

AGENDA ITEM

120 NOVEMBER 2014

DATE: November 3, 2014

TO: Members of the Regulation and Discipline Committee

FROM: Karen Goodman, Chair, Discipline Standards Task Force

SUBJECT: Standards for Attorney Sanctions for Professional Misconduct, Proposed Modifications – Request for Public Comment

EXECUTIVE SUMMARY

The Standards for Attorney Sanctions for Professional Misconduct (“Standards”) were adopted by the Board of Trustees, effective January 1, 1986, to provide a means for determining the appropriate disciplinary sanction in a particular case and to ensure consistency across cases dealing with similar misconduct and surrounding circumstances.

The Standards were in place for nearly 27 years without any major modifications. In 2013, the State Bar realized the Standards needed to be updated. A “clean-up” project was initiated that included making stylistic revisions, rewriting the Standards in plain English, reorganizing them for better flow and comprehension, and substantively modifying them in certain places to better reflect current case law, rule, and statutory authority.

The revised Standards were adopted by the Board of Trustees on October 12, 2013, and during the public comment period, all commentators agreed that the new Standards provided clearer, more concise, and enhanced guidance with respect to determining appropriate degrees of discipline. However, some expressed their view that a major overhaul of the Standards was appropriate, and that the Board should consider: (1) making additional substantive changes to existing Standards; (2) creating narrowly tailored disciplinary sanctions similar to sentencing guidelines; and/or (3) breaking out Standards that were only currently captured in the catch-all provision.

Based on this feedback, the Board appointed a Disciplinary Standards Task Force, chaired by Karen Goodman, to evaluate these proposals and determine what additional changes, if any, needed to be made to the Standards.

The Task Force began its work on May 12, 2014, and broke into three working groups: Working Group I (Standards Model Comparisons), Working Group II (Levels of Discipline), and Working Group III (Aggravation and Mitigation). These working groups met and made recommendations to the full Task Force. The Task Force received and

approved those recommendations on October 24, 2014, and voted to refer them to the Regulation and Discipline Committee.

This item summarizes those recommendations and seeks a 45-day public comment period.

Board members with any questions should contact Veronica Li, Task Force Coordinator, Office of General Counsel, at Veronica.Li@calbar.ca.gov or (415) 538-2433.

BACKGROUND

In 1985, the State Bar, through a collaborative effort between the State Bar Court and the Office of the Chief Trial Counsel, developed proposed Disciplinary Standards. At the time, the American Bar Association (ABA) was undertaking a similar project and had prepared draft model disciplinary sanction standards, which had not yet been approved by the ABA House of Delegates, but which the State Bar considered during its vetting process. The State Bar opted to proceed with its own proposed Standards, which were adopted by the Board of Trustees in November 1985 and became effective January 1, 1986.

The State Bar intended to achieve several important goals with these Standards, including: (1) furthering the primary purposes of attorney discipline; (2) providing greater consistency in disciplinary sanctions for similar offenses; and (3) identifying the factors that may properly be considered for imposing discipline and the means by which those factors may lead to a particular sanction in a given case.

In the nearly three decades that the Standards have been in effect, the California Supreme Court has generally looked with favor upon their application. Although the Standards are not binding on the Court, they serve as guidelines to promote the consistent and uniform application of disciplinary measures and are generally adhered to. (*In re Silverton* (2005) 36 Cal. 4th 81, 91; *In re Naney* (1990) 51 Cal.3d 186, 190; *In re Lamb* (1989) 49 Cal.3d 239, 245.) Accordingly, as recently as 2005, the Court reaffirmed its position that the Standards are entitled to “great weight” (see *In re Silverton, supra*, 36 Cal. 4th at 92) and the Court will not reject a recommendation based on the Standards unless it has grave doubts about the propriety of the recommendation. (*Id.* at 91; *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366.)

The Court has also held that the State Bar Court should follow the guidance of the Standards whenever possible, although strict application may not always be appropriate. (*In re Young* (1989) 49 Cal.3d 257, 267 [the State Bar Court should always look to the Standards for guidance but it is not compelled to strictly follow them in every case].) Thus, while the State Bar Court may deviate from the Standards in certain instances, the Court has indicated that the recommendation should contain clear reasons for the departure from the Standards. (*Blair v. State Bar* (1989) 49 Cal.3d 762, 776, fn. 5 [“In future cases, however, in which the State Bar recommends discipline

different from that called for in the Standards, we believe it would be most helpful to this court, and perhaps to the member being disciplined, for the State Bar to make clear the reasons for its departure from its own Standards.”].)

Ultimately, “the imposition of discipline does not issue from a fixed formula. Each case must be decided on its own merits based on a balanced consideration of all relevant factors.” (*Levin v. State Bar* (1989) 47 Cal.3d 1140, 1150.)

Until last year, the Standards had not been subject to any substantial modifications or revisions since their initial adoption and implementation. However, in 2013, amendments were proposed to the Standards that involved a general “cleanup” of the Standard. This included recasting the Standards into plain English in order to eliminate unnecessary and repetitive language and inserting footnotes to relevant rules, statutes or case law to provide precedent, authority and guidance. In addition, the Standards were reorganized for better flow and ease of comprehension. This modification followed the current theme of a two part compilation of the Standards – Part A: Standards in General and Part B: Sanctions for Specific Misconduct – but rearranged the sequence and titles of the individual Standards and added new Standards. Finally, specific Standards were updated to reflect the state of the law as it has evolved since 1986.

At the Board of Trustees’ July 18-19, 2013 meeting, the RAD Committee authorized a 60-day comment period to circulate the proposed modifications to the Standards for public input. The 60-day period expired on September 23, 2013. Generally, all commentators found the proposed Standards to be a significant improvement over the existing Standards, but there were suggestions that specific Standards be substantively modified and that the entire set of Standards be overhauled to include narrowly tailored disciplinary sanctions similar to sentencing guidelines. These concepts represented such a conceptual departure from existing precedent that it was suggested that the Board consider further evaluation and study to determine if such a whole-sale revision and paradigm change was necessary.

At its October 2013 meeting, the Board adopted the proposed changes to the Standards and appointed a Disciplinary Standards Task Force to evaluate the Standards to see if additional changes should be made.

The Task Force met between May 12, 2014 and October 24, 2014, and ultimately declined to adopt the model of narrowly tailored sentencing guidelines. The Task Force also looked at the ABA Model and decided that it was not a good fit either – as it contained terms such as “negligence” and “admonitions” that were inconsistent with our approach to levels of discipline. However, the Task Force did recommend substantive changes to certain Standards and the adoption of new Standards for specific acts of misconduct that were only previously addressed in a catch-all provision. The specific proposals are summarized below in the Discussion Section.

The Task Force also recommended the creation of a staff working group to consider whether the concept of “stayed suspension” should be eliminated as a level of

discipline. This concept of “stayed suspension” has proven to be confusing to participants in the discipline system as well as to the public. The Task Force was generally in favor of eliminating “stayed suspension”, but because of the impact on the State Bar Rules of Procedure, the Discipline Orders, and Probation Revocation Proceedings, the Task Force thought it more prudent to have the idea vetted internally by State Bar staff before finalizing a full recommendation to the Board.

ISSUE

Whether the Regulation and Discipline Committee should authorize a 45-day public comment period for consideration of the proposed revisions to the Standards for Attorney Sanctions for Professional Misconduct, in the form attached.

And whether Regulation and Discipline Committee should appoint a staff working group made up of representatives from the Office of Probation, the Office of the Chief Trial Counsel, the Office of General Counsel, and the State Bar Court to consider whether or not to eliminate “stayed suspension” as a level of discipline and to consider other issues related to the levels of discipline described in the Standards for Attorney Sanctions for Professional Misconduct.

DISCUSSION

A. Task Force Members and Charge

The Discipline Standards Task Force was charged with studying and reviewing the Standards for Attorney Sanctions for Professional Misconduct, as modified and adopted by the Board of Trustees effective January 1, 2014, to see what, if any, additional modifications were desired or warranted. All final recommendations from the Task Force must be presented and approved by the Regulation and Discipline Committee (formally the Regulation, Admissions and Discipline Oversight Committee).

The members included Karen Goodman (Chair), Raul Ayala, Glenda Corcoran, Evan Davis, Daniel Dean, James Fox, David George, James Heiting, Carol Langford, Steven Lewis, Ellen Peck, Judith Sklar, and Adam Torres. The advisory members included Beth Jay (Supreme Court), Rebecca Rosenthal (State Bar Court), and George Scott (State Bar Court), and staff representatives included OCTC attorneys, Robert Hawley, Rachel Grunberg, Rick Zanassi and Mark Torres-Gil.

The Task Force broke out into three working groups: Working Group I (Standards Model Comparisons), Working Group II (Levels of Discipline), and Working Group III (Factors in Aggravation and Mitigation). The working groups reviewed their respective areas and provided recommendations which were submitted to the full Task Force and approved.

B. Proposed Revisions

The Task Force agreed that significant changes were needed in an effort to better protect the public and provide more guidance. Among the revisions, the Task Force recommendations include:

- Adding clarifying language and definitions to otherwise ambiguous terms, such as public and private reprovals, interim remedies, conditions, and probation.
- Separating public and private reprovals into separate levels of discipline. See Standard 1.3(d) and (e).
- Removing footnotes and citations throughout the Standards. The Standards are intended to capture general principles, and since every disciplinary case is decided on its own facts and circumstances, determining which cases and authorities to cite became controversial. It was decided that adding source references and notes transformed the Standards into more of a treatise rather than a statement of general guidelines, and that the State Bar Court Reporter and the State Bar Compendium provide a comprehensive guide of essential cases in each category without appearing to give more weight to any specific case. There was also a concern that including footnotes and citations would require periodic updates and additional resources.
- Breaking out concealment, overreaching, and uncharged violations as stand-alone factors in aggravation. See Standard 1.5(f)-(h).
- Adding “misrepresentation” and “high level of vulnerability of the victim” as factors in aggravation in Standard 1.5(e) and (n).
- Modifying Standard 1.6(a) to clarify that absence of a prior record of discipline is considered mitigation when the present misconduct is deemed to be “aberrational and not likely to recur.” This is more consistent with existing case law than the language in the current Standard, which uses the phrase “misconduct that is not deemed serious.”
- Including a new introduction section to Part B, Sanctions for Specific Misconduct that indicates that “presumed sanctions” are the starting point for the imposition of discipline, and that the degree of sanction can increase or decrease based on factors in mitigation and aggravation. The introduction also indicates that there may be acts of misconduct not specifically listed in Part B, but which are captured in the catch-all provisions in Standards 2.18 and 2.19.
- Throughout Part B, a new phrase “presumed sanction” has been used for each Standard. This replaces the current language which states “xxx level of discipline is appropriate.”

- Revising the language in current Standard 2.1 “Misappropriation” to reflect levels of discipline more consistent with case law.
- Breaking out several new Standards that are currently captured in the catch-all provisions. These new Standards include: (1) Standard 2.5 “Representation of Adverse Interests”; (2) Standard 2.6 “Breach of Confidentiality”; (3) Standard 2.8 “Fee-Splitting with Non-Lawyers”; and 2.9 “Fivolous Litigation.” These new Standards are based on violations of the Rules of Professional Conduct and the State Bar Act, and the presumed sanctions were derived from existing Supreme Court case law and State Bar Court precedent. In general, these new Standards have ranges that include actual suspension to reproof – which are wholly consistent with Business and Profession Code section 6077 that provides for suspension to reproof for a willful breach of the any of the Rules of Professional Conduct. The Fivolous Litigation Standard includes disbarment as a sanction, but only when there is a pattern.
- Replacing current Standard 2.5 “Failure to Perform or Communicate” with new Standard 2.7 “Performance, Communication or Withdrawal Violations.” The Task Force explored breaking out performance and communication violations into separate Standards, but realized that the case law bundles them together and there were no published cases dealing with failure to communicate as a stand-alone offense. Renaming the Standard -- “Performance, Communication or Withdrawal Violations” -- better captures types of misconduct that generally appear in tandem. The Task Force was also concerned that breaking these out into separate Standards could lead to stacking of discipline.
- Standard 2.7 (renumbered as 2.11) relating to “Moral Turpitude, Dishonesty, Fraud, Corruption, or Concealment” was expanded to include “intentional or grossly negligent misrepresentation.” In determining the degree of sanction, additional language was added to capture the “impact on the adjudicator” and “the administration of justice”.
- Correcting typographical errors, incorporating grammatical edits, renumbering, and making conforming changes throughout the Standards.

FISCAL / PERSONNEL IMPACT:

None expected.

RULE AMENDMENTS:

None known.

BOARD BOOK IMPACT:

None known.

RECOMMENDATION:

It is recommended that the Regulation and Discipline Committee authorize a 45-day public comment period for consideration of the proposed modifications.

PROPOSED BOARD COMMITTEE RESOLUTION:

Should the Regulation and Discipline Committee agree with the above recommendation, the following resolution would be appropriate:

RESOLVED, that the Regulation and Discipline Committee authorizes staff to make available for 45 days of public comment, the proposed modifications to the Standards for Attorney Sanctions for Professional Misconduct, in the form attached; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed item; and it is

FURTHER RESOLVED, that the Regulation and Discipline Committee appoint a staff working comprised up of representatives from the Office of Probation, the Office of the Chief Trial Counsel, the Office of General Counsel, and the State Bar Court to consider whether or not to eliminate “stayed suspension” as a level of discipline and to consider other issues related to the levels of discipline described in the Standards for Attorney Sanctions for Professional Misconduct.

ATTACHMENTS: Standards for Attorney Sanctions for Professional Misconduct with proposed modifications (red-lined version)

Standards for Attorney Sanctions for Professional Misconduct with proposed modifications (clean-copy)