

# AGENDA ITEM

**DATE:** June 27, 2013

**TO:** Members, Regulation, Admissions and Discipline Oversight

**FROM:** Office of General Counsel

**SUBJECT:** Standards for Attorney Sanctions for Professional Misconduct, Proposed Modifications – Request 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, 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. Since 1986 only a few minor modifications have been made to the Standards. This item proposes updates and stylistic revisions to the Standards, including rewriting them 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 are intended to be clearer, more concise, and to offer enhanced guidance with respect to determining appropriate degrees of discipline.

This agenda item requests 60 days of public comment to ensure full participation by interested constituents, including the Office of the Chief Trial Counsel, State Bar Court, and Respondents Bar.

Board members with any questions should contact Starr Babcock, General Counsel, at [Starr.Babcock@calbar.ca.gov](mailto:Starr.Babcock@calbar.ca.gov) or (415) 538-2070.

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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 State Bar intended to achieve several important goals by issuing these Standards, including: (1) furtherance of the purposes of attorney discipline; (2) greater consistency in disciplinary sanctions for similar offenses; and (3) identification of the factors which may properly be considered for imposing discipline and the means by which those factors may lead to a particular sanction in a given case. (See Introduction to Standards, Rules of Procedure of the State Bar, Title IV.)

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. 4<sup>th</sup> 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. 4<sup>th</sup> 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.)

## **ISSUE**

Whether to authorize 60 days of public comment on the proposed revisions to the Standards for Attorney Sanctions for Professional Misconduct, in the form attached.

## **DISCUSSION**

### **A. Purpose and Scope of the Revisions**

The Standards have not been subject to any substantial modifications or revisions since their initial adoption and implementation 27 years ago.<sup>1</sup> The purpose of the instant proposal is to update and provide a more streamlined, concise and better-organized version of the Standards.

This general “cleanup” involved recasting the Standards into plain English in order to eliminate unnecessary and repetitive language. The proposed Standards are now clear, more concise, and easier to read. Another aspect involved inserting footnotes to relevant rules, statutes or case law to provide precedent, authority and guidance and so as not to distract from the substance of the Standards. In addition the Standards have been reorganized for better flow and ease of comprehension. This modification follows the current theme of a two part compilation of the Standards – Part A: Standards in General and Part B: Sanctions for Specific Misconduct – but rearranges the sequence and titles of the individual Standards and adds new standards. Finally, specific standards were updated to reflect the state of the law as it has evolved since 1986.

During this process, input was solicited from key internal State Bar constituents and suggested revisions were circulated and considered. A number of the suggestions received were incorporated into the final version. However, certain suggestions involved broad policy changes. For example, one such suggestion proposed creating detailed disciplinary ranges similar to sentencing guidelines. Another suggestion proposed eliminating the term “actual suspension” from the Standards. Yet another suggestion was to remodel the Standards to align more closely to the American Bar Association Standards. The Office of General Counsel, while not passing on the merits of the proposals, felt the proposals went beyond the scope of modifying the existing Standards. Accordingly, we anticipate comment from the constituents, both internal and external, outlining their own separate proposals. After receipt of the comments, the Board Committee will be in a better position to consider whether to further study any of those proposals.

## **B. Proposed Revisions**

In revising the existing Standards, it is important to remember that the Standards are guidelines for use in determining the appropriate degree of discipline and that the purpose of disciplinary proceedings is not to punish the member but to protect the public, preserve confidence and integrity in the profession, and maintain the highest professional standards. The Supreme Court has held that the degree of discipline imposed must be sufficient to deter future wrongdoing by the member (see *In re Morse*, (1995) 11 Cal.4<sup>th</sup> 184), but that rehabilitation can also be considered if it comports with the primary purposes of discipline.

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<sup>1</sup> In 2010, the Office of the Chief Trial Counsel proposed amendments to the Standards. The proposed revisions were released for public comment and were discussed at RAD at its July 2010 meeting. RAD voted to postpone action on the matter so that a task force could be created to study the issue. No task force was ever officially appointed, however, and the project was put on hold.

The proposed revisions to the Standards, as discussed below, are intended to promote clarity and ensure fairness and consistency.

1. Elimination of the “Introduction” section. The historical overview, while beneficial when the Standards were first introduced, is no longer relevant after 27 years. References in this section are outdated and key portions that remain relevant are captured in proposed Standard 1.1(Purpose and Scope.)
2. Elimination of the terms “willful” or “willfully” from the Standards. These terms add little guidance since generally all misconduct is deemed willful so long as it is volitional – including everything from intentional to negligent acts.
3. Elimination of the phrase “irrespective of mitigating circumstances” in Standards 2.2(a) and (b), 2.5, 2.7 and 3.2. In practice, both the State Bar Court and the Supreme Court look to mitigating circumstances in order to determine if there is cause to depart from the Standards. (See e.g., *In re Brown* (1995) 12 Cal.4th 205, 221-222; *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092, 1100; *Howard v. State Bar* (1990) 51 Cal.3d 215.)
4. Proposed Standard 1.1 (Purpose and Scope of Standards).
  - a. This is a merger of current Standards 1.1(Scope of Standards) and 1.3 (Purposes of Sanctions for Professional Misconduct the Purpose and Scope). This revision eliminates repetitive language and includes the essence of those Standards under one title. Proposed Standard 1.1 includes additional clarifying language that the Standards do not apply to non-disciplinary dispositions such as admonitions and agreements in lieu of discipline.
  - b. A key update is made in this proposed standard, consistent with Supreme Court case law developed since 1986, that any disciplinary recommendation that deviates from the Standards should include clear reasons for the departure. (See *Blair v. State Bar, supra*, 49 Cal.3d at 776, fn. 5.) To further assist the Supreme Court, the proposed standard also indicates that if a recommendation is at the high or low end of a Standard, an explanation should be given by the State Bar Court as to how the recommendation was reached. This is generally done by the State Bar Court, but its inclusion in the Standards signifies its importance in assisting the Supreme Court in determining if the recommended discipline is appropriate.
5. Proposed Standard 1.2 (Definitions).

- a. “Admonition” is deleted from the definition section since it is a non-disciplinary disposition and the Standards only apply to disciplinary matters.
  - b. The general definition of aggravation and mitigation remains, but the factors that are considered in aggravation and mitigation have been moved to separate and distinct standards. (See proposed Standards 1.5 and 1.6.)
  - c. “Conditions” have been added to the definition section, since conditions are a major component of most disciplinary recommendations.
  - d. The generally recommended periods of actual suspension are now expressly listed and contained in the definition section under “suspension” (e.g., thirty days, sixty days, ninety days, six months, one year, 18 months, two years, or three years.) In conjunction with this change, it made sense to also relocate the rehabilitation, fitness and present learning requirement to this same section. This requirement traditionally has been imposed when there is a two-year period of actual suspension; but to conform to current practice, the proposed standard now allows the State Bar Court, in its discretion, to recommend it in other appropriate cases for public protection reasons.
6. Proposed Standard 1.3 (Degrees of Sanctions).
- a. “Admonition” is deleted since it is a non-disciplinary disposition.
  - b. Actual and stayed suspensions are listed as separate degrees of discipline rather than subsets of “suspension.”
7. Proposed Standard 1.4 (Conditions Attached to Sanctions). Notice of discipline to affected parties (as provided in California Rule of Court, rule 9.20) has been added as a possible condition of probation.
8. Proposed Standards 1.5 (Aggravating Circumstances) and 1.6 (Mitigating Circumstances). Factors in mitigation and aggravation have been moved to their own separate Standards, since they are key components of most disciplinary recommendations and should be highlighted and readily accessible.
9. Proposed Standards 1.5 (Aggravating Circumstances).
- a. “Multiple acts of wrongdoing or a pattern of misconduct” is currently listed as one factor in aggravation. It has been broken out into two separate factors in Standard 1.5(b) [multiple acts of wrongdoing] and 1.5(c) [a pattern of misconduct]. (See *Levin v. State Bar*, *supra*, 47 Cal.3d at 1149 [multiple acts of wrongdoing may not always equate to a pattern of

misconduct, although for purposes of aggravation, the result is the same regardless of how conduct is characterized].)

- b. “Intentional misconduct” has been added as a factor in aggravation in Standard 1.5(d).
  - c. “Failure to make restitution” has been added as a factor in aggravation in Standard 1.5(i). (See *Potack v. State Bar* (1991) 54 Cal.3d 132, 138-139 [failure to make restitution is a proper factor to consider in aggravation]; *Edwards v. State Bar* (1990) 52 Cal.3d 28, 36.)
10. Proposed Standard 1.6 (Mitigating Circumstances).
- a. Clarifying language has been added to the “good faith” factor in Standard 1.6(b) to indicate that it must be honestly held and reasonable to be considered in mitigation. (See *In the Matter of Levine* (Review Dept. 2012) WL 5406820; *In the Matter of Riordan* (Review Dept. 2007) 5 Cal. State Bar Court Rptr. 41, 50.).)
  - b. “Mental disabilities” was conspicuously absent from the current Standard, which provided for mitigation in cases of extreme emotional difficulties or physical disabilities. It has now been added as a factor in mitigation in Standard 1.6(d). (See *Shapiro v. State Bar* (1990) 51 Cal.3d 251, 259-260; *Ballard v. State Bar* (1983) 35 Cal.3d 274, 289; *In re Cohen* (1974) 11 Cal.3d 935, 939, 944.) Also in Standard 1.6(d) the member must now establish that the difficulties or disabilities “no longer pose a risk that the member will commit misconduct” as opposed to “no longer suffers from such difficulties or disabilities.”
  - c. “Restitution made without threat or force of administrative, disciplinary, civil or criminal proceedings” has been added as factor in mitigation in Standard 1.6(j). A member who acts only under threats or force of third party action should be given no mitigation. (See *Grim v. State Bar* (1991) 53 Cal.3d 21, 32.)
11. Proposed Standard 1.7 (Determination of Appropriate Sanctions). Additional language has been added to give greater guidance in balancing factors in aggravation and mitigation in order to determine whether a lesser or greater sanction is warranted. (See Standard 1.7(b) and (c).)
12. Proposed Standard 1.8 (Effect of Prior Discipline). The “three strikes and you’re out” Standard is rarely followed. New language has been added in Standard 1.8(b) to comport to current practice. Under the new language, if a member has two or more prior records of discipline, disbarment is appropriate in the following circumstances, unless the misconduct underlying the prior discipline occurred during the same time period as the current misconduct (see *In the Matter of Sklar*

(Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 602, 619; *In the Matter of Miller* (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 131, 136) or the most compelling mitigating circumstances clearly predominate:

- a. Actual suspension was ordered in any one of the prior disciplinary matters;
  - b. The prior disciplinary matters coupled with the current record demonstrate a pattern of misconduct; or
  - c. The prior disciplinary matters coupled with the current record demonstrate the member's unwillingness or inability to conform to ethical responsibilities.
13. Proposed Standards 2.1 (Misappropriation) and 2.2 (Commingling and Other Trust Account Violations). Misappropriation and commingling have been broken out into their own separate standards. They are distinct violations commonly charged in disciplinary proceedings and they carry different degrees of discipline.
14. Proposed Standard 2.1 (Misappropriation).
- a. Misappropriation is divided into three categories: intentional or dishonest acts of misappropriation; gross negligence; and misappropriation that does not involve either intentional/dishonest or gross negligent conduct. Each level carries a different degree of discipline based on the *mens rea*. (*Edwards v. State Bar, supra*, 52 Cal.3d at 38 ["An attorney who deliberately takes a client's funds, intending to keep them permanently, and answers the client's inquiries with lies and evasions, is deserving of more severe discipline than an attorney who has acted negligently, without intent to deprive and without acts of deception"]; *In the Matter of Doan* (Review Dept. 2011) WL 9374057.)
  - b. The California Supreme Court expressed dissatisfaction with the current Standard insofar as it precludes actual suspension of less than one year as a sanction for misappropriation. (See *In re Brown, supra*, 12 Cal.4th at 220; *Edwards v. State Bar, supra*, 52 Cal.3d at 38.) By removing the binding language – that one year actual suspension must be imposed, irrespective of mitigating circumstances – there is no prohibition in considering factors in mitigation. Consequently, the proposed standard presents one year as a starting point that may be adjusted accordingly.
15. Proposed Standard 2.2 (Commingling and Other Trust Account Violations). The language requiring three months actual suspension, irrespective of mitigating circumstances, for a commingling violation has been criticized as too harsh and has not been routinely followed. Commingling and other trust account violations often result in a lesser sanction. (See *Dudugjian v. State Bar, supra*, 52 Cal.3d at 1100.) By removing the binding language – that three months actual

suspension must be imposed, irrespective of mitigating circumstances – there is no prohibition in considering factors in mitigation. Consequently, the proposed standard presents three months as a starting point that may be adjusted accordingly.

16. Proposed Standard 2.3 (Illegal or Unconscionable Fees). Illegal fees have been added to this Standard to comport with rule 4-200, Rules of Professional Conduct. Separate degrees of discipline are set out for unconscionable and illegal fees, as sanctions imposed for illegal fees are generally less than for unconscionable fees.
17. Proposed Standard 2.4 (Business Transactions, Pecuniary Interests Adverse to a Client). If the terms of the transaction are unfair or unreasonable, this standard provides for enhanced discipline.
18. Proposed Standard 2.5 (Failure to Perform or Communicate). Additional guidance is provided to assist in determining the appropriate level of discipline – disbarment is appropriate in cases involving a pattern of failing to perform; actual suspension is appropriate in cases involving failure to perform or communicate in multiple client matters where there is no pattern; and reproof is appropriate in cases involving a single client matter.
19. Proposed Standard 2.6 (Unauthorized Practice of Law). This is a “breakout” from current Standard 2.6 (Offenses Involving Other Specified Sections of the Business and Professions Code). This new standard specifies the types of unauthorized practice of law that warrant disbarment or actual suspension, thereby providing additional guidance in an area where the Supreme Court has held that the Standards provided little guidance.
20. Proposed Standard 2.7 (Moral Turpitude, Dishonesty, Fraud, Corruption, or Concealment). Consistent with Business and Professions Code section 6106, “corruption” has been added as a component of this standard. Also, “intentional dishonesty” has been changed to “dishonesty” because intentional is an unnecessary modifier in this context.
21. Proposed Standard 2.8 (Violation of Oath or Duties of an Attorney). This is a “breakout” from current Standard 2.6 (Offenses Involving Other Specified Sections of the Business and Professions Code). This new standard provides additional guidance for violations of a member’s statutory oath or duties, an area where the Supreme Court has held that the Standards provided little guidance.
22. Proposed Standard 2.9 (Sexual Relations with Clients). This is a “breakout” from current Standard 2.6 (Offenses Involving Other Specified Sections of the Business and Professions Code) and creates a new standard for violations resulting from a member’s sexual relations with a client. This standard provides for disbarment where the most egregious elements are present – where a



member requires or demands sexual relations with a client incident to or as a condition of professional representation or employs coercion, intimidation, or undue influence in entering into sexual relations with a client. This standard provides guidance and preserves public confidence by underscoring that such egregious conduct will not be tolerated.

23. Proposed Standard 2.10 (Violations of Conditions Attached to Discipline). Additional guidance has been provided in determining the severity of the sanction, noting that the degree depends on the nature of the condition violated and the member's unwillingness or inability to comply with disciplinary orders.
24. Proposed Standard 2.11 (Convictions of Crimes Involving Moral Turpitude).
  - a. Guidance is provided to distinguish between felonies and misdemeanors involving moral turpitude. Generally felonies involving moral turpitude should result in disbarment. (See *In re Utz* (1989) 48 Cal.3d 468; *In re Joseph* (1989) 49 Cal.3d 430; *In Re Oheb* (Review Dept. 2006) 4 Cal. State Bar Ct Rptr. 920.) However, if compelling mitigating factors clearly predominate, actual suspension of at least two years is appropriate. For misdemeanors involving moral turpitude, disbarment or actual suspension is appropriate.
  - b. The requirement in current Standard 3.2 that a two year period of actual suspension be prospective to any interim suspension imposed has been eliminated. The California Supreme Court has found this requirement to be unduly harsh and that its strict application does not lead to disciplinary recommendations that are fair and consistent. (See *In re Leardo* (1991) 53 Cal.3d 1, fn. 8; *In re Young, supra*, 49 Cal.3d at 266-269.)
  - c. Current Standard 3.3 (Conviction of Certain Felonies – involving summary disbarment cases) has been assimilated into this proposed Standard 2.11 since the vast majority of summary disbarment cases involve moral turpitude.
25. Proposed Standard 2.12 (Criminal Convictions Not Involving Moral Turpitude). Current Standard 3.4 provides little guidance as to the degree of discipline for crimes that do not involve moral turpitude. Proposed Standard 2.12 provides for actual suspension for conviction of a felony and either suspension or reproof for a misdemeanor.
26. Proposed Standard 2.13 (Criminal Conviction for Specific Misconduct). This proposed standard combines current Standard 2.5 (Offenses Involving a Violation of Business and Professions Code Section 6131 – public prosecutor aiding in the defense of defendant) and Standard 2.6(e) and (f) (Offenses Involving Other Specified Sections of the Business and Professions Code – sections 6128 through 6130 and 6151 through 6153.)

27. Proposed Standard 2.14 (Violation of Other Article 6 Statutes). Proposed Standard 2.14 contains the remaining components of current Standard 2.6 (Offenses Involving Other Specified Sections of the Business and Professions Code.)
28. Proposed Standard 2.15 (Violations of Rules in General). Proposed Standard 2.15 eliminates the Business and Professions Code catchall since most Business and Professions Code violations are captured in specific proposed Standards. Also, Business and Professions Code section 6077 specifies a suspension not to exceed three years to reproof as the range of discipline for violations of the Rules of Professional Conduct. There is no such range specified for code violations.

**FISCAL / PERSONNEL IMPACT:**

None expected.

**RULE AMENDMENTS:**

None known.

**BOARD BOOK IMPACT:**

None known.

**RECOMMENDATION**

It is recommended that the Board Committee authorize 60 days of public comment on the proposed modifications.

**PROPOSED BOARD COMMITTEE RESOLUTION:**

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

**RESOLVED**, that the Regulation, Admissions and Discipline Oversight authorizes staff to make available for 60 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.

**ATTACHMENT:** Standards for Attorney Sanctions for Professional Misconduct with proposed modifications

Table, comparison of the current Standards with the proposed Standards