



THE STATE BAR  
OF CALIFORNIA

OFFICE OF THE  
CHIEF TRIAL COUNSEL

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To: Members of the Regulation, Admissions and Discipline Oversight Committee, Board of Trustees, State Bar of California

From: Jayne Kim, Chief Trial Counsel, Office of the Chief Trial Counsel

Subject: OCTC's comment regarding proposed modifications to the Standards for Attorney Sanctions for Professional Misconduct

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**I.**

**OPENING COMMENT**

The Regulation, Admissions and Discipline Oversight Committee (Committee) has been presented proposed revisions to the Standards for Attorney Sanctions for Professional Misconduct (Standards). The proposal addresses many of the Office of the Chief Trial Counsel's (OCTC) concerns, but a more comprehensive review and redrafting should be considered in order to further improve the level of guidance provided by the Standards and ensure their consistency with Supreme Court precedent.

OCTC believes that the Standards should be revised to provide tailored ranges of discipline consistent with Supreme Court decisional law; address specific acts of misconduct more precisely; incorporate within each Standard those factors in aggravation and mitigation which are most significant to the act of misconduct addressed; provide greater guidance as to how less significant factors in aggravation and mitigation are to be weighed and balanced against one another; provide greater guidance as to the purposes of rule 9.20 of the California Rules of Court, rehabilitation hearings under Standard 1.4(c)(ii) and the application of the “third strike” rule under Standard 1.7(b); and generally update their format, language and various aspects of aggravation and mitigation.

The idea that portions of the Standards lack clear guidance is not new. In 1995, the Supreme Court discussed Standards 2.6 and 2.10, finding that they “provide little guidance in this case.” (*In re Morse* (1995) 11 Cal.4<sup>th</sup> 184, 206.) Standard 2.6 lists six distinct provisions of the Business and Professions Code, the violation of any one of which could lead to discipline ranging from suspension to disbarment depending upon various factors including due regard to the purposes of imposing discipline as set forth in Standard 1.3. Standard 2.10 is a “catch all” section, equally vague, which states that any violation of the Business and Professions Code or Rules of Professional Conduct not specified in the Standards shall result in discipline ranging from reproof to suspension depending upon various factors including the purposes of imposing discipline as set forth in Standard 1.3. Neither Standard 2.6, nor 2.10, distinguish between stayed and actual suspension.

The Court in *Morse* characterized the two Standards as providing a “wide range of discipline” that lacked specificity, therefore requiring the Court to use as its “lodestar” the purposes of discipline and decisional law for guidance in determining the appropriate level of discipline. (*In re Morse*, *supra* 11 Cal.4<sup>th</sup> at p. 206 - 207.)

As discussed below, OCTC believes that the shortcomings of the current Standards extend beyond Standards 2.6 and 2.10. In offering this comment, it is not our goal or desire to limit the State Bar Court’s discretion or to increase the overall level of discipline through revisions to the Standards. In fact, there are instances in which we believe that mitigation provided for in the Standards should be expanded. For example, where a member’s misconduct is the direct result of inexperience, the Standards should treat that inexperience as a mitigating circumstance.<sup>1</sup> There are also instances within the Standards where levels of discipline should be reduced. For example, Standard 2.2(b) provides for a minimum 90 days actual suspension, “irrespective of mitigating circumstances,” for all violations of rule 4-100 of the Rules of Professional Conduct not involving misappropriation. This Standard currently captures a range of misconduct including serious acts such as commingling entrusted funds with personal property and potentially less serious acts such as a single instance of failing to timely provide an appropriate accounting. Ninety days actual suspension is often times inappropriate for less serious violations of rule 4-100 and the “irrespective of mitigating circumstances” language is inconsistent with the concept of court discretion and discipline analysis as articulated by the Supreme Court.<sup>2</sup>

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<sup>1</sup> *Matthew v. State Bar* (1989) 49 Cal.3d 784, 791 [inexperience may be mitigation in some cases]; *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366 -1368 [inexperience coupled with other factors found to be compelling mitigation] and *Crawford v. State Bar* (1960) 54 Cal.2d 659, 669 [inexperience considered in determining level of discipline].

<sup>2</sup> *In re Morse* (1995) 11 Cal.4<sup>th</sup> 184, 208-209 [discipline ultimately depends on the answer to two key questions: what did the member do wrong and what is the discipline most likely to protect the public, courts and profession from future wrongdoing]. The Court in *In re Brown* (1995) 12 Cal.4<sup>th</sup> 205, 221, addressed the “irrespective of mitigating circumstances” language of Standard 2.2(a) stating that “this Court has expressed dissatisfaction with

## II.

### COMMENTS ON LEVEL OF DISCIPLINE GUIDANCE

#### Levels of Discipline Within the Standards

Standards providing tailored ranges of discipline should be considered.

The Standards lack clear guidance where they provide overly broad ranges of discipline. For example, Standard 2.4(b) recommends discipline in the range of reproof to suspension for failing to perform legal services in an individual client matter or failing to communicate with a client. This range of discipline moves from private reproof at the low end to, potentially, multiple years of actual suspension at the high end.<sup>3</sup> The Standard states that the “extent of the misconduct” and the “degree of harm” suffered by the client are to be considered in analyzing discipline, but does not offer much guidance beyond that statement.

The guidance provided by the Standards could be enhanced by relating tailored levels or narrow ranges of discipline to specific levels of culpability or acts of misconduct.<sup>4</sup> Factors in aggravation and mitigation most significant to a particular act of misconduct could also be incorporated.

The proposal before the Committee, under section “2.1 MISAPPROPRIATION,” is a step in this direction.<sup>5</sup> The proposal presents three levels of discipline for misappropriation based upon the level of intent in a particular case. First, disbarment for instances of misappropriation involving intentional or dishonest conduct. Second, disbarment or actual suspension for instances of misappropriation resulting from gross negligence. And third, suspension or reproof for instances where neither intentional misconduct nor gross negligence are involved.

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Standard 2.2(a) insofar as it precludes discipline less severe than a one-year actual suspension” and that strict application of the Standard would not be “faithful to the teachings” of the Court’s decisions.

<sup>3</sup> Also see Standards 2.3 re actual suspension to disbarment for engaging in an act of moral turpitude, 2.6 re suspension to disbarment for violating various provisions of the Business and Professions Code, 2.8 re reproof to suspension for violating rule 3-300 of the Rules of Professional Conduct and 2.10 re reproof to suspension for violating any section of the Business and Professions Code or rule of the Rules of Professional Conduct not otherwise specified in the Standards.

<sup>4</sup> This approach is in accord with Supreme Court direction. (See *In re Brown* (1995) 12 Cal.4<sup>th</sup> 205, 221, where the Court stated that it has “stressed that willful misappropriation covers a broad range of conduct varying significantly in the degree of culpability.” Also see *In the Matter of Bach* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 631, 648, discussing Standard 2.4(b) and stating that aside from indicating a range of discipline, the Standards alone do not provide guidance concerning an exact length of suspension.) While the Standards cannot be revised to provide “exact” levels of discipline in all cases, they can be revised to provide greater guidance overall.

<sup>5</sup> Also see proposal, section “2.5 FAILURE TO PERFORM OR COMMUNICATE.”

However, a revised Standard on misappropriation could be further tailored to incorporate those factors in aggravation and mitigation that are of particular relevance to misappropriation such as whether restitution has been made<sup>6</sup> and the definition of an “insignificantly small” amount of funds.

Attached for consideration under tab #1 is an example of a Standard for misappropriation which sets specific levels of discipline based upon different levels of intent and whether restitution had been made. Additional factors in aggravation and mitigation would be analyzed based upon those specific starting points.<sup>7</sup> However, the levels of discipline in this example could be revised to provide narrow ranges of discipline in place of specific starting points.

### Ranges of Misconduct

Similarly, the Standards could address misconduct more specifically.

The Standards lack clear guidance in many areas because they address overly broad ranges of misconduct. For example, Standard 2.2(b) addresses commingling of entrusted funds with personal property and any other violation of rule 4-100 of the Rules of Professional Conduct that does not result in willful misappropriation.<sup>8</sup> The Standard calls for a minimum 90 days actual suspension in these cases “irrespective of mitigating circumstances.”

Standard 2.2(b) and its minimum 90 day actual suspension applies to serious misconduct such as commingling entrusted funds and issuing checks from a client trust account without sufficient funds and less serious acts such as a single instance of failing to timely provide an appropriate accounting. Because the Standard calls for a minimum level discipline irrespective of mitigation and applies to a broad range of misconduct, it is inconsistent with the discipline analysis articulated in *Morse* and subject to frequent deviation.<sup>9</sup>

Standards which are overly broad in terms of the types of misconduct they address could be rewritten in a manner which categorizes the different types of misconduct according to their seriousness and, therefore, presumptive level of discipline. Attached for consideration under tab #2 is an example of how this may be accomplished for the acts of misconduct currently covered by Standard 2.2(b). As with the example attached under tab #1, each level of discipline in this example provides a specific starting point

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<sup>6</sup> See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 32, 39, where the Court discussed in mitigation the member’s candor to the victim of his misappropriation, his repayment of the funds and the fact that he did not engage in deceit.

<sup>7</sup> The levels of discipline in this example are based predominately upon Supreme Court precedent.

<sup>8</sup> Also see Standards 2.6 addressing the violation of six distinct provisions of the Business and Professions Code and 2.10 addressing the violation of any section of the Business and Professions Code or rule of the Rules of Professional Conduct not otherwise specified in the Standards.

<sup>9</sup> Also see *Dudugjian v. State Bar* (1992) 52 Cal.3d 1092, 1100, where the Court acknowledged that a public reproof was inconsistent with the Standards, specifically Standard 2.2(b) and its minimum level of discipline of three months actual suspension, but stated that the Standards are simply guidelines and do not bind the court. The Court then imposed a public reproof, Standard 2.2(b) notwithstanding. Also see *In re Brown* (1995) 12 Cal.4<sup>th</sup> 205, 221-222, where the Court expressed dissatisfaction with the minimum one year actual suspension set forth in Standard 2.2(a) stating that it is “not faithful to the teachings of this court’s decisions.”

from which factors in aggravation and mitigation would then be analyzed.<sup>10</sup> However, the specific starting points could be revised to provide narrow ranges of discipline.

### Aggravation and Mitigation

The current Standards do not provide sufficient guidance as to the weight or effect that particular types of aggravation and mitigation should have in particular cases.

Aggravation and mitigation impact discipline because the factors provide insight into the member's ability and willingness to meet his or her professional responsibilities in the future. Stated another way, they are often indicators of the likelihood that a member will or will not commit future misconduct. To the extent that a particular factor in mitigation demonstrates that a member's act of misconduct is aberrational, and therefore not likely to recur, significant weight should be afforded that factor. Conversely, to the extent that a particular factor in mitigation does not explain why an act of misconduct occurred, it is not probative of the member's likelihood to commit future misconduct. Therefore it is not worthy of significant weight in the discipline analysis.

For example, an illness such as depression may very well explain why a member failed to perform legal services for a client. The effects of depression often times include avoidance of responsibility and an inability to focus on and complete tasks. Therefore, there is a causal relationship between the illness and the failure to perform. To the extent that all of the elements of Standard 1.2(e)(iv) relating to emotional and physical difficulties can be established, significant weight in mitigation should be afforded the member because he or she will have demonstrated that a direct cause of the misconduct is no longer a significant concern and, therefore, the likelihood of future misconduct is significantly reduced.

The Standards currently provide little guidance in relating particular factors in aggravation and mitigation to specific acts of misconduct. Standard 2.4(b) regarding individual failures to perform legal services states that the level of discipline to be imposed will depend upon the extent of the misconduct and the degree of harm suffered by the client. Standard 2.3 regarding acts of moral turpitude also states that the level of discipline to be imposed will depend upon the extent to which the victim was harmed. However, the factors specified in these two Standards do not help explain why the underlying misconduct occurred or whether it is likely to recur.

Consideration should be given to whether the Standards should include greater discussion of those factors in aggravation and mitigation which are directly related to the acts of misconduct addressed. For example, in the case of misappropriation, decisional law supports a higher level of discipline where the misconduct is surrounded by concealment, deceit or other forms of dishonesty.<sup>11</sup> Decisional law also supports significant mitigation for conduct such as candor to the victim and prompt repayment of the misappropriated funds.<sup>12</sup> These types of aggravation and mitigation are directly related to the act of

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<sup>10</sup> The levels of discipline in this example are based predominately upon Supreme Court precedent.

<sup>11</sup> See *Kaplan v. State Bar* (1991) 52 Cal.3d 1067, 1073, where the Court stated that the member's behavior was "indicative of a level of dishonesty that raises concerns beyond those associated with misappropriation of others' funds."

<sup>12</sup> See *Edwards v. State Bar* (1990) 52 Cal.3d 28, 32, 39, where the Court discussed in mitigation the member's candor to the victim of his misappropriation, his repayment of the funds and the fact that he did not engage in deceit.

misappropriation, provide insight into an offending member's attitude regarding his or her ethical responsibilities, and are probative of the member's likelihood of reoffending. Therefore, these factors should weigh significantly on the issue of level of discipline in a case of misappropriation.

Conversely, factors in mitigation such as a lack of prior discipline and a demonstration of good character may not play a significant role when analyzing discipline in a case of misappropriation because they are far less helpful in understanding why the misconduct occurred, and therefore less probative as to the likelihood of future misconduct.<sup>13</sup>

Next, the Standards provide no guidance as to how factors in aggravation and mitigation are to be balanced or weighed against one another, nor do they provide clear guidance as to the extent the factors may move a recommended level of discipline *vis a vis* a prescribed range of discipline.

As to balancing, Standard 1.2(b) states that an aggravating circumstance is an event or factor which demonstrates that a greater degree of sanction than that set forth in the standards is required to protect the public. Standard 1.2(e) states that a mitigating circumstance is an event or factor established as having caused or underlain the member's misconduct which demonstrates that a more lenient degree of sanction than that set forth in the standards is sufficient to protect the public.

The conventional language used by the courts to describe degrees of aggravation and mitigation include "strong," "substantial," "significant," "some," "not strong," "limited," "little," "slight," "minimal" and "nominal."<sup>14</sup> This language is vague and there is no clear basis upon which to balance these descriptors. For example, how is a finding that a member is entitled to "some" degree of mitigation for recognition of wrongdoing to be balanced against a finding that the member failed to cooperate with the State Bar.

OCTC recognizes that the Standards cannot address every possible combination of misconduct, aggravation and mitigation. However, the Standards could be enhanced with additional discussion on this concept. For example, they could state that aggravating factors should be weighed according to the extent they tend to show that a member may not be willing or able to fulfill his or her ethical duties.<sup>15</sup> Similarly, mitigating factors should be weighed according to the extent that they explain the member's misconduct, tend to show that a member's misconduct is aberrational and indicate that the member is likely to meet his or her ethical duties in the future.<sup>16</sup>

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<sup>13</sup> See *Cooper v. State Bar* (1987) 43 Cal.3d 1016, 1029-1030 for the proposition that a discipline free record of many years is a factor affecting level of discipline, but of less relevance where the facts of a case indicate that the discipline-free record offers little assurance that the public will be protected in the future.

<sup>14</sup> See *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 13, re strong, substantial and significant; *In the Matter of Riley* (Review Dept. 1994) 3 Cal. State Bar Ct. Rptr. 91, 116, re some; *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 66, re not strong; *In the Matter of Kreitenberg* (Review Dept. 2002) 4 Cal. State Bar Ct. Rptr. 469, 477-478, re limited, little and slight; *In the Matter of Hultman* (Review Dept. 1995) 3 Cal. State Bar Ct. Rptr. 297, 308, re minimal; and *In the Matter of Duxbury* (Review Dept. 1999) 4 Cal. State Bar Ct. Rptr. 61, 66, re nominal.

<sup>15</sup> See, for example, *Chang v. State Bar* (1989) 49 Cal.3d 114, where the Court discussed the fact that the aggravating circumstances surrounding the member's conduct lead to doubt that he would conform his future conduct to professional requirements.

<sup>16</sup> See, for example, *Edwards v. State Bar* (1990) 52 Cal.3d 28.

OCTC notes that the proposal before the Committee, under section “1.7 DETERMINATION OF APPROPRIATE SANCTIONS,” represents a step in this direction. However, more could be done with regard to balancing factors in aggravation and mitigation. Those factors which are most relevant to a particular act of misconduct could be specifically addressed in the Standard applicable to the particular violation. Again, see tab #1, sample standard on misappropriation incorporating the payment of restitution.

As to movement within or beyond a specified discipline, Standards 1.2(b), 1.2(e) and 1.6(b) speak to aggravation and mitigation moving a recommended level of discipline to a point above or below that set forth in the applicable standard. However, those instructions are problematic when analyzing discipline under Standards such as 2.3, 2.4(b) and 2.6 which provide ranges of discipline. The Standards do not offer clear guidance as to the extent that aggravation and mitigation move a discipline recommendation within the range of discipline versus outside of the range.

This problem could be addressed by revising the Standards to consistently provide either a specific level of discipline or a narrow range of discipline. If a narrow range of discipline is chosen, the Standards could then explain how aggravation and mitigation are to be analyzed and applied within those ranges. For example, compelling aggravation or mitigation<sup>17</sup> may support a level of discipline beyond the prescribed range while ordinary aggravation or mitigation may move the recommended discipline within the range.

#### General Guidance as to Levels of Discipline and Disciplinary Conditions

The Standards could also be enhanced by establishing discrete options for levels of discipline and including a discussion of when and why additional orders or conditions are to be imposed.

The Standards, as well as the proposal before the Committee under section “1.2 DEFINITIONS,” set forth the various levels of discipline most often imposed in disciplinary matters: private and public reprimands; stayed suspensions of one or two years; actual suspensions of 30, 60 and 90 days, six months, one year, 18 months, two years and three years; and disbarment. However, the Standards should be clear that discipline recommendations falling between those stated levels are disfavored.

The Standards could also include a statement regarding the purposes and goals of rule 9.20 and rehabilitation hearings under Standard 1.4(c)(ii).

For example, a hearing pursuant to Standard 1.4(c)(ii) is commonly viewed as necessary when a member has been removed from the practice of law for an extended period of time, usually two years or more. The idea being that a member who has not practiced law for two years should have to demonstrate a current fitness and ability to practice before being returned to active status. However, the nature of the member’s misconduct also plays a role in determining whether a 1.4(c)(ii) hearing is warranted. In analyzing discipline, a case of misconduct should be viewed from the perspective of whether the member’s misconduct places his or her fitness to practice law in such question that a 1.4(c)(ii) hearing is necessary to protect the public.

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<sup>17</sup> See *Howard v. State Bar* (1990) 51 Cal.3d 215 and *Edwards v. State Bar* (1990) 52 Cal.3d 28 for discussion of compelling mitigation *vis a vis* Standard 2.2(a).

Additionally, the Standards should affirmatively support the imposition of a 1.4(c)(ii) hearing whenever it is warranted, irrespective of the underlying period of actual suspension.<sup>18</sup>

### III.

#### BRIEF COMMENTS ON SPECIFIC STANDARDS AND OTHER ISSUES

##### Criminal Convictions

The current Standards for criminal conviction matters are problematic for all of the reasons discussed above.<sup>19</sup> Attached for consideration under tab #3 is an example of Standards for criminal conviction matters delineated according to OCTC's view of the most common types or categories of conviction matters. As with the prior two attachments, each level of discipline in this example provides a specific starting point from which factors in aggravation and mitigation may be analyzed.<sup>20</sup> However, the specific starting points could be revised to provide narrow ranges of discipline.

##### Standard 1.7(b)

Standard 1.7(b) provides that where a member has a record of two prior disciplines, disbarment shall be imposed in a third disciplinary proceeding unless the most compelling mitigating circumstances clearly predominate. However, the court looks to many factors in determining whether or not this "third strike" rule is to be imposed in a particular case.<sup>21</sup> The proposal before the Committee, under section "1.8 EFFECT OF PRIOR DISCIPLINE," recognizes the need for greater guidance in a "third strike" rule and provides a structure to analyze the facts underlying the prior record of discipline.

Additional factors to consider within the proposed structure include whether the prior and current misconduct demonstrate a trend of increasingly serious acts of misconduct and whether the record of misconduct as a whole evidences a repeated lack of remorse or recognition of wrongdoing.

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<sup>18</sup> See *In re Carr* (1988) 46 Cal.3d 1089, imposing a 1.4(c)(ii) hearing with six month actual suspension (consecutive to an existing suspension which was not further defined) arising out of multiple convictions for driving under the influence of alcohol and *In the Matter of Wolff* (Review Dept. 2006) 5 Cal. State Bar Ct. Rptr. 1, 17, recommending 1.4(c)(ii) hearing with 18 month actual suspension where facts of case and lack of insight suggested misconduct might recur.

<sup>19</sup> See *In re Brown* (1995) 12 Cal.4<sup>th</sup> 205, 220, for discussion of Standard 3.4 regarding final convictions for a crime not involving moral turpitude, but involving other misconduct warranting discipline and stating that the Standards provide "little guidance" as to the criminal conviction matter before the Court, three misdemeanor counts of failing to remit funds withheld from employee wages to the State.

<sup>20</sup> The levels of discipline in this example are based upon Supreme Court and State Bar Court decisional law.

<sup>21</sup> See *Conroy v. State Bar* (1991) 53 Cal.3d 495, 507, citing to *Arm v. State Bar* (1990) 50 Cal.3d 763, where the Court, in discussing the application of Standard 1.7(b), stated that it is not required to treat all prior disciplines as having equal weight, but should consider the facts underlying the various proceedings in arriving at the appropriate discipline.



### Required Conditions of Discipline

Standard 1.5 and the proposal before this Committee, under section “1.4 CONDITIONS ATTACHED TO SANCTIONS,” identify various optional conditions of reproofs and probation. However, conditions that clearly relate to underlying misconduct and clearly serve a rehabilitative purpose should be made mandatory.

### Illegal Fees & Unauthorized Practice of Law

The Standards should specifically address illegal fees and the unauthorized practice of law.

### Standards 2.6 & 2.10

As mentioned above, the various violations covered in Standards 2.6 and 2.10 could be addressed more specifically.

### Specific Aggravating & Mitigating Circumstances

OCTC also notes the following:

- a. Multiple acts of misconduct and a pattern of misconduct are currently addressed in a single section. (Std. 1.2(b)(ii)) These are two different concepts under the law and should be discussed in separately.
- b. Similarly, Standard 1.2(b)(iii) addresses aggravation for bad faith, dishonesty, concealment, overreaching, the extent to which trust funds were involved in the misconduct and the inability to account. This Standard should be broken down into individual sections.
- c. Standard 1.2(b)(iv) addresses harm caused by the member’s misconduct. OCTC recommends that the Standard be revised to include aggravation for the potential harm of misconduct.
- d. The Supreme Court has granted mitigation for a member’s many years in practice without prior discipline even in those circumstances where the misconduct at issue is serious.<sup>22</sup> Standard 1.2(e)(i) is not consistent with this case law in this respect.
- e. Standard 1.2(e)(ii) regarding mitigation for a member’s “good faith” should include a definition of that term.
- f. Standard 1.2(e)(iii) provides mitigation for a “lack of harm.” OCTC questions whether this is appropriate where the misconduct raises the potential of harm or the lack of harm is simply fortuitous.
- g. Standard 1.2(e)(vi) regarding mitigation for good character should be revised to ensure that character witnesses demonstrate sufficient knowledge of both the member and his or her misconduct before their testimony is given any weight. Additionally, it may be appropriate to diminish the weight of character evidence in instances where a member has a record of prior discipline.
- h. The Standards should include mitigation for a member’s lack of experience where the misconduct is the direct result of a lack of experience and does not involve concealment or dishonesty.<sup>23</sup>

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<sup>22</sup> *Hawes v. State Bar* (1990) 51 Cal.3d 587, 596.

<sup>23</sup> *Lawhorn v. State Bar* (1987) 43 Cal.3d 1357, 1366-1368; *Matthew v. State Bar* (1989) 49 Cal.3d 784, 791; and *Crawford v. State Bar* (1960) 54 Cal.2d 659, 669.

#### **IV.**

#### **CLOSING COMMENT**

The current Standards have been in place for nearly 28 years without significant revision. During that period of time, the Supreme Court has commented on their weaknesses and found them difficult to work with on occasions. OCTC recommends that the proposal before the Committee be accepted as a starting point for a more comprehensive review of the Standards and Supreme Court decisional law.

OCTC appreciates the opportunity to participate in the Committee's evaluation of the Standards for Attorney Sanctions for Professional Misconduct and will remain available to address any questions it may have going forward.

# **TAB 1**

## 2.1 **MISAPPROPRIATION AND FAILURE TO MAINTAIN ENTRUSTED FUNDS**

The following sanctions are generally appropriate in cases involving intentional/dishonest misappropriation, grossly negligent misappropriation and the willful failure to preserve entrusted funds and property. Except as expressly limited by this standard, the sanction specified by this standard is the presumptive sanction prior to consideration of aggravating or mitigating circumstances, and in every case under this standard, that sanction shall reflect the extent of the harm suffered by the client or victim and the subsequent conduct of the member to correct the cause of the failure and address the harm caused by the misconduct.

- 2.11 Disbarment is appropriate when a member intentionally or dishonestly misappropriates entrusted funds or property regardless of harm to the client or victim unless the most compelling mitigating circumstances clearly predominate and full restitution has been made to the client or victim.
- 2.12 Actual suspension of two years is appropriate when a member, as a result of gross negligence, misappropriates a significant amount of entrusted funds or property and fails to make full restitution to the client or victim.
- 2.13 Actual suspension of one year is appropriate when a member, as a result of gross negligence, misappropriates a significant amount of entrusted funds or property but makes full restitution to the client or victim.
- 2.14 Actual suspension of 90 days is appropriate when:
  - (a) a member, as a result of gross negligence, misappropriates an insignificant amount of entrusted funds or property, or
  - (b) a member willfully fails to maintain any sum of client funds or property in trust which did not involve an intentional, dishonest or grossly negligent misappropriation, and fails to make prompt restitution to the client or victim.
- 2.15 Reproval is appropriate when a member wilfully fails to maintain client funds or property in trust which did not involve an intentional, dishonest or grossly negligent misappropriation, and makes full restitution to the client or victim.
- 2.16 For purposes of this standard, a misappropriated amount is “significant” if the amount would constitute a meaningful loss either:
  - (a) to a person of average financial means; or
  - (b) given the economic circumstances of the victim of the misappropriation.
- 2.17 For purposes of this standard, restitution includes all of the following:
  - (a) the member’s payment to a victim of the amount of entrusted funds received by the member on behalf of the victim which the member misappropriated, whether through intentional, dishonest, or grossly negligent acts, or which the member willfully failed to deposit or maintain in trust;
  - (b) the member’s payment to a third party of the amount of entrusted funds received by the member on behalf of the victim which the victim intended to be paid to that third party but which the member misappropriated, whether through intentional, dishonest, or grossly negligent acts, or which the member willfully failed to deposit or maintain in trust; and
  - (c) the member’s deposit in a trust account the amount of entrusted funds received by

the member on behalf of the victim which the member misappropriated, whether through intentional, dishonest, or grossly negligent acts, or which the member willfully failed to deposit or maintain in trust, where the funds are thereafter maintained in trust until properly disbursed pursuant to the Rules of Professional Conduct.

## **TAB 2**

## **2.2 COMMINGLING AND OTHER VIOLATIONS OF DUTIES REGARDING TRUST ACCOUNTS**

The following sanctions are generally appropriate in cases involving commingling of personal funds in a trust account and violations of other duties to clients or third parties regarding the trust account such as the duty to notify of receipt of funds, disburse at the direction of the client or victim, and render appropriate accounts. Except as expressly limited by this standard, the sanction specified by this standard is the presumptive sanction prior to consideration of aggravating or mitigating circumstances, and in every case under this standard, that sanction shall reflect the extent of harm suffered by the client or victim and the subsequent conduct of the member to rectify the misconduct.

- 2.21 Actual suspension of two years is appropriate when a member intentionally or dishonestly:
  - (a) renders false or inaccurate accounts on client funds; or
  - (b) commingles personal funds in a trust account intending to conceal the funds from creditors or taxing authorities or for some other improper motive.
- 2.22 Actual suspension of one year is appropriate when a member intentionally issues trust account checks drawn against insufficient funds.
- 2.23 Actual suspension of six months is appropriate when a member, through gross negligence, issues trust account checks drawn against insufficient funds.
- 2.24 Actual suspension of 90 days is appropriate when a member willfully:
  - (a) fails to promptly pay or deliver entrusted funds or property as requested by the client which the client is entitled to receive; or
  - (b) commingles funds belonging to the member in the trust account by depositing personal funds in a trust account or by paying personal expenses from a trust account.
- 2.25 Actual suspension of 30 days is appropriate when a member willfully fails to:
  - (a) promptly inform a client of the receipt of the client's funds or property;
  - (b) render appropriate accounts for entrusted funds; or
  - (c) maintain complete records of all entrusted client funds or property coming into the member's possession.
- 2.26 Reproval is appropriate when a member, in a single instance, willfully fails to:
  - (a) render appropriate accounts for advanced fees to a client, or
  - (b) withdraw funds from a trust account at the earliest reasonable time after his or her interest in the funds becomes fixed.

# **TAB 3**



### 3.0 **CRIMINAL CONVICTIONS**

The following sanctions are generally appropriate in cases involving a member's criminal conviction other than those matters in which the member is subject to summary disbarment pursuant to statute. Except as expressly limited by this standard, the sanction specified by this standard is the presumptive sanction prior to consideration of aggravating or mitigating circumstances, and in every case under this standard, that sanction shall reflect the extent of harm suffered by the victim or public and the extent to which the conviction bears on the member's fitness to practice.

#### 3.1 FELONY CONVICTIONS INVOLVING MORAL TURPITUDE

Disbarment is appropriate for any felony conviction in which the facts and circumstances surrounding the misconduct involve moral turpitude.

#### 3.2 FELONY CONVICTIONS INVOLVING PHYSICAL VIOLENCE

- (a) Actual suspension of two years is appropriate where the member used a deadly weapon or the victim of the crime was someone to whom the member owed a special duty of care or a law enforcement officer.
- (b) Actual suspension of one year is appropriate where the crime resulted in serious bodily injury.
- (c) Actual suspension of six months is appropriate where the crime did not result in serious bodily injury.

#### 3.3 OTHER FELONY CONVICTIONS WARRANTING DISCIPLINE

- (a) Actual suspension of two years is appropriate where the crime was committed in the course of the practice of law or the victim of the crime was the member's client.
- (b) Actual suspension of two years is appropriate for vehicular manslaughter offenses involving alcohol or drugs.
- (c) Actual suspension of one year is appropriate for all other felony convictions.

#### 3.4 MISDEMEANOR CONVICTIONS FOR CRIMES INVOLVING MORAL TURPITUDE INHERENTLY OR BASED UPON THE SURROUNDING FACTS AND CIRCUMSTANCES

- (a) Actual suspension of one year is appropriate where the crime was committed in the course of the practice of law or the victim of the crime was the member's client.
- (b) Actual suspension of six months is appropriate for other non-violent crimes involving moral turpitude, except petty theft.
- (c) Actual suspension is appropriate for petty theft.

#### 3.5 MISDEMEANOR CONVICTIONS INVOLVING VEHICULAR CRIMES AND ALCOHOL OR DRUGS

- (a) Actual suspension of one year is appropriate where the member has been twice previously convicted of vehicular crimes involving alcohol or drugs.
- (b) Public reproof is appropriate where the member caused bodily injury, had a passenger in the vehicle, committed the crime in the course of the practice of law, or had previously been convicted of a vehicular crime involving alcohol or drugs.

#### 3.6 MISDEMEANOR CONVICTIONS INVOLVING SEXUAL OFFENSES, BUT NOT MORAL TURPITUDE

- (a) Actual suspension of one year is appropriate where the victim was a child, someone to whom the member owed a special duty of care, or the member's client.
- (b) Public reproof is appropriate for minor misdemeanor sexual offenses.

### 3.7 OTHER MISDEMEANOR CONVICTIONS FOR CRIMES WARRANTING DISCIPLINE

- (a) Actual suspension of six months is appropriate where the crime was committed in the course of the practice of law, the victim of the crime was the member's client, the crime resulted in serious bodily injury or involved tax or regulatory offenses.
- (b) Actual suspension of ninety days is appropriate where the victim was someone to whom the member owed a special duty of care, the victim was a law enforcement officer, the member used a deadly weapon, or stalking was involved.
- (c) Public reproof is appropriate in other instances.