

**STATE BAR OF CALIFORNIA
DISCIPLINE STANDARDS TASK FORCE**

DATE: OCTOBER 21, 2014

TO: KAREN GOODMAN, CHAIR
DISCIPLINE STANDARDS TASK FORCE, MEMBERS

FROM: WORKING GROUP I (Carol Langford, Glenda Corcoran, Daniel Dean, and Steve Lewis)

SUBJECT: REPORT AND RECOMMENDATIONS CONCERNING THE
CURRENT STANDARDS

Working Group I consisted of the Task Force members (Carol Langford-Chair, Glenda Corcoran, Daniel Dean, and Steve Lewis). Participants also included Robert Hawley from the Executive Director's Office, Rachael Grunberg, Rick Zanassi and Mark Torres-Gil from the Office of General Counsel, Kevin Taylor and Kristin Ritsema from the Office of Chief Trial Counsel, as well as occasional overview by Mr. Joseph Dunn and Ms. Karen Goodman. We therefore had input from important stakeholders in the drafting process. We were particularly grateful that Ms. Corcoran and Mr. Dean took time from the Board to assist us in this endeavor.

Despite a tough start - we tackled the Misappropriation Standard first which turned out to be the Standard with the most case law, and hence the toughest to revise, we finished it and were able then to more rapidly anticipate the issues that might arise in other Standards. At the same time, we prepared what we term "Orphan Standards" - Standards that were not yet in the current Standards of Discipline, but encompassed conduct that would be a violation of the Rules of Professional Conduct.

For each Standard we thoroughly researched case law by the Supreme Court and the Review Department. We also asked for commentary from OCTC and others on non-published discipline; what the Bar refers to as "stipulations." We did this to be consistent with case law and what the judges were seeing as an appropriate level of discipline.

2.1 Misappropriation

Citing to Case Law: This was the first Standard we tackled and the most difficult just from the perspective that we had to get a handle on case law so as to be consistent. You will note that this Standard has footnotes to case law to show the various levels of discipline. We discussed both putting citations to case law with commentary on the facts of the cases and just including pure footnotes. There are both pros and cons to footnoting case law in a Standard. Steve Lewis commented that he liked the idea of citations to a few cases that would show how

the courts interpret the Standard, especially since the cases are relatively consistent. Only in the pre-Standard 70's and 80's were the cases inconsistent, and those cases should not be looked at as the current law in his opinion. He liked that it made the Standards more assessable for the public and respondents.

Mr. Hawley discussed putting case footnotes only (without a case comment section) and said while we would have to update them occasionally and some people might ask "Why this case and not another?" he is not particularly troubled by source references, as long as they are not viewed as "outlier" cases. Ms. Langford liked including footnotes, but was concerned, along with others, that case law has to be updated, and can take tremendous time (as we discovered). We would likely have to meet every year to update it. Also, the State Bar Reporter includes citations to case law for each violation of the Rules.

Mr. Torres raised the issue of there being no decisional law involving "pure" misappropriation where the court granted a reproof as the level of discipline. Most of the cases where misappropriation is involved were really a co-mingling of funds. However, he agreed that stipulations probably existed where that level of discipline was imposed. Ms. Langford and Steve both agreed with this, having handled respondent's matters involving misappropriation where reprovals were granted via stipulation.

We also noticed that the facts of the cases where a reproof was given for co-mingling were clearly technically misappropriation. However, we believe the court labeled the conduct co-mingling, probably to deviate from the current Standard (which imposes too harsh a discipline) where the amount was small, and there was mitigating evidence (one case involved a little over \$10 dollars). We agreed that courts will find ways to be fair, and pure negligence, even though it is usually not brought before the Bar court, could and probably should result in a reproof where the amount is small, there is little harm, etc.

2.7 Misrepresentation

We declined to have a separate Standard for Misrepresentation as current 2.7 included language involving conduct involving fraud and dishonesty. So, we included the wording "intentional or grossly negligent misrepresentation" into the current Standard. We first just put the word "intentional" in the Standard without the wording "grossly negligent" but all agreed it might be confusing to not also include gross negligence. We discussed that the first time an attorney misleads a client as to, say, status, it might be negligent conduct or a mistake; for example where the secretary tells the client or attorney the wrong date for a hearing. However, the next time it occurs it might be gross negligence or intentional conduct.

While the Bar would probably consider gross negligence in making misrepresentations to be encompassed by the Standard we wanted to make it clear in the wording that this was so. Bob Hawley discussed the ABA Standard which distinguishes between intentional conduct and gross negligence and the level of discipline for misstatements. Ms. Langford then discussed the difference between fraud and civil misrepresentation which can be intentional or negligent. We finessed the language to include both.

Conflicts of Interest

We then discussed a new "conflicts" Standard. We discussed that people expect their lawyer to be loyal and that conflicts hurt the profession. We agreed that it was a public protection issue.

After much discussion of Rule 3-310 we agreed to address current actual and former actual conflicts. OGC did do a draft of all the conflicts cited in Rule 3-310, but we felt it was "biting off more than we could chew" and also encompassing things like discipline for third party payor disclosures that the State Bar never prosecutes as no one complains. We did not want to tackle potential conflicts as those are resolved by DQ motions most often and the Bar might not want to use resources to try a potential conflicts case that did not result in harm to the client (or actualize).

Bob Hawley agreed that loyalty is the driving force in conflicts rules even if that is not mentioned in the Rule. The Rule is prophylactic to keep lawyers out of trouble. We discussed language that would include that if a lawyer breached his or her duty of loyalty and/or confidentiality in an actual conflicts situation without informed written consent then the Standard is violated. Everyone agreed that the Bar has not traditionally dealt with conflicts.

We conducted some research regarding discipline cases stemming from conflicts of interest. There appear to be very few disciplinary cases in which the sole or primary violation involves representing conflicting interests. On the other hand, the Supreme Court and the Courts of Appeal have weighed in on conflicts issues in a number of civil cases, particularly in the areas of when an attorney should be disqualified and when an attorney should forfeit fees because of conflicts. Interestingly, attorneys who have been disqualified or who have forfeited their fees are not always disciplined; probably because the client at that point has won his motion or gotten his fees back.

We also discussed whether notice (full and complete oral disclosure) is the same as signed written consent for disciplinary purposes. The group discussed the issue at length and Steve suggested that absent written consent should not always lead to disbarment. The court struggles with this issue. However, Rule of Professional Conduct 3-310 says a lawyer must give informed written consent, and we cannot deviate from the Rule.

Articulating Standards with Minimal Case Law

We then discussed at length whether it is the role of our Working Group to only articulate Standards that reflect published case law only. The issue is that a lot of discipline matters resolve by stipulation and stipulations are not published. Also, since lawyers pay for the Bar's costs if they lose, most cases resolve early - before trial - and hence are not reported. Many resolve by default.

Mr. Lewis did not like the Group creating a level of discipline where case law was sparse. Mr. Hawley and all others agreed we could do so where we found it appropriate. We agreed, however, that we have to first look at what Supreme Court and Review Department case law

exists, troll our collective memory for stipulations that involved the conduct in question, look at the ABA Standards and of course our other California Standards. We want to fill in gaps where appropriate.

We then discussed the punishment to give for an actual conflict with current clients that was unwaived (i.e. no informed written consent), and there was harm to the client. We finally agreed to not include "potential" conflicts where the client was informed and the conflicts were waived orally or in writing and no harm resulted to the client; i.e. technical conflicts.

Bob Hawley reiterated that the proposed Standard requires a breach of confidences and that is have caused harm, so therefore the Standard is not ambiguous and captures real harm to the public vs. matters where the client might have orally consented and there was no harm. We all agreed to support the Standard move it forward to the whole group. We have three rounds and we are only round one; the Disciplinary Task Force is round two and the Board is round three so everyone will have input.

We discussed at length former conflicts. Ms. Langford addressed the Oasis West case as the California Supreme Court making clear that former representations can result in a conflict whether or not the lawyer/respondent denies having gotten confidential information. Ms. Langford believes that the Court was saying essentially that they don't want to see a lawyer assist a client in obtaining a permit for a development and then two or three years later petition against it being developed. Ms. Langford believes Oasis may have really been a 3-310(b) disclosure case vs. a 3-310 (c) case but however it was analyzed lawyers should not go against former clients on a matter they worked on in the past.

Ms. Langford stressed that our draft former client Standard covers only actually adverse situations, with harm to the client and no written consent. It is a tough Standard to meet - the lawyer has to have done something very disloyal.

Competence

There were several issues about the wording of the current competence Standard that everyone agreed was problematic like "failing to perform legal services with clients" vs. "for clients" (which is better language). There was also a disconnect in the levels of discipline for, say, two instances of failure to perform (which could invoke actual suspension) and one (which is a reproof). We discussed putting in a range of discipline. Kristin stated that OCTC is not going to prosecute one failure involving mere negligence that does not rise to intentional or reckless conduct. There are disbarment cases where the conduct constituted a lengthy pattern of failures to perform. Ms. Langford commented that usually drugs or alcohol would be involved in a lengthy pattern or a truly bad staff member.

We then discussed why a failure to perform and the duty to communicate were in the same Standard. Ms. Langford commented that a failure to communicate was a failure to perform since a lawyer under Rule 3-500 has a duty to communicate, but that maybe they could be separated. Steve liked the idea of seeing a separate Standard.

Rachel and I discussed at length a separate competence/communications Standard (2.5). As you know, Rachel offered to research communications to see what the disciplinary case law provided as to discipline. Both Rachel and I were unable to find any pure failure to communicate cases. The published decisions seem to include an umbrella of misconduct that incorporate a failure to communicate, failure to appear at hearings, etc., failure to give status updates to the client, abandonment, improper withdrawal, delay, failure to perform, failure to act competently and failure to return files and/or unearned fees. Therefore, if I create a Standard, it will be out of whole cloth, with no case law supporting it.

We believe this is why Standard 2.5 and its predecessors evolved the way they did – by combining failure to perform and failure to communicate. The concept of “competency” and all other Rule 3-110 violations are subsumed in the current 2.5 Standard within the broader umbrella “failure to perform.” This is really no surprise, as a lawyer who is really not communicating with her client will likely be failing to show up at a hearing, etc. And if the communication failure is minor - the lawyer has not returned a phone call or two and the client immediately complains - the Bar will often just call the lawyer, ask him about it and tell him to call the client (I have seen this in several cases).

Rachel and OCTC met and concluded that “failure to communicate” is not an orphan standard that needs to be addressed, due to the above problems.

I noted one more problem: if we parse out communications from competence, we probably have to parse out abandonment, delay, etc. and create a new Standard for those issues. This could cause the judges to “stack” discipline by combining three or four Standards that address each failure to perform/communicate, causing the lawyer to get more discipline than warranted. For these reasons we recommend keeping communication and performance in one Standard.

The group then turned to the competence/communications 2.5 Standard. Ms. Langford and Rachel from OGC discussed that we could not separate out communications from competence without creating perhaps a stacking of discipline by judges confused by competence being broken out into abandonment, etc. The cases intertwine competence issues with communication and there are not pure communications cases. Usually lawyers who are not communicating are also failing in their duty of competence. We discussed Mr. Lewis' research and he agreed that it was hard to separate out competence from communications.

Mr. Lewis also wanted to see the word “habitual” worked into the Standard. He felt that disbarment should only be for conduct beyond a mere pattern. He stated that usually the bad cases involve some sort of misrepresentation. He raised that the conduct needed to be reckless or repeated and Mr. Hawley raised that those words are already in the Rule which is the basis for the Standard so the words did not have to be repeated.

Kevin raised that there are cases that discuss the pattern of failures of competence and communication. Usually six times is not really bad but failing seven times is bad. He likes the court having discretion on how many times is bad. Misrepresentation to the client pushes the

conduct into moral turpitude. He also stressed that in competence cases the largest number of mitigating factors occur.

Fee Splitting and Frivolous Litigation Standards

We agreed to limit fee splitting to matters involving non-lawyers and all agreed that where harm occurs as well as a pattern of filing frivolous matters disbarment may be appropriate.