

# THE ADOPTION OF THE ABA STANDARDS FOR IMPOSING LAWYER SANCTIONS BY THE ALASKA SUPREME COURT — *IN RE* *BUCKALEW*

## I. INTRODUCTION

The House of Delegates of the American Bar Association adopted the *Standards for Imposing Lawyer Sanctions* (“*ABA Standards*”) in February 1986.<sup>1</sup> Concerns about inconsistent applications of sanctions for attorneys’ violations of ethical standards led to the formulation and approval of the *ABA Standards*.<sup>2</sup> Such inconsistencies, involving violations of similar rules in the *Model Code of Professional Responsibility*<sup>3</sup> and the more recent *Model Rules of Professional Conduct*,<sup>4</sup> have occurred not only among various jurisdictions but also within the same jurisdiction.<sup>5</sup>

The *ABA Standards* attempt to address the problem of nonuniformity by providing a framework of available sanctions,<sup>6</sup> and a process for analyzing disciplinary offenses in order to arrive at a recommended sanction.<sup>7</sup> The *ABA Standards* also list potential aggravating and mitigating factors which are to be considered only after a recommended sanction has been identified.<sup>8</sup>

The Alaska Supreme Court applied the *ABA Standards* in *In re Buckalew*<sup>9</sup> to disbar Robert J. Buckalew for violations of the *Model Code of Professional Responsibility*.<sup>10</sup> The *Buckalew* decision represents the first use of the *ABA Standards* in an Alaska attorney discipline case. They were introduced during the final stage of the state attorney discipline process. The Alaska Supreme Court used the *ABA*

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1. STANDARDS FOR IMPOSING LAWYER SANCTIONS (1986) (approved by the ABA House of Delegates in February 1986) [hereinafter ABA STANDARDS].

2. *Id.* Preface at 1-3.

3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980).

4. MODEL RULES OF PROFESSIONAL CONDUCT (1983).

5. ABA STANDARDS, *supra* note 1, Preface at 1 nn.2-3 (citing *In re Gold*, 77 Ill. 2d 224, 396 N.E. 2d 25 (1979); *In re Oliver* M.R. 2454, 79-CH-6 (1980)).

6. *Id.* Black Letter Rules, § 2, at 7-9.

7. *Id.* Black Letter Rules, § 3.0, at 9. *See also id.* Theoretical Framework at 5.

8. *Id.* § 9.0, at 15.

9. 731 P.2d 48 (Alaska 1987).

10. *Id.*

*Standards* to recommend a more severe sanction than the one recommended by the counsel for the Alaska Bar Association.<sup>11</sup>

The introduction of the *ABA Standards* by the Alaska Supreme Court is an important development in the evolution of the attorney discipline process in Alaska. The use of the new standards should provide more consistency in the application of sanctions imposed for disciplinary violations and lead to a greater degree of certainty about the penalties for misconduct. If other state courts adopt the *ABA Standards*, discipline may be standardized among other states as well as within Alaska.

This note examines the *ABA Standards* adopted in the *Buckalew* decision. Section II addresses the *ABA Standards* and their development. The distinction between the new standards and the imposition of sanctions in past Alaska cases is noted in Section III. Section IV summarizes the facts of the *Buckalew* decision. While it is too early to assess the effectiveness of the new *ABA Standards* in Alaska, possible implications of the supreme court decision are analyzed in Section V. Section VI concludes that the application of the *ABA Standards* will be effective in standardizing disciplinary law in Alaska, if the standards are used uniformly at all levels of the state attorney discipline process.

## II. THE *ABA STANDARDS* FOR IMPOSING LAWYER SANCTIONS — AN OVERVIEW OF THEIR BACKGROUND AND SUBSTANTIVE PROVISIONS

### A. The Adoption of the *ABA Standards* by the American Bar Association in 1986

Before the adoption of the *ABA Standards* by the ABA House of Delegates in February 1986, there were few guidelines for the imposition of attorney sanctions once a violation of professional responsibility had been determined to exist.<sup>12</sup> The previous authority for the imposition of sanctions was the *Standards for Lawyer Discipline and Disability Proceedings* ("1979 Standards") adopted by the House of Delegates in 1979.<sup>13</sup> The 1979 Standards contained model rules for judicial and attorney discipline. They did not, however, contain specific recommendations for sanctions to be applied for each offense. Standard 7.1 of the 1979 Standards stated that the sanction should

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11. *Id.* at 56.

12. See generally Cameron, *Standards for Imposing Lawyer Sanctions — A Long Overdue Document*, 19 ARIZ. ST. L.J. 91, 94-95 (1987) (The Honorable Justice Cameron served as the Chairman of the Committee which developed the ABA STANDARDS. This article provides an overview of the history and methodology of the project.).

13. STANDARDS FOR LAWYER DISCIPLINE AND DISABILITY PROCEEDINGS (1979).

“depend upon the facts and circumstances of the case, should be fashioned in light of the purpose of lawyer discipline, and may take into account aggravating or mitigating circumstances.”<sup>14</sup> The Alaska Supreme Court noted in *Buckalew* that the 1979 Standards were similar to the Alaska standard used before *Buckalew*, which required the balancing of all relevant factors in each particular case.<sup>15</sup>

Under the 1979 Standards, inconsistencies in the application of sanctions among jurisdictions and within the same jurisdiction continued to occur.<sup>16</sup> The Preface to the *ABA Standards* cites one example in which the same jurisdiction imposed different sanctions for failure to file income tax returns — one attorney was suspended for a year while the other was only censured.<sup>17</sup>

The ABA established a Joint Committee on Professional Sanctions (the “Committee”) to make recommendations for achieving a greater measure of consistency in the imposition of sanctions. Justice Cameron, the Chairman of the Committee, indicated that the statement of purpose adopted by the Committee was based on a finding in the 1970 report of the Clark Committee.<sup>18</sup> The 1970 report recognized the need for standards for enforcing the existing ethical rules formulated by the ABA:

For lawyer discipline to be truly effective, sanctions must be based on clearly developed standards. Inappropriate sanctions can undermine the goal of lawyer discipline; sanctions which are too lenient fail to adequately deter misconduct and thus, lower public confidence in the system and deter lawyers from reporting ethical violations on the part of other lawyers. Inconsistent sanctions, either within a jurisdiction or among jurisdictions, cast doubt on the efficiency in the basic fairness of all disciplinary systems.<sup>19</sup>

The Committee examined all reported lawyer discipline cases from 1980 through June 1984, as well as cases for a ten-year period from eight jurisdictions.<sup>20</sup> After compiling these cases, the Committee attempted to identify patterns and formulate recommendations. It found that courts were fairly consistent in identifying the policy considerations which are relevant in discipline cases.<sup>21</sup> These considerations include “protecting the public, ensuring the administration of

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14. *Id.* § 7.1.

15. 731 P.2d 48, 51 n.9 (Alaska 1986).

16. See Cameron, *supra* note 12, at 94.

17. ABA STANDARDS, *supra* note 1, Preface at 1 nn.2-3 (citing *In re Gold*, 77 Ill. 2d 224, 396 N.E.2d 25 (1979); *In re Oliver*, M.R. 2454, 79-CH-6 (1980)).

18. ABA Special Comm. on Evaluation of Disciplinary Enforcement (Final Draft June 1970).

19. ABA Special Comm. on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 167 (1970).

20. ABA STANDARDS, *supra* note 1, at 2.

21. *Id.* at 2-3.

justice, and maintaining the integrity of the profession.”<sup>22</sup> Nevertheless, the Committee did not find the same consistency in the imposition of sanctions, concluding instead that “the courts failed to articulate any theoretical framework for use in imposing sanctions.”<sup>23</sup>

The Committee considered several approaches before it adopted the framework contained in the *ABA Standards*. It rejected the approach of identifying every possible type of misconduct and recommending a sanction.<sup>24</sup> Also rejected were approaches which looked only at the intent of the lawyer or the extent of the injury.<sup>25</sup> Instead, the Committee sought an alternative approach that focused on the ethical duty of the attorney, although both the intent of the lawyer and the extent of the injury are relevant in the broader theoretical framework of the discipline process.<sup>26</sup>

The approach developed by the Committee involves a process which progresses through several steps in order to arrive at a recommended sanction. The process “looks first at the ethical duty and to whom it is owed, and then at the lawyer’s mental state and the amount of injury caused by the lawyer’s misconduct,” resulting in “an organizational framework that provides recommendations as to the type of sanction that should be imposed based on violations of duties owed to clients, the public, the legal system and the profession.”<sup>27</sup> Under this framework, the disciplinary body is to initially identify the appropriate sanction without regard to aggravating or mitigating factors.<sup>28</sup>

The Committee recognized that the existence of mitigating or aggravating factors could lead to the imposition of a different sanction from that recommended as a result of the initial process. The Committee made it clear, however, that the assessment of the weight of these factors should be conducted only after the initial analysis of the misconduct has taken place. By separating the assessment of sanctions into two phases, the Committee hoped to increase consistency in the results. When aggravating and mitigating factors are viewed at the initial assessment stage, they may obscure the true nature of the act committed and the resulting harm to the injured party.<sup>29</sup> A separate

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22. *Id.* at 3.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *See id.*

29. *Id.*

standard for this second phase was therefore created, listing the potential aggravating and mitigating factors which can be taken into account.<sup>30</sup>

The Committee also recognized that attorneys often apply for reinstatement after suspension or disbarment, although this issue is not a focus of the *ABA Standards*. The brief standard which mentions this issue notes that some states allow reinstatement after disbarment while others do not. It does call specifically for the adoption of procedures

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30. *Id.* Black Letter Rules, §§ 9.1-4, at 15. The Aggravation and Mitigation section reads in relevant part:

9.22 *Factors which may be considered in aggravation.*

Aggravating factors include:

- (a) prior disciplinary offenses;
- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses;
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;
- (f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
- (g) refusal to acknowledge wrongful nature of conduct;
- (h) vulnerability of victim;
- (i) substantial experience in the practice of law;
- (j) indifference to making restitution.

9.32 *Factors which may be considered in mitigation.*

Mitigating factors include:

- (a) absence of a prior disciplinary record;
- (b) absence of a dishonest or selfish motive;
- (c) personal or emotional problems;
- (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
- (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
- (f) inexperience in the practice of law;
- (g) character or reputation;
- (h) physical or mental disability or impairment;
- (i) delay in disciplinary proceedings;
- (j) interim rehabilitation;
- (k) imposition of other penalties or sanctions;
- (l) remorse;
- (m) remoteness of prior offenses.

9.4 *Factors which are neither aggravating nor mitigating.*

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

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

for attorneys to apply for readmission to the bar after suspension.<sup>31</sup> Such distinctions are relatively unimportant in a state such as Alaska where the procedures for applying for reinstatement are the same in cases involving either disbarment or suspension.<sup>32</sup> Procedures for readmission are more relevant in those states such as New York where disbarment can be permanent.<sup>33</sup> A number of the members of the Committee believed that disbarment should be permanent.<sup>34</sup> They deferred to the varied practices of the states, however, and made the *ABA Standards* consistent with the majority practice of allowing reinstatement.<sup>35</sup>

## B. The *ABA Standards* Model for Imposing Discipline

The Committee adopted a model framework for courts to use in imposing lawyer discipline. The framework is based on four questions which courts should answer to arrive at the appropriate level of sanction. These questions are:

- (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?<sup>36</sup>

The types of potential sanctions range from disbarment to admonition and other sanctions and remedies that the disciplinary body finds appropriate.<sup>37</sup> The *ABA Standards* are organized so that the types of duties are listed in order of importance,<sup>38</sup> with the duty to the client being the most important.<sup>39</sup> Subparagraphs then list the appropriate sanction for each mental state and level of injury caused by the violation of a duty. For example, standard 4.11 states that "disbarment is generally appropriate when a lawyer knowingly converts client property and causes injury or potential injury to a client."<sup>40</sup> The *ABA*

31. *Id.* § 2.10, at 9.

32. *See infra* note 65.

33. N.Y. JUD. LAW § 90(2), (4) (McKinney 1982).

34. Cameron, *supra* note 12, at 95.

35. *Id.* at 95-96.

36. ABA STANDARDS, *supra* note 1, Theoretical Framework at 5. *See also id.*, Black Letter Rules, § 3.0, at 9.

37. *Id.* Black Letter Rules, § 2, at 7-9.

38. *Id.* §§ 4.0-7.0, at 9-14.

39. *Id.* Theoretical Framework at 5 ("[T]he Standards assume that the most important ethical duties are those obligations which a lawyer owes to *clients*." (emphasis in original)).

40. *Id.* Black Letter Rules and Commentary, § 4.11, at 26.

*Standards* also follow the pattern of other ABA guidelines such as the *Model Rules of Professional Conduct* by supplying explanatory comments after each standard.<sup>41</sup>

### C. Uncertain Impact of the *ABA Standards*

It is too soon to assess the overall impact of the *ABA Standards*, since they have only recently been adopted.<sup>42</sup> The *ABA Standards* are not expected to be permanent, but rather, they represent a "first attempt at consistency in the inconsistent field of lawyer discipline."<sup>43</sup> The Committee also expressed the need for courts and disciplinary authorities to report their decisions, and the reasoning underlying those decisions, so that a body of opinions is generated which will aid in the achievement of consistency.<sup>44</sup>

The regulation counsel for the ABA Center for Professional Responsibility defined the *ABA Standards* in terms of their effect on the judiciary:

Having these standards, we can't lose because the purpose of them is to get judges to articulate bases for their decisions on what sanctions to impose. I can speak for the whole committee in saying that if not one state ever agreed with one of our standards or even the underlying basis to be considering in imposing standards, but did look at them and came up with their own rational basis for disagreeing, then we've still got what we wanted.<sup>45</sup>

While the impact of a gradual evolution of standards from reasoned opinions is not yet apparent, it is possible to suggest some changes which the application of the *ABA Standards* should bring about in a particular state, such as Alaska.

## III. PAST DISCIPLINARY SANCTION PRACTICE IN ALASKA

Initial complaints of attorney misconduct in Alaska are referred to Area Hearing Committees, which may refer the matter to the Disciplinary Board of the Alaska Bar Association.<sup>46</sup> One or both of the parties may refer the matter to the Alaska Supreme Court, which has ultimate jurisdiction over attorney discipline.<sup>47</sup> The Alaska Supreme Court may also choose to review the matter at its discretion, as it did in *Buckalew*.<sup>48</sup>

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41. See generally MODEL RULES OF PROFESSIONAL CONDUCT (1983).

42. Cameron, *supra* note 12, at 101.

43. *Id.* at 101.

44. ABA STANDARDS, *supra* note 1, Preface at 2.

45. Blodgett, *Mixed Reviews for ABA Discipline Standards*, 11 BAR LEADER 25, 26 (1986).

46. See, e.g., *In re Stump*, 621 P.2d 263, 263 (Alaska 1980).

47. See *Buckalew*, 731 P.2d 48, 51 (Alaska 1986).

48. *Id.* at 50.

There are few attorney discipline case proceedings reported in Alaska. The Committee found only eight reported cases between 1980 and June 1984.<sup>49</sup> When cases do arrive at the higher levels of the attorney discipline process, the sanction imposed is often more severe than the sanction originally recommended at the local level.<sup>50</sup>

The previous standard for assessing sanctions for lawyer misconduct in Alaska was the "balanced consideration of [all] relevant factors" test articulated in *In re Minor*.<sup>51</sup> The factors to be considered as set forth by the *Minor* court included "whether there are mitigating circumstances, what efforts the respondent [lawyer] has made to remedy the problem, and the respondent's prior disciplinary record."<sup>52</sup>

The Alaska Supreme Court also made reference to the 1979 *Standards* in other attorney discipline cases.<sup>53</sup> As the court stated in *Buckalew*, the 1979 *Standards* were similar to the procedure used in *Minor*, since no comprehensive guidelines were provided for the disciplinary sanction to be imposed for particular types of misconduct.<sup>54</sup> In both of these articulations of a similar standard, the aggravating and mitigating factors were assessed at the same time as the nature of the misconduct and the injury.<sup>55</sup>

Alaska disciplinary cases contain several examples of inconsistencies. There are inconsistent results within different hearing levels in the same case, and within different opinions written for the same case. In *In re Stump*, the Area Hearing Committee recommended a one-year suspension from the practice of law for the falsification of an item of documentary evidence.<sup>56</sup> The Disciplinary Board and the Alaska Supreme Court disagreed with the recommendation, proposing instead that the period of suspension should be five years.<sup>57</sup> In *Stump*, there was a dissenting opinion which assessed the relevant factors differently from the majority and recommended different penalties for the attorney misconduct.<sup>58</sup>

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49. ABA STANDARDS, *supra* note 1, App. 3, at 62. Alaska had eight cases which accounted for 0.3% of the total cases considered in the study.

50. See, e.g., 731 P.2d at 56; *Stump*, 621 P.2d at 264; *In re Preston*, 616 P.2d 1, 3 (Alaska 1980).

51. 658 P.2d 781, 784 (Alaska 1983) (quoting *Spindell v. State Bar of California*, 13 Cal. 3d 253, 261, 530 P.2d 168, 174, 118 Cal. Rptr. 480, 486 (1975)).

52. *Id.* at 784.

53. See, e.g., *Stump*, 621 P.2d at 265.

54. 731 P.2d at 51 n.9.

55. See *Minor*, 658 P.2d at 784. See also *In re Simpson*, 645 P.2d 1223, 1228 (Alaska 1982); *In re Preston*, 616 P.2d 1, 7 (Alaska 1980).

56. 621 P.2d at 264.

57. *Id.* at 266.

58. *Id.* at 269-70 (Connor, J., dissenting in part, and Burke, J., dissenting); 616 P.2d at 8 (Connor, J., and Burke, J., concurring in part, dissenting in part).

IV. THE *BUCKALEW* DECISION

The *Buckalew* case came to the Alaska Supreme Court as the result of a stipulation for discipline between Buckalew and the counsel for the Alaska Bar Association. The stipulation was filed with the Alaska Supreme Court according to statutory procedure.<sup>59</sup> The agreement was reached after Buckalew reported his own unethical conduct. Buckalew had misrepresented the result of an action to a client and then embezzled funds from two segregated trust accounts in order to pay the client for a supposed settlement when the action had actually been dismissed.<sup>60</sup> Buckalew's attorney notified all of the relevant parties<sup>61</sup> including the Alaska Bar Association. The Alaska Supreme Court suspended Buckalew while the action was pending.<sup>62</sup>

After a hearing before the Alaska Bar Association Board of Governors, Buckalew and the Discipline Counsel of the Alaska Bar Association entered into a stipulation for discipline by consent on August 29, 1985. This stipulation, which is allowed under *Alaska Bar Rule 22(h)*,<sup>63</sup> stated that Buckalew had violated four provisions of the *Model Code of Professional Responsibility*.<sup>64</sup> The stipulation further provided that he would be suspended for five years, with reinstatement

59. Alaska Bar Rule 22(h) provides in relevant part:

Respondent may tender a conditional consent to a specific discipline contained in Rule 16. This conditional consent will be submitted to Discipline Counsel for his or her approval. If accepted by Discipline Counsel, (s)he will refer the conditional admission to the Board for its approval or rejection of the requested discipline.

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Acceptance of the conditional consent by the Board will be subject to Court approval if the specific discipline to be imposed includes discipline provided in Rule 16(a)(1),(2),(3) and (4). Any conditional admission rejected by the Board or the Court will be withdrawn . . . .

If the Court or the Board rejects a conditional consent, the matter will be remanded to the Hearing Committee . . . .

ALASKA BAR RULE 22(h).

60. 713 P.2d at 49.

61. The relevant parties included the Alaska Bar Association, state and federal law enforcement agents, the affected clients and the bankruptcy court.

62. 713 P.2d at 49. Alaska Bar Rule 26(d) imposes suspension when "conduct by an attorney . . . constitutes a substantial threat of irreparable harm to his or her clients or prospective clients or where there is a showing that the attorney's conduct is causing great harm to the public by a continuing course of misconduct." ALASKA BAR RULE 26(d).

63. See *supra* note 59.

64. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980). The four provisions are DR 9-102 (requirement to preserve identity of client's funds), DR 1-102(A)(3) (prohibition from engaging in moral turpitude), DR 1-102(A)(4) (prohibition from conduct involving dishonesty, fraud, deceit or misrepresentation) and DR 1-102(A)(6) (prohibition from conduct that adversely reflects on fitness to practice law).

conditioned upon compliance with *Alaska Bar Rule 29(b)*.<sup>65</sup> *Alaska Bar Rule 22(h)* requires that such a stipulation be acceptable to the Board of Governors and the Alaska Supreme Court.<sup>66</sup> The stipulation was approved by the Board of Governors and filed with the Alaska Supreme Court.<sup>67</sup>

The Alaska Supreme Court reviewed the stipulation and entered an order requiring Buckalew to show cause why he should not be disbarred. Both Buckalew and the Discipline Counsel for the Alaska Bar Association ("Bar Counsel") filed briefs in response which highlighted the mitigating factors in the case and urged that the stipulation be accepted. The Bar Counsel also requested that the Alaska Supreme Court follow the procedures outlined in *Alaska Bar Rule 22(h)*<sup>68</sup> if it did not accept the stipulation. Rule 22(h) would require the matter to go before a full Bar Association Hearing Committee rather than have the Alaska Supreme Court make its own determination of the proper sanction for the rules violation.

The Alaska Supreme Court rejected the recommendation of the Bar Counsel for a five-year suspension. The court relied on the *ABA Standards* in holding that the appropriate sanction was disbarment.<sup>69</sup> Two of the five justices disagreed with the decision and found that suspension was the appropriate sanction given the mitigating factors present in the case.<sup>70</sup> The case was remanded to the Alaska Bar Association for further proceedings in order to comply with *Alaska Bar Rule 22(h)*.<sup>71</sup> The Alaska Supreme Court emphasized that it held the final responsibility for approving the appropriateness of disciplinary sanction decisions.<sup>72</sup>

The Alaska Supreme Court first explained that it was utilizing the *ABA Standards* because they provided a "comprehensive system" for

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65. Former Alaska Bar Rule 29(b) required disbarred attorneys to satisfy certain criteria before admission, while former Rule 29(c) allowed automatic reinstatement upon filing a verified petition for attorneys who had been suspended. Rule 29 has now been amended to apply the stricter requirements to all attorneys disbarred or suspended for more than one year. ALASKA BAR RULE 29.

66. See *supra* note 59.

67. 731 P.2d at 50.

68. See *supra* note 59.

69. 731 P.2d at 56.

70. *Id.* (Rabinowitz, C.J., and Moore, J., dissenting).

71. *Id.* at 56.

72. *Id.* at 51 n.7 ("It is our duty to discipline lawyers who indulge in practices inconsistent with the high ethical standards imposed upon the legal profession in this state. In determining the appropriate sanction to be imposed, we need not accept the Board's recommendation but may exercise our own independent judgment." (citations omitted)).

determining sanctions.<sup>73</sup> The previous standard, which had been articulated in *In re Minor*, called for a balanced consideration of relevant factors, but did not make any attempt to match sanctions with attorney conduct.<sup>74</sup> The court adopted the *ABA Standards* with the following statement:

The *ABA Standards* and the methodology that they provide are sound. They combine clear, straight-forward guidelines which ensure a level of consistency necessary for fairness to the public and the legal system with the flexibility and creativity essential to secure justice to the disciplined lawyer. Therefore, we will refer to the *ABA Standards* and methodology as an appropriate model for determining sanctions for lawyer misconduct in this state.<sup>75</sup>

Upon adopting the *ABA Standards*, the court applied the four-factor test provided by the guidelines.<sup>76</sup> The court found it unnecessary to consider the first three factors of the test extensively because of the stipulation. The ethical duty violated, the lawyer's mental state and the extent of the injury caused were all clear from the facts which had been agreed upon in the case. The court found that "Buckalew intentionally and knowingly violated ethical duties to his clients, the public and the legal system, which caused injury and potential serious injury."<sup>77</sup>

The *Buckalew* court looked next to the sanctions recommended in the *ABA Standards* for the type of injury involved in the case. The court found that all four standards that Buckalew had violated — knowing conversion of client funds, deceptive conduct, commission of criminal acts and abuse of the legal process — have a recommended sanction of disbarment.<sup>78</sup>

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73. 731 P.2d at 51-52.

74. *In re Minor*, 658 P.2d 781, 784 (Alaska 1983). The Alaska Supreme Court pointed out that this standard was similar to that provided in the *ABA Standards for Lawyer Discipline and Disability Proceedings*. *Buckalew*, 731 P.2d at 51 n.9.

75. 731 P.2d at 52.

76. *Id.* See also *supra* text accompanying note 36.

77. 731 P.2d at 53.

78. ABA STANDARDS, *supra* note 1, Black Letter Rules, §§ 4.0-6.2, at 9-13. The four ABA Standards involved are: Standard 4.11 (knowing conversion of property causing injury or potential injury to client), Standard 4.61 (deceiving client with intent to benefit lawyer or another causing serious injury or potential serious injury to a client), Standard 5.11(a) (engaging in serious criminal conduct with a necessary element which includes intentional interference with administration of justice, misrepresentation, fraud, misappropriation, theft), and (b) (engaging in intentional conduct involving dishonesty, fraud, deceit or misrepresentation with serious adverse reflection on fitness to practice), Standard 6.21 (knowing violation of court order or rule with intent to obtain benefit for lawyer or another causing serious injury or potentially serious injury to a party or causes serious or potentially serious interference with legal proceeding).

The court applied the last part of the four-part test by looking for aggravating and mitigating factors. While a number of the mitigating factors on the list included in the *ABA Standards*<sup>79</sup> were set forth in the stipulation,<sup>80</sup> the court found that these factors did not justify a reduction of the recommended sanction. Stating that “[t]here is no ‘magic formula’ to determine which or how many mitigating circumstances justify the reduction of an otherwise appropriate sanction,”<sup>81</sup> the court listed several reasons for refusing to recommend suspension.

First, the court reiterated that its primary duty is to protect the public and that such grave misconduct warrants disbarment even if it is an isolated incident.<sup>82</sup> Second, it discussed the severity of the violation, especially the mishandling of client funds.<sup>83</sup> The court also considered the need for internal bar sanctions because of the position of trust occupied by lawyers.<sup>84</sup> Finally, it stated that the actual punitive effect of suspension and disbarment might be the same.<sup>85</sup> The court concluded that “[o]ur paramount concern, here as always, must be the protection of the public, the courts, and the legal profession.”<sup>86</sup>

Chief Justice Rabinowitz and Justice Moore dissented in part to the result reached by the majority.<sup>87</sup> They objected to the rejection of the recommended discipline of a five-year suspension.<sup>88</sup> They noted the presence of mitigating factors sufficient to lighten the otherwise appropriate penalty of disbarment. These factors included a psychiatrist’s finding that Buckalew was suffering from emotional and psychological problems at the time of the misconduct and might have been making a “professional suicide attempt.”<sup>89</sup> While this factor did not excuse Buckalew’s conduct, it was relevant to the issue of intent, which is one of the prongs of the *ABA Standards* test.<sup>90</sup> His motives were not purely “greed or evil intent.”<sup>91</sup>

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79. See *supra* note 30.

80. 731 P.2d at 50 n.6. The listed mitigating factors included that Attorney Buckalew had diagnosed emotional problems during the period of misconduct, had no prior record of misconduct, made full disclosure and restitution (through his law firm), cooperated with Bar Association and law enforcement authorities, was remorseful and recognized his wrongdoing and did not use the embezzled funds for personal use.

81. *Id.* at 54.

82. *Id.* at 54-55.

83. *Id.* at 55.

84. *Id.*

85. *Id.* See also *supra* note 65.

86. 731 P.2d at 56.

87. *Id.* (Rabinowitz, C.J., and Moore, J., dissenting).

88. *Id.* (Rabinowitz, C.J., and Moore, J., dissenting).

89. *Id.* at 56-57 (Rabinowitz, C.J., and Moore, J., dissenting) (quoting psychiatric report of Dr. Deborah Geeseman).

90. ABA STANDARDS, *supra* note 1, Black Letter Rules, § 3.0(b), at 9.

91. 731 P.2d at 57 (Rabinowitz, C.J., and Moore, J., dissenting).

The dissenting justices proceeded to note the other mitigating factors from the list provided in the *ABA Standards* which were present in the case. Buckalew had no record of misconduct prior to the events in question.<sup>92</sup> He made full disclosure of his misconduct and expressed remorse, and his law firm made full restitution of the embezzled funds.<sup>93</sup> Also, Buckalew had already been sentenced by the United States District Court for the District of Alaska for the crime of embezzlement by a trustee, the same conduct considered in the case before the Alaska Supreme Court.<sup>94</sup> The dissent noted that none of the money was used for Buckalew's personal consumption.<sup>95</sup> Most of the same factors were noted by the majority, but the dissent concluded that these circumstances had enough weight to mitigate the otherwise appropriate sanction of disbarment. Like the majority, the dissenting justices noted that suspension leads to the same practical consequences as disbarment,<sup>96</sup> but that the stigma of the latter is greater. The dissent concluded that the procedures for reinstatement provide the same level of protection to the public as disbarment.<sup>97</sup>

#### V. IMPLICATIONS OF ADOPTION OF *ABA STANDARDS* FOR ALASKA ATTORNEY MISCONDUCT CASES

The implications of the *Buckalew* decision adopting the *ABA Standards* as the method for assessing the appropriate sanctions for attorney ethics violations in Alaska are difficult to evaluate at this time. The result in one case does not provide enough material to allow a judgment of the effectiveness of the guidelines in fulfilling the broad purpose of the *ABA Standards*, which is to eliminate or reduce differences among sanctions given for similar misconduct.<sup>98</sup> Some changes may be needed in Alaska if the Alaska Supreme Court plans to make the *ABA Standards* effective in achieving consistency.

Since few cases ever reach the Alaska Supreme Court,<sup>99</sup> the major impact of any change will have to come at the local level. The local level of the regional hearing system will have to adopt the *ABA Standards* approach when considering ethics violations in order for the new guidelines to have broad effect.

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92. ABA STANDARDS, *supra* note 1, Black Letter Rules, § 9.32(a), at 15.

93. *Id.* § 9.32(e), at 15.

94. *See* 731 P.2d at 49 n.1 (Buckalew received a five-year suspended sentence for the felony of embezzlement of property by a trustee in violation of 18 U.S.C. § 153).

95. *Id.* at 57 n.4. (Rabinowitz, C.J., and Moore, J., dissenting).

96. 731 P.2d at 57 (Rabinowitz, C.J., and Moore, J., dissenting). *See* ALASKA BAR RULE 29(b)(5); *see supra* note 65.

97. 731 P.2d at 57 (Rabinowitz, C.J., and Moore, J., dissenting).

98. *See supra* note 18 and accompanying text.

99. *See supra* note 49.

In particular, a specific attempt will have to be made to encourage the use of the two-step process in determining penalties. Until the *Bucklew* decision, the Alaska Supreme Court had joined other state disciplinary bodies in combining all of the aggravating and mitigating factors with the basic facts to determine whether misconduct occurred.<sup>100</sup> The *ABA Standards* should create more consistency in the initial stages of the process which involve defining the misconduct and matching it to the appropriate sanction. The assessment of aggravating and mitigating factors is less likely to become consistent because of the unique combination of these factors in each incident of misconduct. While these factors are listed in the *ABA Standards*, as are factors which should not be considered in aggravation or mitigation,<sup>101</sup> the specific impact of each type of factor is not defined. There is no effort to rank them or to match them to any specific reduction in sanction. The difference in assessments of the role of additional factors can be seen in *Bucklew*, where the dissenting opinion weighed the same mitigating factors as the majority and argued that these factors did compel a reduction in the sanction defined by the *ABA Standards*.<sup>102</sup>

If the minimum goal of the *ABA Standards* is to encourage courts to analyze the reasons for their decisions more carefully and to report the factors which led to the imposition of particular sanctions,<sup>103</sup> then the *Bucklew* opinion indicates that this goal may be reached in Alaska. The Alaska Supreme Court made a careful and well-reasoned application of the test defined by the *ABA Standards*, articulating reasons at each step of analysis. The goal will be reached more effectively if the regional hearing boards are encouraged to follow similar procedures.

## VI. CONCLUSION

The recent *Bucklew* decision, in which the Alaska Supreme Court adopted the *ABA Standards*, should alter the way attorney misconduct is assessed in Alaska. The separation of the determination of the appropriate sanction from the weighing of additional factors should clarify the disciplinary process. More effort may be needed to clarify the role of aggravating and mitigating factors and to standardize their application because the *ABA Standards* do not attempt to go beyond listing relevant factors. The additional effort to explain decisions should lead to the formation of a body of case law which will

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100. *In re Stump*, 621 P.2d 263, 266 (Alaska 1980).

101. *ABA STANDARDS*, *supra* note 1, Black Letter Rules, § 9.4, at 15.

102. *Bucklew*, 731 P.2d at 54 (Rabinowitz, C.J., and Moore, J., dissenting).

103. *See ABA STANDARDS*, *supra* note 1, at 2. *See also* text accompanying note 40.

allow penalties for similar misconduct to become more uniform over time.

*Michele J. Woods*

