

# AGENDA ITEM

**DATE:** March 12, 2015

**TO:** Members of the Regulation and Discipline Committee

**FROM:** Office of General Counsel

**SUBJECT:** Discipline Standards Task Force – Proposed Revisions to Standards – Request for Re-Release for Public Comment

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## EXECUTIVE SUMMARY

The Standards for Attorney Sanctions for Professional Misconduct (“Standards”) were adopted by the Board of Trustees (“Board”), 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 three decades without any major modifications. However, in 2013, after a modest “clean-up” of the Standards (which included mainly technical and stylistic revisions), the Board appointed a Disciplinary Standards Task Force (“Task Force”), to evaluate whether substantive modifications, if any, needed to be made to the Standards.

The Task Force, chaired by Karen Goodman, began its work on May 12, 2014, and broke into three working groups: Working Group I (Standards Model Comparisons, chaired by Carol Langford), Working Group II (Levels of Discipline, chaired by Ellen Peck), and Working Group III (Aggravation and Mitigation, chaired by Judith Sklar). 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 (“RAD”). At its November 6, 2014 meeting, RAD authorized release of the proposed recommendations for a 45-day public comment period.

During the comment period, several substantive comments were received, which are summarized in this item. However, the Task Force sunsetted at the end of 2014, before the public comment period closed. The Board President, in consultation with the Chair of RAD, asked the former Chair of the Task Force and the Chairs of the Working Groups to review the comments and provide an advisory recommendation, which is also summarized in this item.

Based on the feedback received, it is recommended that the proposed Standards be re-released for a 30-day comment period, and that the former Chair of the Task Force and

Chairs of the Working Groups review any further comments received and report back to RAD and the Board.

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## **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 Standards have not been subject to any substantial modifications or revisions since their initial adoption and implementation. However, in 2013, amendments were proposed that involved a general “cleanup” of the Standards. This included recasting the Standards into plain English in order to eliminate unnecessary and repetitive language and reorganizing them for better flow and ease of comprehension. It also included updates to reflect the state of the law as it has evolved since 1986.

At the Board’s July 18-19, 2013 meeting, RAD authorized a 60-day comment period to circulate the proposed modifications to the Standards for public input. 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 in some areas 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 wholesale revision and paradigm change was necessary.

At its October 2013 meeting, the Board adopted the proposed “clean up” changes and appointed the Task Force to evaluate the substantive comments to see if additional changes, if any, should be made to the Standards.

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 the State Bar’s 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 Task Force's proposals were released for public comment in November 2014 and several substantive comments were received. The former Chair of the Task Force and Chairs of the Task Force working groups reviewed the comments, at the request of the Board President and the Chair of RAD, and recommend further changes to the Standards.

## **ISSUE**

Whether the Regulation and Discipline Committee should re-release the Standards for Attorney Sanctions for Professional Misconduct, in the form attached hereto, for an additional 30-day public comment period?

## **DISCUSSION**

### **A. Task Force Members and Charge**

The Task Force was charged with studying and reviewing the Standards, as modified and adopted by the Board, effective January 1, 2014, to see what, if any, additional modifications were desired or warranted.

The members of the Task Force 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 (California Supreme Court), Rebecca Rosenthal and George Scott (State Bar Court), and State Bar staff representatives included Robert Hawley (Acting and Deputy Executive Director), Kevin Taylor and Kristen Ritsema (Office of the Chief Trial Counsel), and Rachel Grunberg, Rick Zanassi, and Mark Torres-Gil (Office of the General Counsel).

The Task Force broke out into three working groups: Working Group I (Standards Model Comparisons – chaired by Carol Langford), Working Group II (Levels of Discipline – chaired by Ellen Peck), and Working Group III (Factors in Aggravation and Mitigation – chaired by Judith Sklar). The working groups reviewed their respective areas and provided recommendations which were submitted to the full Task Force and approved. Among the revisions, the Task Force recommendations included:

- Adding clarifying language and definitions to otherwise ambiguous terms, such as public and private reprovls, interim remedies, conditions, and probation.
- Separating public and private reprovls 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, which 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 (4) Standard 2.9 “Frivolous 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 Frivolous 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.

On November 6, 2014, RAD authorized that the recommendations be released for a 45-day comment period.

Several substantive comments were received, including comments from Steven Lewis (attorney member of the Task Force), David Carr (attorney), Phillip Reed (inactive member), Miles King (member of the public), and Jayne Kim (Chief Trial Counsel). These comments are attached to this item for RAD’s consideration and summarized below.

The comments were reviewed by the former Chair of the Task Force and the Working Group Chairs (“Chairs”) for input and advice. The Chairs’ recommendations are summarized below and incorporated into Attachments B & C, which this item requests that RAD re-release for public comment.

## **A. STANDARDS IN GENERAL**

### **Comments**

- Jayne Kim, Chief Trial Counsel (“CTC”) expresses overall support for the proposed revisions to the Standards.
- David Carr prefers the “clean up” version of the Standards that was adopted by the Board in 2013, effective January 1, 2014. He believes the proposed

modifications “are not better than the revised Standards that they [sic] would purport to replace.”

- David Carr and Steven Lewis both support the inclusion of citation to authorities in footnotes. They believe that case citations would be a helpful resource to respondents representing themselves in disciplinary proceedings.
- The Standards use the concept of “presumed sanctions” and state that a “presumed sanction ... is a starting point for the imposition of discipline.” David Carr believes the term “presumed sanction” should be replaced with the term “baseline sanction.”
- David Carr believes the Task Force “was not empowered to create new guidelines out of whole cloth.” He does not support the idea that every violation deserves its own Standard.
- Phillip Reed suggests that permanent guidelines be added to the Standards that define the timing for a lawyer to voluntarily resign or place himself/herself on inactive status.
- Miles King similarly suggests that lawyers should quit the practice of law “when they have lost the strong personal desire to do competent legal work....” He recommends that guidelines be added that assist lawyers in determining when they should voluntarily resign. He also challenges the discipline system as a whole. He states the State Bar fails in its job as a regulatory agency. He also suggests that two sets of rules exist – one for attorneys and one for pro pers.

### **Chairs’ Recommendations**

- The Chairs believe the Task Force’s recommendations are an overall improvement to the Standards.
- The Chairs disagree that case citations are appropriate in the Standards. This topic was heavily discussed by the Task Force and voted down. Even the concept of providing a small sampling of cases was rejected. Strong concern was raised regarding the time and resources that would be needed to update citations. More importantly, each discipline case is decided on its own facts and circumstances and given the volume of precedent, it became controversial choosing between cases. Providing some cases to the exclusion of others was thought to be problematic, in that it might over-emphasize the importance of certain cases. The State Bar Court Reporter is a publication put out by the State Bar that includes all of the published Review Department cases since 1989. It also includes a case digest that was specifically developed for the purpose of facilitating research in the specialized area of California attorney discipline and regulatory case law. The Task Force and the Chairs believe the State Bar Court

Reporter is a more appropriate and comprehensive resource guide for all parties involved in the discipline system.

- The Chairs believe “presumed sanction” is sufficiently clear and the Standards convey that a “presumed sanction” is simply a starting point that can be “adjusted up or down depending on the application of mitigating and aggravating circumstances set forth in Standards 1.5 and 1.6, and the balancing of these circumstances as described in Standard 1.7(b) and (c).” (See Standards, Part B. Sanctions for Specific Misconduct, introductory paragraph.)
- The Task Force charge was to “study and review the Standards ... to see what, if any, additional modifications are desired or warranted.” The Task Force and the Chairs believe that addressing specific violations that were previously captured in the catch-all Standard is within this charge. The new break-out 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 (4) Standard 2.9 “Frivolous Litigation.” These 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.
- The Standards do not apply to resignations. (See Standard 1.1). The Chairs believe that the comments from Phillip Reed and Miles King regarding whether attorneys should be disciplined for competence issues or whether they should be required to resign should be referred to the Commission for the Revision of the Rules of Professional Conduct for consideration.

## **B. STANDARD 1.1 PURPOSE AND SCOPE OF STANDARDS**

### **Comments**

- Steven Lewis recommends that the Standards reference the longstanding decisions made by the Supreme Court, as well as the decisions of the Review Department or Hearing Department of the State Bar Court (that have been approved by Supreme Court).
- David Carr takes issue with the introductory sentence that indicates that the Standards “set forth a *means* for determining the appropriate disciplinary sanction in a particular case....” He believes this implies that the Standards are the exclusive means of determining discipline. He recommends that Standard 1.1 be amended to provide that a “balanced consideration of all relevant factors” is needed to reach a particular discipline recommendation.

### **Chairs’ Recommendations**

- The Chairs agree in part with Steven Lewis and recommend that Standard 1.1 be amended to include reference to published decisions of the Review Department of the State Bar Court. Hearing Department decisions do not carry any precedential weight.
- The Chairs believe Standard 1.1 adequately explains the purpose and scope of the Standards and clearly state that they are “a means” to determine a sanction – not the only means.

## **C. STANDARD 1.2 DEFINITIONS**

### **Comments**

- CTC recommends that the definitions should include a statement explaining why aggravating and mitigating factors affect the level of discipline to be imposed in a particular case. CTC proposes that Standard 1.2 or Standard 1.7 include language stating that “the weight to be afforded a factor in aggravation or mitigation is to be determined by the extent to which the factor is probative of the member’s willingness and ability to conform to ethical responsibilities in the future.”
- Standard 1.2(c)(1) includes language that states: “Actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years, or until specific conditions are met.” David Carr believes cases impose different periods of suspension other than only those listed.
- David Carr also believes the definition of “stayed suspension”, under Standard 1.2(c)(2), which permits a suspension to be stayed “only if it is consistent with the primary purposes of discipline”, is not supported by case law.

### **Chairs’ Recommendations**

- The Chairs note that Standard 1.7 includes sufficient guidance regarding application of factors in mitigation and aggravation and already incorporates the essential elements of CTC’s proposed language. Standard 1.7(b) discussing aggravating circumstances currently states: “On balance, a greater sanction is appropriate in cases where there is serious harm to the client, the public, the legal system, of the profession and where the record demonstrates that the member is unwilling or unable to conform to ethical responsibilities.” Standard 1.7(c) discussing mitigating circumstances currently states: “On balance, a lesser sanction is appropriate in cases of minor misconduct, where there is little or no injury to a client, the public, the legal system, or the profession and where the record demonstrates that the member is willing and has the ability to conform to ethical responsibilities in the future.”

- The Chairs disagree with David Carr’s comment and note that Standard 1.2(c)(1) indicates generally the defined periods of suspension (thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, or three years) and that most discipline cases fall within these ranges.
- The Chairs also note that a staff working group will be reviewing the entire concept of “stayed suspension” and they will refer David Carr’s comment regarding Standard 1.2(c)(2) to that group.

#### **D. STANDARD 1.3 DEGREES OF SANCTIONS**

##### **Comments**

- CTC recommends that “interim remedies” be deleted as sanctions under the Standards. CTC indicates that “though a member may receive credit towards an actual disciplinary suspension for the time her or she was suspended under an interim remedy, the interim remedy itself is not a disciplinary sanction.”

##### **Chairs’ Recommendations**

- The Standards do not apply to interim suspensions after conviction of a crime or involuntary inactive enrollments. (See Standard 1.1). However, the Chairs defer to the statutory language of the Business and Professions Code, which includes “a full range of *interim remedies or final discipline short of involuntary inactive enrollment.*” (See Bus. & Prof Code section 6007(h) [emphasis added].) Business and Professions Code section 6233 [the Attorney Diversion and Assistance Program] also contemplates various sanctions, short of involuntary inactive enrollment, such as practice restrictions and monetary accounting procedures. Without further discussion about what “final discipline” means under the statutory authorities, the Chairs are reluctant to remove this group of potential sanctions from the Standards.

#### **E. STANDARD 1.6 MITIGATING CIRCUMSTANCES**

##### **Comments**

- Standard 1.6(a) states that a mitigating factor can be the “absence of any prior record of discipline over many years of practice coupled with present misconduct, which is aberrational and not likely to recur.” CTC recommends that “aberrational” be deleted.
- Standard 1.6(b) states that a mitigating factor can be a “good faith belief that is honestly held and reasonable.” CTC recommends that the Standard be

amended to read “good faith belief that is honestly held and objectively reasonable.”

### **Chairs’ Recommendations**

- The Chairs agree with CTC and believe the term “aberrational” can be deleted from Standard 1.6(a) since the concept is already encompassed under the phrase “not likely to recur.”
- The Chairs believe that the term “reasonable” in Standard 1.6(b) incorporates an “objective” standard. However, they see no harm in adding the word “objectively” in front of “reasonable” to underscore that point.

## **F. STANDARD 2.5 REPRESENTATION OF ADVERSE INTERESTS**

### **Comments**

- Steven Lewis expresses concern that no meaningful body of case law exists for Standard 2.5; that violation of Rule of Professional Conduct 3-310 is already governed by the existing “catch-all” Standard; and that there are unforeseen consequences in creating a conflicts standard because reasonable judges and attorneys often disagree in this arena. He does not support a Standard specifically aimed at conflicts, but recommends that if we are to go forward we adopt his proposal, as outlined in his comment, which incorporates the concept that there be “no reasonable doubt as to whether, under existing case law, there is a duty to refrain from representing multiple clients without informed written consent.”
- David Carr also believes violations of Rule of Professional Conduct 3-310 (conflicts) do not “cry out for their own Standards.”
- CTC expresses concern that the Standard only addresses some violations of Rule of Professional Conduct 3-310 and not all of them and recommends that the Standard be revised to capture all violations.

### **Chairs’ Recommendations**

- The Chairs do not agree with Steven Lewis’ proposal, but do recommend changes to the Standard to more narrowly address only situations where there is significant harm to a client or former client. The Chairs believe that conduct involving minimal or no harm is most often addressed through civil disqualification proceedings and not disciplinary proceedings.
- The Chairs believe it is appropriate to have a stand-alone Standard addressing conflicts.

- With respect to CTC’s concern, in those rare cases where there might be additional violations of Rule 3-310 not captured in Standard 2.5, guidance is available under the catch-all Standard 2.19.

## **G. STANDARD 2.7 PERFORMANCE, COMMUNICATION, WITHDRAWAL VIOLATIONS**

### **Comments**

- Steven Lewis recommends that disbarment under Standard 2.7 be based on “habitual disregard of client interests over an extended period of time” rather than “pattern of misconduct.” He also recommends that the Standard be broken out into sanctions for multiple client matters and single client matters, as outlined in his comment.
- CTC recommends a non-substantive change to streamline the following language in Standard 2.7(c) “limited in scope or occur over an isolated period of time” to read “limited in scope or time.”

### **Chairs’ Recommendations**

- The Chairs agree, in part, with Steven Lewis and recommend that any reference to “pattern” in the Standard be replaced with “habitual disregard of client interests.” They believe the term “habitual disregard” necessarily includes the concept of behavior extending over a period of time. They do not agree that the lower end sanctions are reserved for single-client matters and believe the case law discusses violations that are limited in scope and time.
- The Chairs agree with CTC’s streamline change to subsection (c).

## **H. STANDARD 2.8 FEE-SPLITTING**

### **Comments**

- Steven Lewis does not support a Standard specifically aimed at fee-splitting and indicates that there is no case law where the sole violation is fee-splitting.

### **Chairs’ Recommendations**

- The Chairs recommend no change to this Standard. The Standards are not based solely on case law, but also the State Bar Act, and the Chairs defer to the Task Force, which felt that fee-splitting was an area that needed to be specifically addressed in the Standards.

## **I. STANDARD 2.9 FRIVOLOUS LITIGATION**

### **Comments**

- Miles King believes there should be no sanction for frivolous litigation.

### **Chairs' Recommendations**

- The Chairs disagree. Under Rule of Professional Conduct 3-200 and Business and Professions Code sections 6068(c) and (g), frivolous litigation is a disciplinable offense.

### **FISCAL / PERSONNEL IMPACT:**

None expected.

### **RULE AMENDMENTS:**

None known.

### **BOARD BOOK IMPACT:**

None known.

### **RECOMMENDATION:**

It is recommended that the Regulation and Discipline Committee re-release the Standards for Attorney Sanctions for Professional Misconduct for an additional 30-day public comment period for consideration of the proposed modifications and that the former Chair of the Task Force and Chairs of the Working Groups be directed to review any further comments received and report back to the Regulation and Discipline Committee and the Board.

### **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 re-release the Standards for Attorney Sanctions for Professional Misconduct for an additional 30-day public comment period for consideration of the proposed modifications, in the form attached hereto; and it is

**FURTHER RESOLVED**, that this authorization for re-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 former Chair of the Task Force and Chairs of the Working Groups be directed to review any further comments received and report back to the Regulation and Discipline Committee and the Board.

**ATTACHMENTS:**

Attachment A: Public Comments

Attachment B: Standards for Attorney Sanctions for Professional Misconduct with proposed modifications (track-changes version)

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