

# AGENDA ITEM

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**DATE:** August 30, 2014

**TO:** Luis Rodriguez, President  
Members, Board of Trustees

**FROM:** Karen M. Goodman, Chair Discipline Standards Task Force

**SUBJECT:** Discipline Standards Task Force Interim Status Report

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## **I. EXECUTIVE SUMMARY.**

The 15 member Discipline Standards Task Force has researched and examined the existing Standards for Attorney Sanctions for Professional Misconduct, initially drafted in 1986 and revised in 2013. After considerable discussion, the Task Force recommends a substantial revision of the Discipline Standards, focusing on the following substantive areas: (a) the level of discipline, (b) factors considered for aggravation and mitigation and (c) the adequacy of existing standards for Rules of Professional Conduct that relate to public protection.

The Discipline Standards Task Force has met 3 times: May 12, 2014, June 24, 2014, and August 25, 2014. After examining the California Standards as well as the American Bar Association Standards, the Florida State Bar Standards, the Washington State Bar Standards, and relevant articles concerning the purposes relating to Lawyer Discipline, the Task Force decided the existing standards were too vague, inconsistent and incomplete.

With the considerable input of the Office of General Counsel, the Office of Trial Counsel and the State Bar staff, the Task Force is in the process of drafting revisions to the Standards. It is anticipated that the Task Force will have recommended revised standards ready for the 2014-2015 Board of Trustees to review and consider before the end of 2014.

## **II. THE TASK FORCE HAS CONCLUDED THE CURRENT STANDARDS ARE INADEQUATE TO SERVE THE BAR'S PRIMARY GOAL OF PUBLIC PROTECTION.**

The Task Force has closely studied how the standards can effectively promote public protection. The existing Discipline Standards were initially drafted and approved in 1986. As a reminder, the Discipline Standards serve as guidelines to promote the consistent and uniform application of disciplinary measures. (*In re Silverton* (2005) 36

Cal.4<sup>th</sup> 81). The Board approves the Discipline Standards. While the Discipline Standards are not binding on the Supreme Court, the Court has repeatedly acknowledged that it looks to the Bar's Discipline Standards in reviewing discipline cases before it. The Task Force has examined the current Discipline Standards in relation to relevant purposes for lawyer discipline. These purposes include making the client/victim "whole," deter future unethical conduct and set an example in an effort to deter others. The Task Force discussed the importance of rehabilitating lawyers who had violated the Rules of Professional Conduct. The Task Force has approached the examination of the current Standards on whether they are adequately defined to protect the public.

The Task Force examined the resources the Bar currently has available to address lawyer misconduct arising out of substance abuse, alcoholism or mental issues. The Task Force also discussed the impact the aging profession has on public protection and discipline. The Lawyer Assistance Program is not connected to the discipline system, but is available for diversion for disciplined lawyers under certain circumstances.

The Task Force discussed the Rules of Professional Conduct where public protection is particularly impacted. Examples include misappropriation (CRPC 4-100), conflict of interest (CRPC 3-310), and misrepresentations in court proceedings (CRPC 5-200). The review of the existing sanctions revealed that a number of significant Rules do not have sanctions specifically set forth. In addition, some of the current Discipline Standards attempt to combine sanctions for a combination of ethical violations. (See, e.g., 2.5 "Failure to Perform or Communicate"). Instead, the current standards have several "catch-alls", including Standard 2.7, titled "Moral turpitude, dishonesty, fraud, corruption or concealment."

One difficulty the Task Force immediately encountered was the lack of reliable data concerning the severity and frequency of bar discipline cases. In spite of persistent requests from the Board, the State Bar was unable to produce reliable metrics concerning the frequency and severity of particular rules violations. Following the May 2014 meeting, the Task Force requested the State Bar provide the categories of ethical violations with a list of disposition of these cases for the last 5 years. The Office of Trial Counsel and the State Bar Court were unable to provide this data. The Office of Trial counsel is still working with an outdated computer system so the data that the Task Force wanted was not available.

The Task Force heard testimony that the current guidelines provide a lot of flexibility for the State Bar Court to assess discipline based on the specific circumstances. The flexibility is criticized frequently for providing inconsistent discipline for similar offenses. The Task Force examined how relevant the Federal Sentencing Guidelines were for consideration for incorporating into the State Bar Standards. The Task Force recognized the difficulty in reconciling the conflict between the State Bar Court's desire for flexibility and the public's desire for consistent discipline for similar ethical violations. After more detailed discussion presented by Task Force members

Raul Ayala and Evan Davis during the June 24, 2014 meeting concerning the Federal Sentencing Guidelines, the Task Force concluded that any revision to the Discipline Standards needed to provide for flexibility based upon specific circumstances to provide the Court with necessary discretion.

The Task Force examined the work that the Office of General Counsel performed in making stylistic revisions to the Standards. OGC's work focused on recasting the Standards into plain English in order to avoid unnecessary and repetitive language. The revised Standards added specific discipline standards for illegal fees, unauthorized practice of law, violation of oath or duties of an attorney, and sexual relations with clients. Input was solicited from key stakeholders. These revised standards were approved by the Board of Trustees in 2013. The Task Force concluded that the 2013 revisions were a helpful "first step" in addressing the need for the Discipline Standards to provide necessary guidance to the Stakeholders in the discipline system.

The Office of Trial Counsel presented its view on how the current standards have been working and where changes would improve the effectiveness of the Discipline Standards. OTC recommended the Task Force consider adopting ranges of sanctions consistent with Supreme Court cases. OTC also recommended that several of the current standards lacked specificity. (See, e.g., Standards 2.6, 2.7, and 2.8). Further, OTC observed that there were several ethical rules which lacked any discipline standards.

By consensus, the Task Force decided the current Discipline Standards were inadequate to provide sufficient guidance to the participants in the discipline system. At the conclusion of the June 24, 2014 Task Force meeting, three working groups were established in order to examine specific changes to the Standards: (a) Level of Sanctions; (b) Aggravation and Mitigation and (c) the feasibility of importing the ABA Standards into the Discipline Standards and addressing the several ethical rules that currently do not have sanctions.

### **III. THE TASK FORCE IS CURRENTLY WORKING ON DRAFTING REVISIONS TO THE DISCIPLINE STANDARDS TO PROVIDE GREATER GUIDANCE TO THE STAKEHOLDERS.**

During the Task Force's August 25, 2014 meeting, each of the working groups discussed the examination they had conducted. The State Bar staff, most notably the Office of General Counsel, has been very helpful in providing the necessary resources for the Task Force's work. As part of the discussion, the Task Force concluded that a wholesale importation of the ABA's standards would not be appropriate because the ABA Model Rules are not applied in California and many of the citations relate to out-of-state cases.

The initial focus in drafting revised standards focused on misappropriation (Standard 2.1) because of the number of published cases addressing the rule violation and the Task Force's objective of focusing on public protection. There was a robust

discussion concerning the addition of source notes for Standards. The Task Force concluded that where possible, citations to the most relevant cases would be particularly helpful. The Task Force decided that extensive discussions for each Standard would be unwieldy and too time consuming and would not be attempted.

The working group will be identifying Rules that do not have current standards and will be drafting proposed standards with the input of State Bar staff.

The Task Force decided that the Discipline Standards concerning Aggravation and Mitigation needed further definition. The working group will be examining proposed revisions to Standards 1.5, 1.6 and 1.7, to provide greater guidance in how specific factors should be analyzed for determining the appropriate level of sanction for each case.

The Task Force discussed the current level of sanctions outlined in Standards 1.2 and 1.3. Members of the Task Force have studied and debated the usefulness of the current “sanction” of “stayed” suspension” and are exploring drafting changes that would replace “stayed” suspension with “probation.”

The Task Force remains committed to having a substantive revision available for discussion amongst its members by late October 2014, with the objective of having the proposed revisions to the Standards presented to the Board of Trustees before the end of the 2014 calendar year.