation is persuaded that measures short of suspension will be adequate to protect clients and the public, the Office of Lawyer Regulation may petition the court for

appropriate conditions on the respondent attorney's license. SCR 22.34(8).

4. Appointment of Counsel for Respondent

If a petition is filed, the referee appointed by the court to hear the matter may appoint counsel for the respondent. SCR 22.34(13). The referee has no such authority in a misconduct proceeding.

5. Duration of Medical Conditions or Suspension

In contrast with disciplinary dispositions, which are almost always for a specific length of time, medical conditions and incapacity suspensions are for an indefinite period.

6. Removal of Medical Conditions or Suspension

As soon as an attorney subject to a medical disposition has recovered, he or she may petition for reinstatement under SCR 22.36(1). The applicant has the burden of showing by clear, satisfactory and convincing evidence that the medical incapacity has been removed and the applicant is fit to resume the practice of law. SCR 22.36(6).

C. Types of Medical Dispositions

1. Medical conditions

a. When to Impose Medical Conditions

The Office of Lawyer Regulation will seek to impose medical conditions on an attorney's license under circumstances such as the following:

- i.) When there is medical evidence that an attorney is suffering from a condition (such as alcoholism, clinical depression or bipolar disorder) which, when treated, substantially prevents the attorney from performing to acceptable professional standards;
- ii.) When the attorney has sought treatment and is making demonstrable progress in controlling the condition;
- iii.) when there is persuasive medical evidence that the attorney's compliance with specific conditions, e.g., medication, periodic blood or urine testing, periodic individual and/or group therapy, regular participation in AA, will enable the attorney to practice law to acceptable professional standards.

b. Examples:

Alcoholism

An attorney appeared 90 minutes late for a court hearing in an obvious state of intoxication. At the judge's request, the attorney took a preliminary breath test, which showed that the attorney had a blood-alcohol level of .31. In explanation, the attorney described a number of personal problems. She indicated that following the court incident, she joined Lawyers Concerned for Lawyers, began to see a counselor, began to take medication, began to attend AA meetings and reduced her workload. An expert who evaluated the attorney concluded that she satisfied six of the nine DSM III criteria for alcoholism. In the expert's opinion, compliance with the following conditions would enable the attorney to practice to acceptable standards: complete abstinence from the consumption of alcohol for two years, attendance at an out-patient alcohol-dependency counseling for one year, regular attendance at AA meetings or another recovery group for at least two years, and submission to regular random urine or blood testing for the presence of alcohol for two years. The Supreme Court imposed the conditions for the specified periods. *Medical Incapacity Proceedings Against Schlieve*, Case No. 96-3390-D, decided September 12, 1997.

Bipolar Affective Disorder

The attorney suffered from a long-standing bipolar affective disorder for which he had received effective treatment over a number of years. The attorney discontinued his treatment regimen and, consequently, experienced a relapse during which he was unable to practice law to acceptable standards. The attorney voluntarily ceased the practice of law and joined the BAPR in requesting that conditions be imposed on his law license. While the attorney is not actively in practice, he is to submit a written report to the BAPR every six months describing the treatment regimen he is following and indicating whether he has experienced any further relapses. When the attorney resumes practice, he is to undergo monthly examinations by his treating psychiatrist; arrange for submission of quarterly written reports from his psychiatrist; consent to immediate notification from the psychiatrist if the attorney's symptoms recur; undergo periodic testing to verify the attorney's use of prescription medications; and practice only under the supervision of an attorney approved by the BAPR. The Supreme Court imposed the requested conditions indefinitely. *Medical Incapacity Proceedings of King*, Case No. 96-0119-D, decided January 24, 1996.

2. Medical Incapacity Suspension

a. When to Impose a Medical Incapacity Suspension The Office of Lawyer Regulation will seek to impose a medical incapacity suspension under circumstances such as following:

1. when there is medical evidence that an attorney is suffering from an illness that pervasively interferes with many aspects of the attorney's ability to practice;
2. when, nonetheless, that attorney continues to hold him/herself out as one able to handle client matters;
3. when, as a consequence, clients have been or are likely to be harmed; and
4. when the treatment, if any, the attorney has received has not materially improved the attorney's ability to practice.

[The interrelated set of circumstances described above is distinguishable from those instances in which a respondent may have engaged in limited misconduct caused by an illness that no longer presents a risk of client harm. The Office of Lawyer Regulation deals with such instances as misconduct matters and views the causally-related illness as a mitigating factor.]

b. Examples:

Alcoholism

The attorney's disease pervasively interfered with his ability to practice. After a period of inpatient treatment, he immediately resumed incapacitating consumption of alcohol. The attorney stipulated to an indefinite suspension. *Disciplinary Proceedings Against Bailey*, Case No. 94-0062-D, decided May 4, 1994.

Clinical Depression

At a motion hearing in federal court the attorney informed the court that he was "in the process of recovering from a lengthy bout with clinical depression;" that his "lapses in handling" the plaintiff's case resulted from his medical condition; that he did not intend to engage in further active practice until he could state with certainty that his mental health problems would not interfere with his practice; that he intended to take the next two months off "to recuperate while traveling" and that he hoped "within a period of several months" to have recovered to the point where he could practice again. The attorney did not cooperate in the

investigation of his alleged incapacity. The Court ordered a medical incapacity suspension until further order of the court and ordered restitution is made to the client for whom no services were rendered. *Disciplinary Proceedings Against Kerley*, Case No. 97-3326-D, decided March 11, 1998.

Personality Disorder and Depression

Medical evidence established that the attorney was incapacitated by reason of a personality disorder and episodes of depression. The attorney was indefinitely suspended. *Disciplinary Proceedings Against Thompson*, 184 Wis. 2d 607, 516 N.W.2d 708 (1994).

III. Failure to Cooperate with Investigation

A. The Duty to Cooperate-Order to Show Cause

SCR 21.15(4) and SCR 22.03(2) require a Wisconsin attorney who is the subject of a grievance to cooperate with the investigation conducted by the Office of Lawyer Regulations, including investigations by the staff and by the District Investigative Committees. Failures to cooperate may range from failures to respond to two initial letters from the Office of Lawyer Regulation's investigative staff to a complete failure to respond and to provide information during an entire investigation. Any failure to timely provide requested information results in an inefficient use of the Office of Lawyer Regulation's resources and delays the investigation of a matter. The duty to cooperate requires a respondent attorney to "full and fairly disclose all facts and circumstances pertaining to the alleged misconduct or medical incapacity," and may be compelled to "answer questions, furnish documents"...including trust account records,..."and present any information deemed relevant to the investigation."

If the respondent fails to respond to the request for written response to an allegation of misconduct or fails to cooperate in other respects in an investigation, the director may file a motion with the supreme court requesting that the court order the respondent to show cause why his or her license to practice law should not be suspended for wilful failure to respond or cooperate with the investigation. SCR 22.03(4).

B. Fifth Amendment Privilege

An attorney may invoke the Fifth Amendment privilege against self-incrimination and not answer questions on that specific ground, pursuant to

SCR 22.03(4), as to matters which may subject the attorney to criminal liability. In a disciplinary proceeding, a negative inference may be drawn from the invocation of the Fifth Amendment privilege against self-incrimination. *State v. Postorino*, 53 Wis. 2d 412, 193 N.W.2d 1(1972).

C. Aggravating Factors or Separate Violation

Failure to cooperate may be an aggravating factor, with respect to choice of disposition. In addition, the Supreme Court has held that the failure to cooperate, in and of itself, may be the basis for a separate finding of misconduct and imposition of discipline, even when no underlying misconduct is found after an investigation.

1. Public Reprimand

In *State v. Kennedy*, 20 Wis. 2d 513, 123 N.W.2d 449 (1963), the Court publicly reprimanded an attorney for his failure to cooperate, rejecting the argument that the duty to cooperate in the case of a groundless grievance places an unfair burden on an attorney.

Partial failures to cooperate will not normally result in public discipline. For example:

2. Private Reprimand

After submitting an initial response to a client grievance, an attorney failed to respond fully to the BAPR request for additional information for a period of 13 months. The Board determined that the grievance filed by the client was non-meritorious, but that the attorney had failed to cooperate fully with the grievance investigation on a timely basis, contrary to SCR 21.14(4), 21.03(4), 22.07(3) and 22.03(3). The attorney had no prior discipline.

DISCIPLINARY SUMMARY

I. Burden of Proof

Misconduct, which must be established by clear and convincing evidence, *State v. Postorino*, 53 Wis. 2d 412, 193 N.W.2d 1(1972), is enumerated in SCR 20:8.4. SCR 20:8.4(a) refers to violations of professional conduct rules. SCR 20:8.4(g) refers to violations of the attorney's oath, SCR 40.15.

II. Disciplinary Sanctions – Post Investigation

- A. The Office of Lawyer Regulation or Director can dismiss, SCR 22.05(1)(a); refer the matter to diversion from discipline program, SCR 22.05(1)(b), or retain the respondent's consent to file the imposition of a public or private

reprimand, SCR 22.05(1)(c); or present the matter to the Preliminary Review Committee for a determination that there is cause to proceed in the matter, SCR 22.05(a)(d).

- B. The Office of Lawyer Regulation can seek:
1. [Diversion from Discipline (SCR 22.10)]
 2. Private reprimand (SCR 21.16(3)),
 3. Public reprimand (SCR 21.16(3)),
 4. License suspension (SCR 21.16(2)),
 5. Revocation (SCR 21.16(1)),
 6. Monetary payment (restitution) (SCR 21.16(5)),
 7. Conditions on continued practice of law (SCR 21.16(4)),
 8. Suspension for medical incapacity (SCR 21.17; 22.34),
 9. Conditions on continued practice of law for medical incapacity (SCR 21.17; 22.34),
 10. Summary suspension (SCR 22.20) or Temporary suspension (SCR 22.21).
- C. Private or public reprimands can be imposed with consent without filing complaint with Supreme Court. SCR 22.09.

III. Reinstatement Timelines

- A. Suspension for less than six months means reinstatement after filing affidavit with director showing compliance with suspension order and the director's notification to the Supreme Court of the attorney's full compliance. SCR 22.28(2).
- B. Suspension for six months or more requires reinstatement by Supreme Court. Petition can be filed three months before expiration of suspension. SCR 22.28(3).
- C. Revocation is for at least five years. Petition can be filed five years after the effective date of the revocation. SCR 22.29(2).