

LOS ANGELES COUNTY BAR ASSOCIATION

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September 23, 2013

Pat Bermudez
Office of General Counsel
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Comment of the Los Angeles County Bar Association Committee on Professional Responsibility and Ethics Committee to Proposed Revised Standards for Attorney Sanctions for Professional Misconduct

Dear Ms. Bermudez:

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee (“PREC”) submits the following comment regarding the proposal entitled Standards for Attorney Sanctions for Professional Misconduct (Proposed, July 2013), the “Proposed Standards.”

The Proposed Standards are in many ways a significant improvement over the original Standards. In particular, the Office of General Counsel (“OGC”) makes an effort to soften the effect of the “three strikes rule” contained in original Standard 1.7(b), which mandates disbarment if a member is found culpable of misconduct and has a record of two prior impositions of discipline. Section 1.8(b)(1) of the Proposed Standards suggests a new “three strikes rule,” imposing disbarment if there are two priors and “actual suspension was ordered in any one of the prior disciplinary matters.” However, it is a distinction without a difference.

The proposed revision has the same fundamental flaws as the original: it is a categorical imperative that does not allow for any assessment of the seriousness of the prior misconduct, how that misconduct relates to the instant matter, or even remoteness in time between the priors and the instant matter. On page 6 of the Agenda Item accompanying the Proposed Standards the Office of General Counsel (“OGC”) correctly notes that the “three strikes rule” has been rarely followed. That can only be so because it is disfavored by both the State Bar Court and the California Supreme Court. There can be no justification for perpetuating a standard that the courts decline to apply.

The Standards themselves and recent Supreme Court decisions make clear that the Standards are to be used in a way that is consistent with serving the purposes of discipline. See, Standard 1.3. In *In the Matter of Van Sickel* (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980, a case in which the California Supreme Court rejected the State Bar’s appeal, the Review department held:

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We are obligated to afford “great weight” to the standards (*In re Silverton, supra*, 36 Cal.4th 81, 89-92), although we believe that the standards do not mandate a specific discipline. Indeed, if the Supreme Court were of the view that the standards provide for mandatory disciplinary outcomes, it would have directed us to simply apply the specific discipline stated in the relevant standards, including standard 2.7, which it obviously did not.

The court's order is consistent with its long-held position that it is not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender.” (*Howard v. State Bar* (1990) 51 Cal.3d 215, 221-222; *Greenbaum v. State Bar* (1987) 43 Cal.3d 543, 550 [the standards are “simply guidelines”]; *Boehme v. State Bar* (1988) 47 Cal.3d 448, 454 [same]; *Hawk v. State Bar, supra*, 45 Cal.3d at p. 602 [same].) Following the Supreme Court's lead, we recently observed in *In the Matter of Oheb* (Review Dept. 2006) 4 Cal. State Bar Court Rptr.490, that “although the standards were established as guidelines, ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case. [Citations.]

Utilizing this background as guidance, we proceed to consider the relevant standards, as well as the facts and guiding case law. As a general principle, standard 1.3 provides that the primary purposes of the disciplinary proceedings are the protection of the public, the courts, and the legal profession; the maintenance of high professional standards by attorneys; and the preservation of public confidence in the legal profession. (*See also, In re Morse* (1995), 11 Cal.4th 184, 205.)

When a standard is talismanic on its face, it can only be applied in a talismanic fashion. There is no permutation of a “three strikes rule” that is consistent with the legitimate purposes of discipline. Therefore, PREC’s position is that standard 1.8(b)(1) of the Proposed Standards, the “three strikes rule,” should be removed in its entirety from the Proposed Standards.

On behalf of the Los Angeles County Bar Association, PREC extends its thanks to the OGC and to the Board of Trustees for this opportunity to comment on the Proposed Standards.

Sincerely yours,

Carole J. Buckner

Carole J. Buckner

Chair

Professional Responsibility and Ethics Committee