

ATTACHMENT A
Standards for Attorney Sanctions for Professional Misconduct

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December 4, 2014

Via First Class Mail and Email

Veronica Li, Task Force Coordinator
Office of General Counsel
Members of the Board of Trustees
The State Bar of California
180 Howard Street
San Francisco, CA 94105
Veronica.li@calbar.ca.gov

Re: Response to Request for Public Comment
Discipline Standards Task Force
Proposed Modifications to the Standards for Attorney Sanctions
for Professional Misconduct

Dear Ms. Li and Members of the Board of Trustees:

I have been representing attorneys in California for nearly 40 years and had the distinct honor of serving as a chair of COPRAC. I also had the privilege of serving as a member of the Discipline Standards Task Force and of Working Group 1 of the Task Force. Working Group 1 drafted proposed changes to Part B of the Standards, Sanctions for Specific Misconduct. I sincerely appreciate your consideration of this response to the State Bar's request for public comment.

Before addressing the substantive issues, I would like to briefly explain why the views expressed in this public comment letter were not submitted to the Task Force prior to its adoption of the proposed modifications to the standards. On October 17, 2014, I left the country for a long-planned vacation during which I knew I was going to have very limited internet access. As I knew I would not be able to attend the October 24, 2014 meeting at which the proposed modifications were to be considered by the Task Force, on October 16, 2014, I sent Ms. Li an email attaching a nine-page memorandum explaining my concerns with many of the proposed modifications to Part B. In that email, I asked Ms. Li to circulate my memorandum first to Working Group 1 and then to the entire Task Force.

When I returned to the office on October 28, 2014, I learned that the State Bar had decided not to circulate my memorandum to Working Group 1 or to the Task Force, but

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rather to convey some of my views and recommendations orally. While I disagree with the decision the State Bar made not to circulate my memorandum (and not to advise me of the decision in advance so that I could share the memorandum with several colleagues on the Task Force who would be attending the October 24, 2014 meeting), I am pleased that some of my recommendations were included in the proposed standards that the State Bar has circulated for public comment. Nevertheless, I remain very concerned with several of the proposed standards. The remainder of this letter includes my public comment with respect to certain of the proposed modifications to Part B of the Standards.

I. PRIMARY CONCERN WITH CERTAIN OF THE PROPOSED MODIFICATIONS TO PART B OF THE STANDARDS

Standard 1.1, which is in Part A of the standards and which is not being modified, expressly provides:

“The Standards are based on the State Bar Act and the longstanding decisions of the California Supreme Court, which maintains inherent and plenary authority over the practice of law in California.”

Whenever Working Group I discussed proposed modifications to Part B, I stressed my view that the standards should reflect longstanding decisions made by the Supreme Court, or, at the very least, longstanding decisions of the Review Department (that have by necessity been approved by the Supreme Court) and/or a longstanding and meaningful body of Hearing Department decisions (that have also been approved by the Supreme Court whenever a suspension or disbarment is involved). The bases for my stated view were: (1) Standard 1.1, which is not being amended to modify or delete the referenced language; (2) my belief that Standard 1.1 represents a proper approach to creating discipline standards; and (3) the State Bar should be doing its very best not to create new standards which the Supreme Court states are not faithful to case law as the Court did with respect to former standard 2.2(a) regarding misappropriation.¹ While the other participants in Working Group I did not share my view, I continue to believe that the standards should be based upon the State Bar Act and longstanding case law.

The October 21, 2014 memorandum from Working Group I to the Task Force suggests that I did not like the idea of creating a level of discipline “where case law was sparse.” That is not a completely accurate statement of my position. My position has been, and remains, that we should not be adopting discipline standards that are not based on case law. That does not mean I oppose any standard based upon sparse case law. It does mean that if there is going to be a standard where the case law is sparse, the standard should be based upon that case law. In that regard, please see my proposal for a standard

¹ See, e.g., *Edwards v. State Bar* (1990) 52 Cal.3d 28, 38, in which the Supreme Court stated: “In requiring that a minimum of one year of actual suspension invariably be imposed, however, the standard is not faithful to the teachings of this court’s decisions.”

2.5 which is consistent with the very sparse case law that exists with respect to representation of adverse interests.

II. CONCERNS WITH SPECIFIC PROPOSED MODIFICATIONS

A. Proposed Standard 2.5: Representation of Adverse Interests

I do not concur with the proposed new standard 2.5. The rule of professional conduct governing representation of adverse interests has been set forth in Rule 3-310 since 1989 (although it was modified in 1992). From a disciplinary standpoint, violations of Rule 3-310 have, since standards were first adopted, been governed by catch-all standard 2.15 (suspension not to exceed three years or reproof is appropriate for a violation of the Rules of Professional Conduct not otherwise specified in the standards).

Working Group I of the Task Force (which included representatives of the Office of General Counsel and the Office of Chief Trial Counsel) was unable to find a meaningful body of published case law (from the Supreme Court or the Review Department) and was unaware of a meaningful body of unpublished case law (from the Review Department or the Hearing Department) to use in fashioning a new standard to govern representation of adverse interests. In that regard, the Task Force found no disciplinary cases involving a violation of Rule of Professional Conduct 3-310 – Avoiding the Representation of Adverse Interests – which, as noted dates back to 1989. Rather, the Task Force found only two old cases in which discipline was imposed for the representation of adverse interests, one case from 1943 and the other from 1983.

During meetings of the Working Group and in my undelivered memorandum to the Task Force, I stated my understanding that the reason there is almost no case law in this area is that in most conflicts cases there is reasonable doubt as to the propriety of an attorney (a) representing multiple parties without informed written consent (e.g., representing a husband and wife in a business deal with a third party), or (b) occupying a position adverse to a former client. I also expressed my concern about the unforeseen consequences of creating a standard in the conflicts arena because reasonable lawyers and judges often disagree in this very complex arena.² I added that if the Task Force was going to recommend a standard, the proposed standard should be based upon the sparse case law we have in this area. For your convenience the two cases the Working Group found are summarized below.

In the first case, *Sheffield v. State Bar* (1943) 22 Cal.2d 627, the Supreme Court noted that there was no doubt about the impropriety of the attorney's conduct as: (1) the lawyer initially represented Client 1 adverse to Client 2 in connection with a claimed

² Representation of adverse interests is most typically raised through disqualification motions in civil or criminal courts, and practitioners who participate in the field recognize that accomplished lawyers and respected judges often disagree on whether disqualification is warranted.

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breach of contract; (2) after being relieved by Client 1, the attorney then undertook representation of Client 2 adverse to Client 1 in connection with a claimed breach of the same contract; and (3) the attorney also violated a court order directing him not to appear as counsel or to assist or cooperate in the representation of Client 2 adverse to his former client. The Supreme Court imposed a three-month actual suspension noting there was no doubt as to the impropriety of the attorney's conduct. In that regard, the Supreme Court stated: "We can imagine certain instances where there might be a reasonable doubt as to the propriety of an attorney occupying a position adverse to a former client, but the present one certainly does not fall within such a zone of doubt."

The second case, *Gendron v. State Bar* (1983) 35 Cal.3d 409, involved a former public defender's actions in failing, on multiple occasions, to obtain written consent of defendants to joint representation in criminal prosecutions, opposing appointment of a private attorney in another case notwithstanding an obvious conflict of interest, and adopting a policy of not declaring conflicts except when one defendant was going to testify against another, all to protect the his own financial interests. The Supreme Court concluded that the attorney's conduct constituted moral turpitude and warranted a public reproof (then denominated a public reprimand). In *Gendron*, the Supreme Court once again emphasized that it was not dealing with a situation where there was reasonable doubt. Rather, the Court cited existing case law from the United States and California Supreme Courts making it clear that attorneys have a "duty to refrain from representing multiple defendants in any criminal case where there was a possibility of conflicting defenses." Thus, this disciplinary case involved a lawyer who violated his clients' constitutional right to non-conflicted counsel in criminal proceedings.

Some participants in the Working Group also relied upon an explanation of *Sheffield* in a later case that did not involve a violation of the predecessor to Rule 3-310 (*Ames v. State Bar* (1973) 8 Cal.3d 910). I do not believe *Ames* is pertinent for these purposes because that case: (1) involved a violation of a former version of a different rule of professional conduct (current Rule 3-300); (2) involved a provision of the former rule that was not carried over when rule 3-300 was initially adopted in 1989; and (3) addressed what *Sheffield* taught about the conduct that reflected a violation of the rule being considered, not about the appropriate level of discipline to be imposed.

As I noted in the memorandum I wrote to the Task Force on October 16, 2014, if the State Bar believes a conflicts standard should be adopted despite the absence of a longstanding body of case law, given Standard 1.1, the standard should be based upon the *Sheffield* and *Gendron* cases. Otherwise, the risk remains high that the Supreme Court will once again hold that one of the standards is not faithful to the teachings of the Court's decisions. I therefore recommended at that time, and continue to recommend, the following proposed standard for violation of Rule 3-310 relating to the representation of adverse interests:

Revised Proposed Standard 2.5: Representation of Adverse Interests

(a) Discipline ranging from actual suspension to reproof is the presumed sanction when a member fails to obtain informed written consent to a joint representation of multiple clients and there is no reasonable doubt, under existing case law, of the duty to refrain from representing multiple clients without the informed written consent of all of them.

(b) Discipline ranging from actual suspension to reproof is the presumed sanction when a member takes a case adverse to a former client by switching sides in the same matter or when there is no reasonable doubt, under existing case law, of the duty to refrain from doing so without the informed written consent of the clients and former clients.

B. Proposed Standard 2.7: Performance, Communication or Withdrawal Violations

I do not concur with the proposed new standard 2.7 as I do not believe the proposed standard reflects the case law accurately. First, the disbarment cases typically refer to “habitual disregard” of clients’ interests, not “a pattern of misconduct.” Second, the Task Force’s proposed standards 2.7(a) and 2.7(b) focus exclusively on the number of client matters involved. While the number of client matters is an important criterion, the case law evaluating the level of discipline to be imposed looks not only at that factor but also at the nature of the misconduct, the period of time over which the misconduct occurred and the degree of harm to the client. The case law upon which my disagreement with the proposed standard is based includes:

- *Kent v. State Bar* (1987) 43 Cal.3d 729 [disbarment warranted for “habitual disregard” of the interests of clients combined with a failure to communicate, intentionally misleading clients and substantial harm];
- *McMorris v. State Bar* (1983) 35 Cal.3d 77 [disbarment warranted for “habitual disregard” of the interests of clients combined with a failure to communicate over an extended period of time];
- *In the Matter of Hindin* (Rev. Dep’t 1997) 3 Cal. State Bar Ct. Rptr. 657 [disbarment warranted for “habitual disregard” of client interests over an extended period of time combined with a failure to communicate even when the attorney’s conduct is grossly negligent or careless, rather than willful and dishonest];
- *In the Matter of Peterson* (Rev. Dep’t 1990) 1 Cal State Bar Ct. Rptr. 73 [one-year actual suspension warranted where the attorney abandoned clients in three matters (which was not deemed a sufficient number of matters to constitute a

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- pattern of misconduct) and deceived two of the three clients regarding his misconduct thereby injuring their legal position];
- *King v. State Bar* (1990) 52 Cal.3d 307 [three-month actual suspension warranted where the attorney willfully neglected client matters in two cases and one of the clients was seriously injured by the misconduct];
 - *Layton v. State Bar* (1990) 50 Cal.3d 889 [30-day actual suspension warranted where the attorney willfully neglected a client in one matter over an extended five-year period];
 - *In the Matter of Kopinski* (Rev. Dep't 1994) 2 Cal. State Bar Ct. Rptr. 716 [stayed suspension warranted for improper withdrawal from multiple client matters coupled with a failure to communicate with the clients];
 - *Von Sloten v. State Bar* (1989) 48 Cal.3d 921 [stayed suspension warranted where, in a single matter, attorney failed to communicate with client, failed to perform on client's behalf, and failed to withdraw from representation];
 - *In the Matter of Respondent G* (Rev. Dep't. 1992) 2 Cal. State Bar Ct. Rptr. 175 [private reproof warranted where attorney repeatedly failed to perform legal services competently and to communicate with client in a single matter].).

A standard I believe is more consistent with a very well established body of case law would be as follows.

Revised Proposed Standard 2.6: Performance, Communication or Withdrawal Violations

(a) Disbarment is the presumed sanction for performance, communication and/or withdrawal violations demonstrating habitual disregard by the member of the interests of clients over an extended period of time.

(b) Actual suspension or suspension is the presumed sanction for performance, communication or withdrawal violations that occur in multiple client matters. The degree of sanction depends upon the extent of the misconduct, the number of client matters involved, the period of time over which the misconduct occurred, and the degree of harm to the clients.

(c) Suspension or reproof is the presumed sanction for repeated performance, communication and withdrawal violations in a single client matter. The degree of sanction depends upon the extent of the misconduct, the period of time over which the misconduct occurred, and the degree of harm to the client.

C. Proposed Standard 2.8: Fee Splitting with Non-Lawyers

I do not concur with the proposed new standard 2.8. For the reasons are set forth below, I do not believe the proposed standard is based upon any case law as there does not appear to be a single decision in which the sole, or even primary, violation is fee splitting with a non-lawyer. A reasonable sampling of the body of case law regarding the discipline imposed in fee splitting cases follows:

1. ***In the Matter of Jones (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 411 (two-year actual suspension).*** This case involved misconduct in the form of running and capping³ as well as numerous acts of moral turpitude. Mr. Jones split fees with a non-attorney who used runners and cappers to bring him 350 cases. From those 350 cases, Mr. Jones and the non-lawyer each received \$179,000 in pure profit, plus an additional \$358,000 to cover office overhead. The Review Department based the two-year actual suspension upon findings that attorney Jones: (1) formed a partnership with a non-lawyer who was a runner and capper; (2) split fees with that non-lawyer who was a runner and capper; (3) aided the non-lawyer who was a runner and capper in the unauthorized practice of law; (4) recklessly failed to perform services competently; and (5) engaged in multiple acts of moral turpitude.

2. ***In the Matter of Scapa and Brown (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 635 (18-month actual suspensions).*** The hearing judge and the Review Department found that the two attorneys: (1) committed numerous acts of moral turpitude; (2) engaged in prohibited solicitation of clients and cases; (3) used non-lawyers to surreptitiously engage in prohibited solicitation of clients and cases; (4) paid non-lawyers in cash to sign up clients; (5) split fees with non-lawyers; and (6) attempted to collect unconscionable legal fees. In addition, the two attorneys' misconduct led to bribery, kickbacks and client overreaching. The Review Department then concluded that: (1) moral turpitude warrants either suspension or disbarment; (2) the solicitation charges alone warranted a one-year actual suspension; and (3) all of the other misconduct (paying non-lawyers to bring in cases, splitting fees with non-lawyers, and attempting to charge unconscionable fees) warranted an additional six-months of actual suspension. With regard to the additional six-month suspension, the Review Department noted that attempting to charge unconscionable fees, standing alone, calls for a minimum six-month actual suspension pursuant to standard 2.7. Thus, there is no indication that the fee-splitting charge increased the period of actual suspension.

3. ***In the Matter of Bragg (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 615 (one-year actual suspension).*** Mr. Bragg entered into a fee sharing arrangement with a non-lawyer that involved several hundred cases. In addition, Mr. Bragg allowed the non-

³ See, Business and Professions Code, §§6151 – 6154 pursuant to which the conduct of the attorney was not merely a violation of the Rules of Professional Conduct, but unlawful.

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lawyer with whom he shared fees to handle and to settle 30-50 cases per month for nine months, abdicating not only control of the files and settlement of client cases, but disbursement of client funds as well. Thus, there were findings that Mr. Bragg (1) shared fees with a non-lawyer, (2) failed to perform services competently, (3) aided the non-lawyer in the unauthorized practice of law, and (4) engaged in acts of moral turpitude. Moreover, Mr. Bragg had also failed to comply with a prior Agreement in Lieu of Discipline. Looking at the number of cases and the amount of money involved as well as the abdication of responsibility for the cases, the Review Department recommended a one-year actual suspension, noting that Mr. Bragg's case was less egregious than most other similar cases because it did not involve running and capping (i.e., criminal misconduct).

4. ***In the Matter of Nelson (Review Dept. 1990) 1 Cal. State Bar Ct. Rptr. 178 (six-month actual suspension).*** Mr. Nelson entered into a stipulation with the State Bar that he: (1) formed a partnership for the practice of law with a non-lawyer; (2) divided legal fees with that non-lawyer; (3) used that non-lawyer as a runner and capper; and (4) engaged in acts of moral turpitude (running and capping is virtually always considered an act of moral turpitude). In addition, there were findings that Mr. Nelson (1) failed to convey a written settlement offer to a client, (2) failed to notify a client of the receipt of trust funds, and (3) withdrew from employment by five clients without taking reasonable steps to avoid foreseeable prejudice to the clients. The Review Department noted that in cases involving prohibited solicitation, running and capping, or moral turpitude, the minimum level of discipline is typically a six-month actual suspension. The Review Department then determined that the lowest end of discipline, a six-month actual suspension, was warranted because Mr. Nelson (1) voluntarily withdrew from further improper activities, (2) cooperated with the State Bar, and (3) demonstrated rehabilitation as five years had lapsed between the end of his misconduct and the evidentiary hearing. As was the case in *Scapa and Brown*, fee-splitting with a non-attorney did not lead to a longer period of suspension.

5. ***In the Matter of Smithwick (Review Dept. 2014) __ Cal. State Br Ct. Rptr. __ (60-day actual suspension).*** In this very recent Review Department decision which has been designated for publication, the attorney: (1) split fees with a non-lawyer entity; (2) failed to perform legal services with competence; (3) failed to refund unearned fees; and (4) failed to notify the State Bar that he employed a resigned attorney.

Because every fee-splitting case involving an actual suspension included other very serious misconduct, and because fee splitting was previously covered by standard 2.15 which allowed for reproval to a three-year actual suspension, there appears to be no basis in the case law for eliminating reproval as a potential sanction. I therefore recommend the following revised proposed standard 2.8.

Revised Proposed Standard 2.8: Fee Splitting with Non-Lawyers

(a) Actual suspension, suspension or reproof is the presumed sanction when a member shares fees with a non-lawyer. The degree of discipline depends upon the extent of the misconduct.

III. INCLUDING CITATIONS TO AUTHORITIES IN FOOTNOTES TO STANDARDS

One of the objectives of Discipline Standards Task Force was to help establish reasonable consistency in disciplinary cases involving similar factual patterns. I believe including footnotes in the standards that reference the names and citations of some of the “longstanding decisions” upon which the standards are based (according to standard 1.1) would help to achieve that objective. In that regard, I believe including citations to case authorities would help level the playing field for the large number of respondents who self-represent in the disciplinary process. I do not believe the case citations should (a) be accompanied by any discussion of the cases footnoted because that would involve a subjective analysis of the case by the author, and (b) include cases that represent departures from the standards or that are otherwise outliers. Again, my reason for including citations is to help promote consistency in the disciplinary process.

A countervailing view is that if case citations are included, the standards will need to be updated every year. That simply is not correct. According to standard 1.1 the standards are supposed to be based upon the State Bar Act and “longstanding decisions of the California Supreme Court.” That language indicates that the standards should be supported by well-established law that is not likely to change materially from year-to-year. As noted in this public comment, the cases the Working Group considered date back many decades. Moreover, cases that vary materially from the standards without fully explained rationales are uncommon (except in the rare situation in which the Supreme Court finds that the standards are not consistent with case law as the Court repeatedly did when referencing the old misappropriation standard). Moreover, there can be an explanatory note that reads as follows:

“The cases cited in the footnotes to these standards are provided as examples only. Determining the appropriate degree of discipline in a particular case requires an evaluation of the facts and circumstances of the case as well as appropriate legal research. Legal research may disclose relevant decisions by the Supreme Court and the State Bar Court not included in the footnotes as well as amendments to the State Bar Act.”

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IV. CONCLUSION

My hope in serving on the Discipline Standards Task Force was to draw on my 38 years of experience representing and advising lawyers and law firms to help the State Bar create new standards that would better achieve an appropriate balance between the competing goals of consistency and flexibility in the disciplinary process. My approach to the process was always governed by the ultimate goal of promoting the stated objectives of discipline found in standard 1.1 including protection of the public, the courts and the legal profession; maintenance of the highest professional standards; preservation of public confidence in the legal profession; and rehabilitation of members where that is not inconsistent with the primary objectives. It is in that spirit that I have offered these comments, and in that spirit that I would like to express my appreciation to each of the members of the Board of Trustees for your consideration of these comments.

Sincerely,



Steven A. Lewis (SBN #063488)

From: [xray_lab](#)
To: [Li, Veronica](#)
Subject: Discipline Standards Task Force Proposed Modifications to the Standards for Attorney Sanctions for Professional Misconduct
Date: Friday, December 05, 2014 8:56:50 AM

Public Comment on proposed rule changes:

The State Bar would benefit greatly if lawyers who are failing their clients would simply decide to quit voluntarily rather than wait for disciplinary action. Perhaps more guidelines could help to define the point in time when a lawyer should quit the practice of law, such as choosing to be in voluntary inactive status or resigning. Occasional articles mention a bit of that in bar publications but it seems more is needed. Most lawyers make that decision eventually, but some need help to decide when to leave before they make a complete mess of their client's lives. One thing that might help that decision could be permanent guidelines, instead of a rule, that specifies examples of when to quit.

The guideline might say something similar to:

"An attorney should voluntarily quit the practice of law, temporarily or permanently, when the attorney has lost the strong personal desire to do competent legal work, or maintain contact with clients, or appear in court, or the practice has become too stressful to continue, or there is uncharacteristic sloppiness in work product, forgets or ignores important deadlines, has long term unprofitability or chronic lack of funds, or overwhelmed with stress from personal matters such as divorce, bankruptcy, or any other event or circumstance that would make competent law practice excessively burdensome or risky for client or counsel."

While the State Bar generally recognizes that lawyers are under a lot of stress from dealing with dishonest clients, confusing and conflicting demands by courts and legislatures, lack of work, etc., there should be much more said about when to quit practicing law as an honorable option for attorneys who stopped enjoying their job. By the time the State Bar gets a client complaint, the client's money is gone, the attorney is broke and too financially desperate to continue a competent law practice, so Bar Court punishment is like beating a dead horse. It would have been far better for the attorney to make the decision to voluntarily stop before the Bar got involved.

The problem in making a decision to quit is that the huge investment of time and money to become a lawyer in California becomes a barrier to leaving the law profession. Lawyers may reject that so much of their life was wasted to obtain a job they no longer want. The positive side of a decision to quit is that most lawyers in that situation would be far happier doing something else that they enjoy, and they have an education that is valuable in any other type of job.

There should be no bar sanctions for frivolous litigation as both state and federal courts already provide adequate remedies for meritless cases. New case law is often created on cases that had previously been considered frivolous - such as civil rights cases in the South.

Frivolity is often subjectively decided anyway.
It should not be the job of the State Bar to

duplicate punishments already existing in the courts.

P. Reed
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12-5-2014

Attn: Veronica Li
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re: Public Comment discipline standards for attorneys

What is the difference between an ATTORNEY AND A THIEF? One has a license.

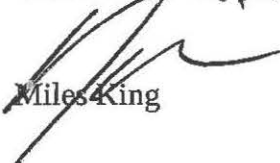
The US Judicial System is corrupt and out of control. State Bar turns a blind eye to any transgression other than a felony. Incompetence, over billing, filing false documents, filing documents asking the court to discriminate against a disabled individual, stating in oral testimony THE COST OF RECOVERING THE FUNDS EXCEEDS THE AMOUNT OF FUNDS MISSING as justification for approving a document known to be false. Should an attorney mock someone's disability or ask the court to dismiss due to a disability – each a violation of Judaical Cannon and Rules of Court – there are no sanctions. This is all documented in the attached appeal King et al v. King. Discovery abuse, no sanctions. Perjurious filings, no sanctions. Furthermore, there are two sets of rules -- one set of rules for attorneys, a second set of rules for in pro per. In pro per is held to a higher standard of care and accountability than an attorney. Equal protection and the Pledge of Alliance are both a fallacy as Judicial exists for the wealth, power and prestige of Judaical and it's officers.

A deputy DA in Los Angeles municipal court in 1991 came out of the stock room with his pants open and shirt out. Another deputy DA in the same courtroom allowed and encouraged testimony by the deputy sheriff which was in direct conflict to the police report. The judge, Fred Felix, regularly returned from lunch intoxicated and paid his bills during testimony.

Family Law is enslavement of men. Should an attorney file grossly incorrect documents – this is accepted regardless of how the documents affect the case. There are no sanctions for the attorney or the client. This happened in Los Angeles County, Esko Woudenberg v. Wendy Woudenberg about 5 years ago.

Courts are about money, power and ego. Justice is not a factor. State Bar is completely failing in its job as regulatory agency. State Bar is a Feudal Guild which exists to extend the power, wealth and prestige of the ATTORNEYS – regardless of justice, fact or fiction.

With all due respect,



Miles King

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Attachments to Mr. King's
comments available upon request.

12/11/2004

Veronica Li
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re: Public Comment Attorney Discipline system, sanctions

The Judicial system in California is out of control. Attorneys file perjurious documents, are rude, insulting, demeaning, and seek no truth, Attorneys seek money, power and prestige. Judges are indifferent to any level of falsehood or nasty.

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TACTICS IN THE COURT

expresses some of the frustration of judicial indifference to arrogant, rude, unprepared, malicious attorneys who treat the Courts & their clients as an ATM machine demanding hourly payments that only the super-rich can afford. Although this article speaks of representation by attorneys, what happens when one is forced to self represent due to abandonment by legal council due to judicial's refusal to reign in abusive council? The courts then become part of the abuse, part of the corruption by supporting the abusive attorney regardless of truth, as judges loathe to deal with the self-represented.

A corrupt judiciary allowing such abuse and abandonment by legal council brings us closer to SYRIA every day.

Sincerely,


Miles King



THE STATE BAR OF CALIFORNIA

Date: January 7, 2015

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

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

Subject: Comment regarding November 2014 proposed revisions to the Standards for Attorney Sanctions for Professional Misconduct

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- III. Closing Comment

I. OPENING COMMENT

In November 2014, the Regulation and Discipline Oversight Committee (Committee) was presented proposed revisions to the *Standards for Attorney Sanctions for Professional Misconduct*. Overall, the Office of the Chief Trial Counsel (OCTC) supports the proposed revisions. The proposal clarifies many of the factors to be considered in aggravation and mitigation and includes new specific standards for misconduct involving adverse interests, breach of confidentiality, fee-splitting with non-lawyers and engaging in frivolous litigation. The proposal also provides greater guidance on the level of discipline to be imposed in disciplinary proceedings by articulating tailored ranges of discipline for specific acts of misconduct and discussing circumstances that are of particular importance to specific types of misconduct. For example, proposed Standard 2.8, regarding fee-splitting with non-lawyers, states that “the degree of sanction depends upon the extent to which the misconduct interfered with an attorney-client relationship.”

OCTC offers the following thoughts for the Committee’s consideration.

II. POINTS FOR CONSIDERATION

1. Proposed Standards 1.2(h) and (i)

Proposed Standards 1.2(h) and (i) define aggravating and mitigating circumstances, respectively. The definitions are general, stating that aggravating circumstances are factors that “demonstrate that the primary purposes of discipline warrant a greater sanction than what is otherwise specified in a given Standard,” while mitigating circumstances are factors that warrant a more lenient sanction.

OCTC recommends that the definitions include a statement that explains why aggravating and mitigating factors affect the level of discipline to be imposed in a particular case. That is, factors are aggravating or mitigating because they are predictive of the likelihood that a member will or will not engage in future misconduct. Additionally, proposed Standard 1.2 (or Standard 1.7, “Determination of Appropriate Sanctions”) could clearly state that the weight to be afforded a factor in aggravation or mitigation is to be determined by the extent to which the factor is probative of the member’s willingness and ability to conform to ethical responsibilities in the future.¹

2. Proposed Standard 1.6(a)

Proposed Standard 1.6(a) states that mitigating circumstances include the “absence of any prior record of discipline over many years of practice coupled with present misconduct, which is aberrational and not likely to recur.”

OCTC recommends that the words “aberrational and” be deleted from this proposal. The lack of a record of prior discipline is a fact that supports a conclusion that an act of misconduct is aberrational. Therefore, an analysis under this proposal could become somewhat circular and confusing. Moreover, the language “not likely to recur” adequately addresses the apparent goal of the proposal.

3. Proposed Standard 1.6(b)

Proposed Standard 1.6(b) states that mitigating circumstances include a “good faith belief that is honestly held and reasonable.” OCTC recommends that the proposal be revised to state that the good faith belief must be “objectively” reasonable.

¹ See *Sternlieb v. State Bar* (1990) 52 Cal.3d 317, 331, mitigating circumstances are most relevant where they demonstrate that misconduct is not likely recur; *Chang v. State Bar* (1989) 49 Cal.3d 114, 128-129, aggravating and mitigating circumstances surrounding the member’s conduct led to doubt that he would conform his future conduct to professional requirements; and *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.

4. Proposed Standard 2.5

Proposed Standard 2.5, “Representation of Adverse Interests,” addresses only a portion of rule 3-310 of the *California Rules of Professional Conduct*. A third subsection should be added to the proposal setting forth the appropriate sanction for violations of rule 3-310 not specifically addressed in subsections (a) and (b). Such a revision would be consistent with the approach taken in Standard 2.2(b).

5. Proposed Standard 2.7(c)

Proposed Standard 2.7(c), addressing failures to perform legal services, properly communicate and properly withdraw from representation, includes language identifying violations “which are limited in scope or which occur over an isolated period of time.” OCTC recommends that this language be simplified to read “which are limited in scope or time.”

6. Proposed Standard 1.3(f)

Proposed Standard 1.3(f) identifies “interim remedies” as a sanction. Though a member may receive credit towards an actual disciplinary suspension for the time he or she was suspended under an interim remedy, the interim remedy itself is not a disciplinary sanction.

**III.
CLOSING COMMENT**

OCTC appreciates the opportunity to participate in the Committee’s evaluation of the *Standards for Attorney Sanctions for Professional Misconduct*. We are available to address any questions the Committee may have going forward.

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January 16, 2015

Via Email to veronica.li@calbar.ca.gov

Veronica Li
Office of General Counsel
The State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Discipline Standards Task Force Proposed Modifications to the Standards for
Attorney Sanctions for Professional Misconduct

Dear Ms. Li:

Below are my comments regarding the Proposed Modifications:

1. The Proposed Modifications misstate and overstate the role of the Standards in the very first sentence by describing their purpose as:

to set forth *a means* for determining the appropriate disciplinary sanction in a particular case and to ensure consistency across cases dealing with similar misconduct and surrounding circumstances.

Emphasis added. This language implies that the Standards are the exclusive means of determining the appropriate discipline in a particular case. This is inconsistent with the Supreme Court case law as interpreted by the Review Department:

The [Supreme Court's] order is consistent with its long-held position that it is "not bound to follow the standards in talismanic fashion. As the final and independent arbiter of attorney discipline, we are permitted to temper the letter of the law with considerations peculiar to the offense and the offender." (Howard v. State Bar (1990) 51 Cal.3d 215, 221-222; Greenbaum v. State Bar (1987) 43 Cal.3d 543, 550 [the standards are "simply guidelines"]; Boehme v. State Bar (1988) 47 Cal.3d 448, 454 [same]; Hawk v. State Bar, supra, 45 Cal.3d at p. 602 [same].) Following the Supreme Court's lead, we recently observed in In the Matter of Oheb (Review Dept.2006) --- Cal. State Bar Court Rptr. ----, that

“although the standards were established as guidelines, ultimately, the proper recommendation of discipline rest[s] on a balanced consideration of the unique factors in each case. [Citations.]”

In the Matter of Van Sickle (Review Dept. 2006) 4 Cal. State Bar Ct. Rptr. 980 (pet. denied.) In *Van Sickle*, the Review Dept., on remand from the Supreme Court following a petition from the Office of Chief Trial Counsel (OCTC) re-considered a prior recommendation of 30 days actual suspension for misconduct including an unconscionable fee, conduct subject to the seemingly mandatory dictate of former Standard 2.7 that the discipline should be a minimum of six months actual suspension. In the opinion on remand, the Review Dept. increased the recommended discipline to 90 days, still below the six months purportedly mandated by old Standard 2.7. OCTC again filed a petition for review, which was denied. *Van Sickle* is citeable precedent in the Review Dept. and its “balanced consideration of unique factors” states the only appropriate means of coming to a discipline recommendation under the California’s Supreme Court’s precedent, discussed in *Van Sickle*. Consistency is an important consideration in the discipline system, but the paramount consideration is the correct discipline in an individual case.

The Proposed Modifications commit the same error when they state that a particular level of discipline is the “presumed” discipline. The most that the Standards can provide is a range of possible disciplines before the application of aggravating and mitigating factors, which can consist of factors outside the strict definition of the Standards. Use of presumption languages puts undue emphasis on the discipline described in the Standards, which would be better described as the baseline discipline.

A more correct statement in Standard 1.1:

The Standards For Attorney Sanctions For Professional Misconduct (the “Standards”) are adopted by the Board of Trustees to guide participants in the discipline system *in addressing the balanced consideration of all relevant factors in necessary to reach a particular discipline recommendation, including the factor of consistency across cases dealing with similar misconduct and surrounding circumstances*. The Standards help fulfill the primary purposes of discipline, which include:

The word “presumed” should be replaced the word “baseline”.

2. The definition of actual suspension contained in Standard 1.2(c)(I) states an “actual suspension is generally for a period of thirty days, sixty days, ninety days, six months, one year, eighteen months, two years, three years...”. There are many

discipline cases that impose different levels of suspension than the 8 categories set forth in the Standard. There is no reason specified for circumscribing the levels of actual suspension.

3. The statement in Standard 1.2(c)(2) that “[a] suspension can be stayed only if it is consistent with the primary purposes of discipline” is unsupported by any case law and it is among the first of apparently many unsupported policy determinations made the Discipline Standards Task Force that unfortunately dominate the problems with the balance of the document.
4. The Discipline Standards Task Force has not publicly provided its research materials to support the levels of discipline set forth in the new Standards that it proposes. It has made the decision not to include any footnotes or references, not even in supporting materials, so it is impossible to evaluate whether the proposed Standards 2.5 (representation of adverse interests), 2.6 (breach of confidentiality) , 2.7 (performance, communication and withdrawal) 2.8 (fee splitting with non-lawyers) and 2.9 (frivolous litigation) are well-supported in the California Supreme Court case law. Unfortunately, it appears that they may not be, especially Standard 2.5, in light of statements made by Task Force member Steven Lewis.

The Discipline Standards Task Force was not empowered to create new guidelines out of whole cloth. Moreover, the relative paucity of Rule 3-310 violations do not cry out for their own Standard. The idea that every single violation should have a Standard attached was discarded in the Task Force process but some of it remains in this Standard, which recapitulates the “catch all” standard 2.19 in any event. It also addresses factors addressed in other Standards, such as harm (an aggravating factor under proposed Standard 1.5(j)) and disclosure of confidential information (a violation with its own level of discipline under proposed Standard 2.6.) Similarly, proposed new Standard 2.8 (fee splitting with non-lawyers) imports failing to provide legal services and interference with an attorney client relationship as aggravating circumstances within the fee splitting universe, even though one is subject to its own Standard (2.7) and the other is not recognized as an aggravating circumstance.

It’s not clear that these combinations are supported by close reading of the cases to determine if what really makes one fee splitting violation worse than the other. What it looks like is that these categories were created in some haste driven the necessity to turn around some kind of work product in a arbitrary timeline.

January 16, 2015

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The previous set of Standard revisions included footnotes and citations that made it an especially helpful resource to respondents representing themselves in discipline proceeding. The Proposed Modifications are a step backward overall for transparency in the discipline system.

Conclusion

The Proposed Modifications are not better than the revised Standards that they would purport to replace. More extensive work may eliminate the confusion from the current draft but the lack of references and source material makes it impossible to evaluate the Task Force work. In its current state, it will confuse the discipline evaluation process more than assist it. They should not be approved.

Very Truly Yours,



David Cameron Carr