

STATE BAR OF CALIFORNIA DISCIPLINE STANDARDS TASK FORCE

REPORT OF WORKING GROUP NO. II

ON LEVEL OF DISCIPLINE

DATE: October 22, 2014

TO: KAREN GOODMAN, CHAIR, DISCIPLINE STANDARDS TASK FORCE (“DTSF”)

FROM: WORKING GROUP II (Raul Ayala, Evan Davis and Ellen Peck)

SUBJECT: REPORT AND RECOMMENDATIONS CONCERNING: IDENTIFY LEVELS OF DISCIPLINE

EXECUTIVE SUMMARY OF PROPOSED RECOMMENDATIONS:

Working Group II proposes the following recommendations to the members of the DTSF for potential recommendation to the Board of Trustees:

1. Clarify the severity levels of the two types of reproof (public and private). (See proposed 1.3(d) and (e).).
2. Add the sanctions set forth in Bus. & Prof. Code section 6233 (part of the California Attorney Diversion and Assistance Act (Bus. & Prof. C., §§ 6230-6238 to Standard 1.3(f).
3. Add a definition of “probation” and in standard 1.4 (e), delete reference to probation monitors because there are no probation monitors in the system.
4. In order to promote public and lawyer understanding of the severity, degree and definitions of degrees of discipline, recommend a further staff study of the following concepts:
 - 4.1. Whether “stayed suspension” should be removed as a degree of discipline in Standard 1. 2 of the Standards for Attorney Sanctions for Professional Misconduct; and
 - 4.2. Whether a “fully probated suspension” or other terminology should be added as a degree of discipline to describe the circumstance in which no actual suspension is imposed but the member is subjected to terms and conditions of probation generally for a period of one year or longer.

5. That an “admonition” not become a level of discipline, since what other states use as an admonition is similar to a form of private reproof or, as we have recommended, either Reproof Level 1 or 2.

6. That a brief explanation of when an interim suspension will be imposed should be included in Standard 1.3 to promote public and attorney understanding.

DISCUSSION

1. BACKGROUND: WORKING GROUP II’s TASK AND PROCESS

At the DTSF June 24, 2014 hearing, Working Group II was asked to study the Degrees of Sanctions listed in current section 1.3, Standards for Attorney Sanctions for Professional Misconduct (“the Standards”) to report on whether (1) stayed suspension should continue be a degree of sanction; (2) probation should be added as a degree of sanction; (3) other degrees of sanction should be added for the protection of the public and (4) whether section 1.3 should otherwise be amended or modified for clarification or other protection of the public.

Notice of the August 1, 2014 meeting of Working Group II meeting was given pursuant to the open meeting rules adopted by the State Bar Board of Trustees. On August 1, 2014, Working Group II met to discuss the above assignment, to hear public comment and to make recommendations to the Task Force. Present were: Ellen Peck (Lead), Raul Ayala (Member), and Evan Davis (Member). Also in attendance were Rachel Grunberg, Robert Hawley, Kristen Ritsema, Kevin Taylor, and Richard Zanassi. No other member of the public identified himself or herself.

Once there has been a finding or stipulation as to misconduct, current Standard 1.3 identifies the following degrees of sanction: (a) disbarment; (b) actual suspension; (c) stayed suspension; (d) reproof, public or private; or (e) any interim remedies or other final discipline authorized by Business and Professions Code section 6007(h). In reviewing these levels of discipline, Working Group II considered the following resources: Rule 10, American Bar Association (“ABA”) Model Rules for Lawyer Disciplinary Enforcement; ABA Standards for Imposing Lawyer Sanctions; California Attorney Diversion and Assistance Act (Bus. & Prof. C., §§ 6230-6238); American Bar Association Center for Professional Responsibility Standing Committee on Professional Discipline 2011 Survey on Lawyer Discipline Systems; The Florida Bar Standards for Lawyer Sanctions; State Bar of Texas Punishment for Professional Misconduct. Working Group II also had the benefit of expertise of Members Ayala and Davis concerning federal and California state criminal models concerning levels of sanction.

No public comment was presented at the meeting. After consideration of the informative comments of those present, the consensus was to present a report concerning the matters that the following report and recommendations to the Task Force.

At the DTSF’s August 25, 2014 hearing, Working Group II’s report was discussed by those present along with public comment. DTSF reached a consensus on the issues reported in the Executive Summary and requested a further report discussing the recommendations and with proposed language to the Standards.

Working Group II (Members Peck and Ayala) had a further meetings on October 20 and 22, 2014 with representatives of the Office of General Counsel, the Office of Chief Trial Counsel and the Office of Probation regarding comments to this report.

2. DISCUSSION CONCERNING THE APPROACH TAKEN AND REASONS IN SUPPORT FOR TAKING THAT APPROACH

A. SHOULD STAYED SUSPENSION CONTINUE TO BE A LEVEL OF DISCIPLINE? PERHAPS – RECOMMEND FURTHER STAFF STUDY.

RECOMMENDATION:

In its study of whether “stayed suspension” should continue to be a degree of discipline, Working Group II has considered other models, including federal criminal court orders which contain solely a sanction and probation terms and conditions without a stay of execution of any sanction and ABA Models which have the same model. Working Group II has recommended that “stayed suspension” be deleted as a degree of discipline. However, our discussions with staff from Office of General Counsel, Office of Probation and Office of Chief Trial Counsel, and indirectly, from staff of the State Bar Court, suggest that the “fix” is complicated because it may involve redrafting other Rules of Procedure; have unintended consequences and effects the forms of disciplinary orders within the State Bar Court. Additionally, because there is currently no consensus about the purpose of a “stayed suspension,” there must be further study of its role in the disciplinary process by the stakeholders to determine if its deletion is feasible.

Accordingly, it is recommended that the DSTF recommend to the Board of Trustees that a staff working group be appointed by the Executive Director and CEO, composed of authorized representatives of the Office of Chief Trial Counsel, Office of The State Bar Court, the Probation Office and the Office of General Counsel for the purpose of determining whether stayed suspension should continue to be a degree of discipline and if not, to develop a feasible plan of implementation.

BACKGROUND

The Task Force received staff reports that during the public comment period preceding the adoption of the current standards, some public comment was received to the effect that “stayed suspension” as a level of discipline and as used in State Bar Court disciplinary recommendations and in California Supreme Court disciplinary orders is confusing and perhaps, inconsistent with the goal of public protection. We provide the following typical form of a State Bar disciplinary recommendation to illustrate concerns expressed by public comment:

We recommend that respondent Attorney Doe **be suspended from the practice of law in the State of California for one year, that execution of this suspension be stayed**, and that respondent be **placed on probation for two years** on the following conditions:

- 1. That respondent be actually suspended from the practice of law in the State of California during the first three months of probation.** . . [other terms and conditions;

other recommendations regarding passage of the Multistate Professional Responsibility Examination and compliance with CRC 9.20]

We understand¹ that public confusion focuses upon the following topics which we discuss under each topic:

1. In the current form of a disciplinary order, there is confusion about whether Attorney Doe will be removed from practice for one year or on probation without any removal from practice.

Because the first sentence provides for a one year suspension with execution stayed, we understand that there is confusion about whether Attorney Doe will be removed from practice at all and if so, for what duration. The two year probation injects further confusion because in the ABA model and the criminal model, the sanction or punishment is imposed first in time with probation imposed after the sanction is administered. It is not until a person reviews the first probation term and condition, that it is determined that a three month “actual” suspension has been imposed during the first three months of probation. The confusion about whether the three month suspension is a sanction is exacerbated by the issue that Standard 1.3 does not include probation terms as levels of sanction. Even if a member of the public overcame that hurdle, there is still confusion between the difference of “suspension” and “actual suspension.”

Those familiar with the disciplinary understand that the recommendation proposes (a) a three month removal from practice as a condition of probation, among other terms; (b) a two year probation period; and (3) a period of stayed suspension (1 year) that may be imposed in the event that Attorney X violates any of the conditions of probation.

2. Was the appropriate sanction under the standards and case law (taking into account the misconduct, aggravation and mitigation), one year? No.

Because members of the public often read only a summary of the discipline imposed or a stipulation rather than State Bar Court opinions, it is not clear whether the appropriate sanction under the Standards is the period of stayed suspension or the actual suspension imposed as a probation condition.

2.1 The State Bar Court Appears to Apply the Standards to Determine the “Actual” Suspension to be Imposed As a Probation Condition

In suspension cases, it appears from published disciplinary decisions, that the State Bar Court applies the Standards and interpretive case law to determine the level of **actual** suspension warranted by the misconduct, aggravation and mitigation. Although the “actual” suspension is imposed as a probationary condition, the “actual” suspension appears to be the primary focus of the severity of sanction appropriate under the standards. The Court does not appear to regard the

¹ Working Group II has not reviewed the public comment but rather is relying upon reports from those present at the August 1, 2014 meeting concerning public comment regarding confusion surrounding the use of stayed suspensions in State Bar Court recommendations for discipline and in California Supreme Court orders on discipline.

stayed suspension as a factor in that determination. In the few California Supreme Court published cases reviewing State Bar Court decision, it appears that the Supreme Court also focuses primarily on the “actual” suspension imposed as a probation condition to determine the appropriate level of sanction.

Although we have not reviewed all suspension cases, we have not yet found a case discussing whether the level of stayed suspension is appropriate for any purpose.

(See e.g., *Matter of Taylor* (Rev.Dept. 2012) 5 Cal. State Bar Ct.Rptr. 221 at discussion of level of discipline; see also *In re Morse* (1995) 11 Cal.4th 184, 206-207.)

We also understand, from comment of persons who regularly work in disciplinary proceedings, that as a matter of practice, negotiations for stipulated discipline focus almost exclusively upon the “actual” suspension to be imposed, applying the standards and interpretive case law. Apparently, the period of “stayed suspension” is almost always a minor part of the negotiations, after arrival at a mutually agreeable level of “actual suspension.” The negotiation of the period of stayed suspension does not involve the Standards.

To the public, this process is not readily apparent and few have time to find out how the process works. The public sees the final result, which is a disciplinary order that buries the actual suspension into a third paragraph.

Because the stayed suspension is the first part of a sanction order, we understand that some members of the public and attorneys assume that the misconduct warrants the period of “stayed” suspension rather than the “actual” suspension. They reason that if a one year suspension is really warranted by the misconduct, aggravation and mitigation, why should Attorney Doe be given a reduced period of actual suspension of three months if Attorney Doe completes all of the probationary terms and conditions.

Such confusion can create a perception that the disciplinary system is lenient, giving errant attorneys reduced sanctions to promote rehabilitation of the attorney, rather than protecting the public.

If the current State Bar Court and disciplinary system measures what the appropriate disciplinary sanction should be in terms of the actual suspension imposed rather than a stayed suspension, the Standards and orders and stipulations should clearly and transparently reflect the actual practice. Otherwise the public and lawyers may be misled and incorrectly assume that the disciplinary system is lenient when it is not.

3. How does one measure the severity of a period of stayed suspension in comparison with other levels of discipline?

Because each suspension order contains three levels of discipline (a period of stayed suspension, a period of probation and a period of actual (or no actual) suspension), it is difficult for the public to measure the severity of a particular disciplinary order. Therefore, it may be helpful to clarify that the primary measure of the severity of a disciplinary sanction is the actual suspension

imposed and, as a secondary measure, the length of probation. (See e.g., *Matter of Taylor* (Rev.Dept. 2012) 5 Cal. State Bar Ct.Rptr. 221 for discussion of level of discipline.²)

Particularly when there is no actual suspension imposed, it is difficult to determine the difference in severity between a fully stayed suspension and a public reproof. It may be helpful to clarify that the former situation is more severe since, the lawyer may be sanctioned by the full amount of stayed suspension for any breach of probation.

4. If the appropriate sanction under the standards and case law (taking into account the misconduct, aggravation and mitigation) is the three months actual suspension imposed as a condition of probation, what is the purpose of a one year stayed suspension?

In evaluating various disciplinary orders following State Bar Court decisions, it appears that the **only purpose** of a stayed suspension is to provide a period of time referenced in the stayed suspension which may be imposed as actual suspension should the disciplined lawyer not comply with the conditions of the stayed suspension or probation. Rule 5.312, Rules of Procedure of the State Bar of California (The State Bar Court may recommend imposing an actual suspension equal to or less than the period of stayed suspension.)³

If the lawyer completes all conditions of probation, then the order suspending the attorney will be terminated. Typically, the last condition of probation will read something like this:

“Respondent's probation will commence on the effective date of the Supreme Court order imposing discipline in this matter. At the end of the probationary term, if respondent has complied with the conditions of probation, the Supreme Court order suspending respondent from the practice of law for one year will be satisfied, and the suspension will be terminated.”

Thus, the suspension is only stayed on the condition that the disciplined lawyer comply with all terms and conditions of probation, including the period of actual suspension. Assuming deterrence has some value, the threat of facing the period of stayed suspension may assist the disciplined lawyer comply with the Court's order. As a matter of public protection, the period of stayed suspension enables the State Bar Court to protect the public from a lawyer that is unable or unwilling to abide by the terms and conditions of probation in a probation revocation proceeding. (See Rule 5.310 et seq., Rules of Procedure.) Probation revocation proceedings, initiated by the Office of Probation, are expedited and have a preponderance of the evidence standard (rather than clear and convincing evidence required by original proceedings.) (See Rules 5.310-5.312, Rules of Procedure.)

² Therein, after determining the appropriate level of actual suspension, as a secondary matter, the Review Department discussed the appropriate term of probation.

³ It may also recommend staying all or part of the actual suspension and imposing a new period of probation, which may be of a different duration or under different conditions than the original probation or both.

Alternatively, if the Office of Chief Trial Counsel believes that the period of stayed suspension is inadequate to protect the public in light of the facts and circumstances of the probation violation, it may also initiate an original proceeding charging a violation of Business and Professions Code section 6068(k). Such original probation revocation proceedings are not expedited and are governed by the general procedures for original proceedings, including a higher burden of proof.

Thus, a stayed suspension serves as one valuable component of the array of disciplinary sanctions in order to facilitate enforcement of probation.

In the current California disciplinary model, the California Supreme Court, after receiving a recommendation of the State Bar Court, imposes an order of stayed suspension in virtually every attorney disciplinary case, except disbarment cases.⁴ Moreover, in the current California system, probation is imposed in virtually every case. Probation typically commences at the time that the Supreme Court order takes effect.

The ABA Standards for Imposing Lawyer Sanctions have a different approach.

First, ABA standard 2.3 limits suspensions to removal of a lawyer from the practice of law for a specified minimum period of time and does not include any stay of suspension.

Second, ABA standard 2.7 has a different approach to probation than does California. Under the ABA approach, in a suspension case, probation is not imposed during the period of suspension, but only after the period of suspension terminates. ABA Standard 2.7 provides:

“Probation is a sanction that allows a lawyer to practice law under specified conditions. Probation can be imposed alone⁵ or in conjunction with a reprimand, an admonition or immediately following a suspension. Probation can also be imposed as a condition of readmission or reinstatement.”

By contrast, California’s disciplinary system imposes probationary terms at the outset of any period of suspension, so that the lawyer is regulated during that period for the protection of the public. Other disciplinary authorities have a form of stayed suspension. For example, the Washington D.C. attorney disciplinary system currently uses stayed suspensions. In *In re Abigail Askew* (7-14-2014) the D.C. Circuit Court of Appeal ordered:

“Accordingly, it is hereby ordered that, effective 30 days from this decision, Respondent Abigail Askew **is suspended for a period of six months, all but 60 days stayed**, with a

⁴ The State Bar Court is authorized to impose private and public reproofs without California Supreme Court action. Although the parties may seek review of such orders before the California Supreme Court, such review is rare. Upon review, if the Court determined that an order of private or public reproof is appropriate it may refer the matter back to the Court or order the reproof. Such an order would not typically not include any stayed suspension. If the Court determined that a higher degree of sanction was appropriate, the practice of the Court would be to order some period of stayed suspension, except in a disbarment case. Because of the rarity of review of reproofs imposed by the State Bar Court, the focus of our discussion is on the suspension orders issued by the Court.

⁵ Thus, under the ABA Standards, probation imposed alone is the equivalent of a stayed suspension with no actual suspension (except that there would be no actual period of suspension set to be imposed for a probation violation).

concurrently commencing period of one-year supervised probation with all conditions recommended by the Board.”

And like California’s “fully” stayed suspension (no actual suspension) and the ABA Standard’s “probation imposed alone,” the State Bar of Texas has a “Fully Probated Suspension” which provides:

“Fully Probated Suspension This type of discipline is public and is for a term certain; however, the suspension is “probated,” which means that the respondent lawyer may practice law during the period of suspension, but the lawyer must comply with specific “terms of probation” throughout the probated suspension period.” (See Texas “Punishment for Professional Misconduct.”)

As noted above and below, we are recommending that the concept of “fully probated suspension” be added as a degree of discipline to signify imposition of the sanctions associated with the conditions of probation, with no period of suspension or removal from practice.

B. BECAUSE A STAYED SUSPENSION MAY HAVE AN IMPORTANT FUNCTION IN SETTING A POTENTIAL DISCIPLINE IN THE EVENT OF NON-COMPLIANCE WITH THE COURT’S ORDER, THE RESPECTIVE STAFFS THAT PROSECUTE, ADJUDICATE AND MONITOR PROBATION SHOULD MAKE A POLICY RECOMMENDATION ABOUT ITS RETENTION.

As noted above, the Task Force recommends removing a “stayed suspension” as a degree of discipline because a stayed suspension is usually a future potential sanction should there be violation of probation. However, if a stayed suspension has a valid and salutary public protection purpose in the current California disciplinary model, we recommend keeping the concept, defining it as a potential future discipline sanction in the event of a probation violation and recommending to the State Bar Court that the period of stayed suspension be moved to the end of a recommended disciplinary order. The pros and cons of this are set forth below.

1. Reasons for and against the retention of stayed suspension in the disciplinary process.

The reasons for retaining stayed suspensions are:

- Stayed suspensions provide a tool to enforce probation violations by establishing a period of actual suspension that can be imposed for failure to comply with probation violations. (Rule 5.312, Rules of Procedure.)
- Assuming that there is no stayed suspension, all probation violation matters will have to be enforced through original proceedings, in proceedings which are not expedited, with a higher burden of proof and brought by the Office of Chief Trial Counsel, perhaps distracting that office from other types of cases. While this still provides for enforcement of probation proceedings, it does not have the flexibility and cost saving features of the current system.

- Because a stayed suspension is imposed in virtually every suspension case (and those imposing no actual suspension), any change would have a fiscal and operational impact upon the operations of the California Supreme Court and the State Bar Court, assuming that both Courts would adopt such a change.
- Any confusion concerning the stayed suspensions as a level of discipline can be cured by (1) explaining the purpose and intended effect of stayed suspensions in standard 1.2 (that it is a potential, future discipline sanction, in the event of a probation violation and (2) recommending that the State Bar Court move the stayed suspension concept to the end of a recommended disciplinary order.

The reasons against stayed suspensions are that they create public confusion in a number of ways listed above, which confusion affects public confidence in the public protection afforded by our disciplinary system.

However, the stayed suspension would prevent public and lawyer confusion by appearing in a different place in a disciplinary order, as the example is set forth in Exhibit 3. It is also possible to provide definitions, clarifications and public education to prevent and eliminate public confusion.

2. Reasons for and against a “probation” model.

As noted above, the ABA and jurisdictions such as the Texas State Bar and Florida do not “stay” suspensions. Instead, this model has actual suspensions coupled with probation or stand-alone probation. This model is also consistent with federal and California state criminal pleas and sentences.

The reasons supporting this model are:

- Confusion regarding the purpose and effect of a “stay” of suspension would be eliminated because the term would no longer be used.
- California’s levels of discipline would be consistent with the ABA model and the majority of United States disciplinary authorities.

The reasons against the “probation” model are the same supporting retention of the “stayed” suspension model. Additionally, if the probation model is determined to afford better public protection, it is recommended that probation run concurrently with any term of actual suspension rather than at the conclusion of actual suspension in order to provide regulation of a suspended lawyer during that period.

C. SHOULD PROBATION BE A LEVEL OF DISCIPLINE? NO.

Probation is imposed in all suspension cases and where no actual suspension is imposed, but conditions of probation are believed to be adequate to protect the public.

Probation is a series of terms and conditions, tailored in each case to protect the public from future harm from the disciplined lawyer, rather than being a single sanction. Moreover, because it is imposed in virtually every Supreme Court disciplinary order, other than disbarments, and because the various factors which make up probation in a particular case, “probation” does not enable the public to determine its severity in comparison with other degrees of sanction.

However, we understand that probation should be defined in standard 1.2 and recommend the definition attached.

D. THE CONCEPT OF A “FULLY PROBATED SUSPENSION” SHOULD BE STUDIED BY A STAFF WORKING GROUP

If probation is not a degree of sanction, there may still be confusion about the “severity” distinction between a case in which suspension plus probation is imposed and one in which only probation is imposed. For this reason, it is recommended that a new level of discipline, “the fully probated suspension” be adopted to clarify for the public that the imposition of terms and conditions of probation without any suspension is more severe than a public reproof and less severe than the imposition of suspension plus probation.

The definition of this term should assist the public in comprehending what this degree of sanction means and how severe it is in comparison with other sanctions.

However, because a “fully probated suspension” is intertwined with “stayed suspension,” it is recommended that this concept be studied by the respective staff representatives in a staff working group.

E. SHOULD AN ADMONITION OR ADMONISHMENT BE A LEVEL OF DISCIPLINE? NO.

The ABA Model Standards provide a level of discipline for an admonition, as follows:

“Admonition, also known as private reprimand, is a form of non-public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer’s right to practice.” (Standard 2.6, ABA Standards.)

The Florida Bar’s Standards for Imposing Lawyer Sanctions and Black Letter Rules, at Standard 2.6 contain an “admonishment” defined as follows:

“Admonishment is the lowest form of discipline which declares the conduct of the lawyer improper, but does not limit the lawyer’s right to practice.”

Working Group 2 studied these concepts as well as use of the word “reprimand” as used in other jurisdictions, but determined that they were virtually the same level of discipline as the private reproof, already a level of discipline in the California system. Although the terms are different, the meaning of the term is substantively the same in each jurisdiction. Working Group 2 did not believe that a change in the name of the level of discipline should be recommended since implementation of the change would require a statutory change to Business and Professions Code section 6077, 6078 and Rules of Procedure. Finally, adoption of “admonition” as a

discipline level may be confused with the “admonition” currently in use in the California system as a non-disciplinary resolution.

F. OTHER RECOMMENDATIONS

1. “Interim” Suspension

Other jurisdictions include interim suspension as part of the definition of “suspension” as a disciplinary sanction. (See e.g., ABA Standards, Standard 2.3: “Interim suspension is the temporary suspension of a lawyer from the practice of law pending imposition of final discipline. Interim suspension includes: (a) suspension upon conviction of a “serious crime” or, (b) suspension when the lawyer’s continuing conduct is or is likely to cause immediate and serious injury to a client or the public.) Working Group 2 recommends that the definition of suspension be expanded to include this concept. We do not believe that this change would require revision of other Rules of Procedure.

2. Private and Public Reprovals

Working Group 2 considered a suggestion that the “private-private” reproof, which can only be approved by the State Bar Court pursuant to a pre-notice stipulation, be abolished. Working Group 2 declined to adopt this suggestion, because a “private – private” reproof is not inconsistent with public protection and because it is consistent with levels of discipline adopted in other disciplinary jurisdictions. (See e.g., “private reprimand” in State Bar of Texas Punishment for Professional Misconduct.)

However, Working Group 2 believes that a fuller description of the nature and limitations of a private reproof and a public reproof would assist the public and the profession understand these terms better, thereby enhancing public confidence in the disciplinary process.

3. California Attorney Diversion and Assistance Act (Bus. & Prof. C., §§ 6230-6238)

After review of this legislation and the current Standards, Working Group 2 determined that no other level of discipline or description was necessary. However, for clarity, the sanctions set forth in Bus. & Prof. Code section 6233 are proposed to be to Standard 1.3(f).

Enclosure: Exhibits 1.