

AGENDA ITEM

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DATE: September 23, 2013

TO: Members of the Board of Trustees
Members of the Board Committee on Operations

FROM: Starr Babcock, General Counsel/Chief Legal Officer
Office of General Counsel

SUBJECT: Standards for Attorney Sanctions for Professional Misconduct
- Proposed Modifications, Request for Adoption Following
Public Comment

EXECUTIVE SUMMARY

The Standards for Attorney Sanctions for Professional Misconduct ("Standards") were adopted by the then-Board of Governors (now Trustees), effective January 1, 1986, to be applied in proceedings of the State Bar Court and its recommendations of discipline to the California Supreme Court. The purpose of the Standards was to provide guidance 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.

The purpose of the instant proposal is to make 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 proposal was circulated for a 60-day public comment period and two comments were received. This item summarizes the comments submitted by the Los Angeles County Bar Association Professional Responsibility and Ethics Committee ("PREC") and the State Bar's Office of the Chief Trial Counsel ("OCTC"). PREC believes the proposed Standards are a significant improvement over the existing Standards, and only presents suggestions with regard to one particular Standard. OCTC favors a more comprehensive overhaul of the Standards, but believes the proposed Standards address many of the concerns it had with the existing Standards and believes the proposed Standards should be adopted as a starting point.

It is therefore recommended that the proposed Standards be adopted without further modification, effective January 1, 2014.

Board members with any questions should contact Starr Babcock, General Counsel/Chief Legal Officer, at Starr.Babcock@calbar.ca.gov or (415) 538-2070.

BACKGROUND:

In 1985, the State Bar, through a collaborative effort between the State Bar Court and OCTC, 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 then-Board of Governors in November 1985 and became effective January 1, 1986. However, the Standards have not been subject to any substantial modifications or revisions since their initial adoption and implementation 27 years ago.¹

The current proposal updates provides a more streamlined, concise and better-organized version of the Standards. This general “cleanup” recasts the Standards into plain English in order to eliminate unnecessary and repetitive language and makes the Standards clearer, more concise, and easier to read. Footnotes have been added 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. The proposal 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, updates to the law have been incorporated to reflect recent changes. The proposal is attached hereto as Attachment A.

PUBLIC COMMENT:

At the Board of Trustee’s July 18-19, 2013 meeting, the Committee on Regulation, Admission and Discipline Oversight 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. Two comments were received and are summarized below.

SUMMARY OF PUBLIC COMMENT:

¹ 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.

1. PREC Comment (Attached hereto as Attachment B)

PREC generally finds the proposed Standards to be a significant improvement over the existing Standards, and gives feedback only as to proposed Standard 1.8(b).

Proposed Standard 1.8(b) revises Standard 1.7(b) [the “three strikes rule” – which mandates disbarment if a member is found culpable of misconduct and has a record of two prior impositions of discipline]. Standard 1.8(b) adds new language (underlined herein) to indicate that if a member has two or more prior records of discipline, disbarment is appropriate in the following circumstances, unless the most compelling mitigation circumstances clearly predominate or the misconduct underlying the prior discipline occurred during the same time period as the current misconduct:

- (1) actual suspension was ordered in any one of the prior disciplinary matters;
- (2) the prior disciplinary matters coupled with the current record demonstrate a pattern of misconduct; or
- (3) the prior disciplinary matters coupled with the current record demonstrate the member’s unwillingness or inability to conform to ethical responsibilities.

PREC believes the effort to soften the effect of the former Standard is a distinction without a difference. It believes the proposed revision has the same fundamental flaws as the original: it is a categorical imperative that does not allow for assessment of the seriousness of the prior misconduct, how that misconduct relates to the instant misconduct, or remoteness in time between the prior and the instant matter. Since the three strikes rule is rarely followed, PREC states there is no justification for perpetuating a Standard that the Courts decline to apply. PREC calls Standard 1.8(b)(1) “talismanic on its face” and a Standard that can only be applied in a “talismanic fashion” and believes is no permutation of a “three strikes rule” that is consistent with the legitimate purposes of discipline. PREC believes that proposed Standard 1.8(b)(1) should be removed in its entirety.

2. Staff Response to PREC Comment

We believe the rational for the Standard is sound, and the proposed modifications provide greater guidance and structure in which to analyze the facts underlying the prior record of discipline (actual suspension, pattern, timing, etc.). If an attorney has been suspended (with actual time out of the practice) at least once, this is an indication of the seriousness of the misconduct. This coupled with prior instances of discipline is evidence that the attorney is unable or unwilling to abide by the more lenient sanctions previously imposed as a means for reform. It also indicates that the prior discipline was inadequate to deter future bad conduct. (*In re Silverton* (2005) 36 Cal.4th 81; *Gary v. State Bar* (1988) 44 Cal.3d 820; *Arden v. State Bar* (1987) 43 Cal.3d 713.) This Standard is important and recognizes the State Bar’s paramount duty to protect the public and that in instances where an attorney fails to conform to ethical conduct on multiple occasions, spanning different time periods, disbarment should be the appropriate recourse.

Staff recommends adoption of the proposed Standard 1.8(b).

3. OCTC Comment (Attached hereto as Attachment C) and Staff Response

At the outset, OCTC recommends that the current proposal be accepted as a starting point. However, OCTC make suggested changes to specific Standards, some of which have already been addressed and incorporated into the proposed Standards. (These points are raised in OCTC's Comment, Attachment C, pages 8-9.)

- OCTC suggests that additional factors be considered in the "three strikes Standard." In proposed Standard 1.8(b) we included enhanced guidance and structure in which to analyze the facts underlying the prior record of discipline (e.g. – the addition of factors such as actual suspension, pattern, timing, etc.) OCTC suggests that other factors in aggravation, such as a trend of escalating serious acts or a lack of remorse, also be included in the proposed Standard. However, we believe that is already captured in the proposed Standard through the addition of the following language: "the prior disciplinary matters coupled with the current record demonstrate the member's unwillingness or inability to conform to ethical responsibilities." Also, proposed Standard 1.5 lists numerous factors in aggravation that can be applied in any case.
- OCTC suggests that illegal fees be specifically addressed. Illegal fees are addressed in proposed Standard 2.3.
- OCTC suggests that the unauthorized practice of law be specifically addressed. UPL is addressed in proposed Standard 2.6.
- OCTC suggests that the violations covered by existing Standard 2.6 (Offenses Involving Other Specified Sections of the Business and Professions Code) be addressed more specifically. Existing Standard 2.6 is broken out into five new proposed Standards (proposed Standard 2. 6 (UPL); proposed Standard 2.8 (Violation of Oath or Duties); proposed Standard 2.9 (Sexual Relations with Clients); proposed Standard 2.13(b) (Criminal Convictions for Misdemeanors specified in Business and Professions Code sections 6128-6130 and 6153-6155); and proposed Standard 2.14 (Violation of Other Article 6 Statutes).
- OCTC suggests that multiple acts of misconduct and a pattern of misconduct be separated as factors in aggravation. These have been separated and appear in proposed Standard 1.5(b)(multiple acts of wrongdoing) and proposed Standard 1.5(c)(a pattern of misconduct).
- OCTC suggests that factors in aggravation, such as bad faith, dishonesty, concealment, overreaching, the extent to which trust funds were involved in the misconduct, and the inability to account should be broken out into individual

sections. In proposed Standard 1.5(d), we grouped intentional misconduct, bad faith, dishonestly, concealment and overreaching together in one Standard because they all involve the member's *mens rea*, and any in given case the Court, in its discretion, can apply one of more of these factors in aggravation depending on the circumstances. (See *Read v. State Bar* (1991) 53 Cal.3d 394 [applying bad faith, dishonesty, concealment, and overreaching as factors in aggravation since all were applicable]; see and compare *In re Naney* (1990) 51 Cal.3d 186 [applying only one of the factors].) The refusal or inability to account for entrusted funds or property has been broken out into a separate Standard in proposed Standard 1.5(e).

- OCTC suggests that the “good faith” factor in mitigation be defined. In proposed Standard 1.6 we added language clarifying that the member's good faith belief must be “honestly held” and “reasonable.” This language adds both a subjective and objective element and requires heightened analysis to determine if good faith should be counted in mitigation.

There are also several changes suggested by OCTC that were considered during the initial vetting and drafting of the proposed Standards, but rejected. (These points are raised in OCTC's Comment, Attachment C, p. 8-9.)

- OCTC suggests that the criminal conviction Standards be broken out into common types or categories of conviction matters. There is a concern that narrowly tailored Standards can become limiting if they are too fact specific. We believe such compartmentalization of the Standards is a conceptual change, that if desired, would require addition study and evaluation.
- OCTC suggests that proposed Standard 1.4 indicate which disciplinary conditions are mandatory, rather than optional. The proposed Standard has language indicating that several conditions may attach, because depending on the specifics of the case certain conditions will apply and others will not. For instance, restitution will only be required if the offense involves money. Rule 9.20 requirements will only be imposed if actual suspension or disbarment is ordered. The proposed Standard should not be read so literally as to assume that all conditions are optional, it is simply a list of common conditions from which to select as they apply in a given case.
- OCTC suggests that “potential harm” be considered as a factor in aggravation. However, in evaluating “potential harm” the Court has not looked at it as a separate factor, but instead has evaluated it to determine the seriousness of the misconduct. (*In re Kelly* (1990) 52 Cal.3d 487; see also *In the Matter of Burns* (1995) 3 State Bar Court Reporter 406.)
- OCTC suggests that an absence of a prior record of discipline over many years should count in mitigation regardless of whether the present misconduct is serious or not. Proposed Standard 1.6(a) as a general guideline indicates that

such mitigation should be afforded when the present misconduct is not deemed serious. (See *Borre v. State Bar* (1991) 52 Cal.3d 1047 [lack of prior discipline can be considered as a factor in mitigation when the present misconduct is not deemed serious]; *Amante v. State Bar* (1990) 50 Cal.3d 247 [same].)

- OCTC suggests that good character evidence should count in mitigation only when the witness demonstrates sufficient knowledge of both the member and his or her misconduct. Proposed Standard 1.6(f) speaks generally to character witnesses in the legal and general communities who are aware of the full extent of the misconduct, since this is the salient factor that the Courts typically rely on in evaluating character evidence. The key is whether the witness is willing to put their reputation on the line and vouch for the member, knowing the full extent of the member's misconduct. The Court can always take the witness's relationship and familiarity with the member into consideration, but having a per se rule requiring "knowledge of the member" could have a preclusive effect on a wide range of witnesses, such as experts, community leaders, etc.
- OCTC suggests that a member's lack of experience should count in mitigation. It is unclear whether OCTC means "new attorneys with lack of experience" should be given mitigating credit or whether seasoned attorneys who take on "new areas with which they do not have experience" should be given mitigating credit. Proposed Standard 1.6 does not include this factor because we believe a member's "experience" can cut both ways and count either as aggravation or mitigation.
- OCTC also points out that the Supreme Court has commented on the weakness of the existing Standards and found them difficult to work with on occasion. (See Attachment C, pp. 2, 10.) We believe we have addressed any concerns raised by the Court about specific Standards and we emphasize that the Court has adhered to the Standards in a great majority of cases and stated that they serve the valuable purpose of eliminating disparity and assuring consistency in the imposition of attorney discipline.

On a general level, OCTC broadly suggests that the entire set of Standards be overhauled to include narrowly tailored disciplinary sanctions similar to sentencing guidelines. Without passing on the merits this proposal, we note that it is in need of further development before assessing its validity. OCTC's compartmentalized approach to narrowly tailored disciplinary sanctions is such a conceptual departure from existing State Bar Court practice, California Supreme Court precedent, Standards that exist in other jurisdictions, and the ABA Standards, that the Board or Board Committee may wish to consider further evaluation and study to determine if such a whole-sale revision and paradigm change is necessary.

It is recommended at this time that we stay within the framework of the existing Standards and proceed with the adoption and implementation of the proposed Standards as a starting point.

FISCAL / PERSONNEL IMPACT:

None expected.

RULE AMENDMENTS:

If adopted, The Rules of Procedure of the State Bar of California, Title IV. "Standards for Attorney Sanctions for Professional Misconduct" would be superseded and replaced with the modified version attached hereto as Attachment A.

EFFECTIVE DATE OF PROPOSAL

January 1, 2014

BOARD BOOK IMPACT:

None known.

RECOMMENDATION:

It is recommended that the Board Committee on Operations recommend to the Board of Trustees adoption of the proposed modifications to the Standards for Attorney Sanctions for Professional Misconduct in the form attached hereto as Attachment A, effective January 1, 2014.

PROPOSED RESOLUTION:

Board Committee on Operations:

Should the Board Committee on Operations agree with the proposed recommendation, adoption of the following resolution would be appropriate:

RESOLVED, following publication for comment and having considered the comments received, the Board Committee on Operations recommends that the Board of Trustees adopt the proposed modifications to the Standards for Attorney Sanctions for Professional Misconduct in the form attached hereto as Attachment A, effective January 1, 2014.

Board of Trustees:

Should the Board of Trustees concur with the recommendation of the Board Committee on Operations, the following resolution would be appropriate:

RESOLVED, following publication for comment and having considered the comments received, and upon the recommendation of the Board Committee on Operations, the Board of Trustees adopt the proposed modifications to the Standards for Attorney Sanctions for Professional Misconduct in the form attached hereto as Attachment A, effective January 1, 2014.

ATTACHMENT A: Standards for Attorney Sanctions for Professional Misconduct

ATTACHMENT B: Comment of PREC to Proposed Revised Standards for Attorney Sanction for Professional Misconduct

ATTACHMENT C: OCTC's Comment Regarding Proposed Modifications to the Standards for Attorney Sanctions for Professional Misconduct