

AGENDA ITEM

121 MAY 2015

DATE: April 23, 2015

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Office of General Counsel

SUBJECT: Discipline Standards Task Force – Proposed Revisions to Standards – Return from Public Comment and Request for Adoption

EXECUTIVE SUMMARY

The Standards for Attorney Sanctions for Professional Misconduct (“Standards”) were adopted by the Board of Trustees (“Board”), effective January 1, 1986, to provide 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.

The Standards were in place for nearly three decades without any major modifications. However, in 2013, after a modest “clean-up” of the Standards (which included mainly technical and stylistic revisions), the Board appointed a Disciplinary Standards Task Force (“Task Force”), to evaluate whether substantive modifications, if any, needed to be made.

The Task Force met several times between May 12, 2014 and October 24, 2014, and at its final meeting voted to recommend to the Board several substantive changes to the Standards and the adoption of new Standards for specific acts of misconduct. Those recommendations were received by the Board’s Regulation and Discipline Committee (“RAD”) at its November 6, 2014 meeting, and RAD authorized release of the proposed recommendations for a 45-day public comment period. Based on comments received, further modifications to the Standards were recommended, and at its March 12, 2015 meeting, RAD authorized an additional 30-day public comment period.

The second public comment period has now closed, and only one additional comment was received. The comment primarily focuses on admonitions, which, under California’s system, are considered non-disciplinary dispositions and thus not covered by the Standards. The comment also mentions situations where expungement of discipline might be appropriate, but again, that is not something covered by the Standards.

It is therefore recommended that RAD approve and recommend to the Board the proposed recommendations and that the Board adopt the new Standards, effective July 1, 2015.

BACKGROUND

In 1985, the State Bar, through a collaborative effort between the State Bar Court and the Office of the Chief Trial Counsel, developed proposed Disciplinary Standards. At the time, the American Bar Association (“ABA”) was undertaking a similar project and had prepared draft model disciplinary sanction standards, which had not yet been approved by the ABA House of Delegates, but which the State Bar considered during its vetting process. The State Bar opted to proceed with its own proposed Standards, which were adopted by the Board of Trustees in November 1985 and became effective January 1, 1986.

The Standards had not been subject to any substantial modifications or revisions since their initial adoption and implementation. However, in 2013, amendments were proposed that involved a general “clean-up” of the Standards. These changes involved recasting the Standards into plain English in order to eliminate unnecessary and repetitive language, streamlining and reorganizing the Standards for better flow and ease of comprehension, and updating the Standards to reflect the state of the law as it has evolved since 1986.

In July 2013 RAD authorized a 60-day comment period to circulate the proposed changes for public input. Generally, all commentators found the proposed Standards to be a significant improvement over the existing Standards, but there were suggestions that specific Standards be substantively modified in some areas and that the entire set of Standards be overhauled to include narrowly tailored disciplinary sanctions similar to sentencing guidelines. These concepts represented such a conceptual departure from existing precedent that it was suggested that the Board consider further evaluation and study to determine if such a wholesale revision and paradigm change was necessary.

At its October 2013 meeting, the Board adopted the proposed clean-up changes and appointed the Discipline Standards Task Force to evaluate the substantive comments to see if additional changes, if any, should be made to the Standards.

The Task Force met between May 12, 2014 and October 24, 2014, and ultimately declined to adopt the model of narrowly tailored sentencing guidelines. The Task Force also looked at the ABA Model and decided that it was not a good fit either – as it contained terms such as “negligence” and “admonitions” that were inconsistent with the State Bar’s approach to levels of discipline. However, the Task Force did recommend substantive changes to certain Standards and the adoption of new Standards for specific acts of misconduct that were only previously addressed in a catch-all provision.

These recommendations were received by the RAD committee and released for public comment in November 2014 and again with additional modifications in March 2015.

DISCUSSION

Task Force Members and Charge

The Task Force was charged with studying and reviewing the Standards, as modified and adopted by the Board, effective January 1, 2014, to see what, if any, additional modifications were desired or warranted.

The members of the Task Force included Karen Goodman (Chair), Raul Ayala, Glenda Corcoran, Evan Davis, Daniel Dean, James Fox, David George, James Heiting, Carol Langford, Steven Lewis, Ellen Peck, Judith Sklar, and Adam Torres. The advisory members included Beth Jay (California Supreme Court), Rebecca Rosenthal and George Scott (State Bar Court), and State Bar staff representatives included Robert Hawley (Acting and Deputy Executive Director), Kevin Taylor and Kristen Ritsema (Office of the Chief Trial Counsel), and Rachel Grunberg, Rick Zanassi, and Mark Torres-Gil (Office of the General Counsel).

The Task Force broke out into three working groups: Working Group I (Standards Model Comparisons – chaired by Carol Langford), Working Group II (Levels of Discipline – chaired by Ellen Peck), and Working Group III (Factors in Aggravation and Mitigation – chaired by Judith Sklar). The working groups reviewed their respective areas and provided recommendations that were submitted to the full Task Force and approved. Among the revisions, the Task Force recommendations included:

- Adding clarifying language and definitions to otherwise ambiguous terms, such as public and private reprovals, interim remedies, conditions, and probation.
- Separating public and private reprovals into discrete levels of discipline. (See Standard 1.3 “Degree of Sanctions”, subsections (d) and (e).)
- Removing footnotes and citations throughout the Standards. Even the concept of providing a small sampling of cases was rejected by the Task Force. Strong concern was raised regarding the time and resources that would be needed to update citations. More importantly, each discipline case is decided on its own facts and circumstances and given the volume of precedent, it became controversial choosing between cases. Providing some cases to the exclusion of others was thought to be problematic, in that it might over-emphasize the importance of certain cases. The Task Force pointed out that the State Bar Court Reporter is a publication already circulated by the State Bar that includes all of the published Review Department cases since 1989. It also includes a case digest that was specifically developed for the purpose of facilitating research in the specialized area of California attorney discipline and regulatory

case law. The Task Force felt confident that the State Bar Court Reporter provided an appropriate and comprehensive resource guide for all parties involved in the discipline system.

- Breaking out concealment, overreaching, and uncharged violations as stand-alone factors in aggravation. (See Standard 1.5 “Aggravating Circumstances”, subsections (f)-(h).)
- Adding “misrepresentation” and “high level of vulnerability of the victim” as factors in aggravation. (See Standard 1.5 “Aggravating Circumstances”, subsections (e) and (n).)
- Modifying Standard 1.6 “Mitigating Circumstance”, subsection (a), to clarify that absence of a prior record of discipline is considered mitigation when the present misconduct is deemed to be “aberrational and not likely to recur.”
- Including a new introduction section to Part B “Sanctions for Specific Misconduct”, and indicating that “presumed sanctions” are the starting point for the imposition of discipline, and that the degree of sanction can increase or decrease based on factors in mitigation and aggravation. The introduction also indicates that there may be acts of misconduct not specifically listed in Part B, but which are captured in the catch-all provisions in Standards 2.18 “Violations of Other Article VI Statutes” and 2.19 “Violations of Rules in General.”
- Throughout Part B, a new phrase – “presumed sanction” – has been used as the precatory language to the listed sanction. This replaces the current language which states “[xxx level of discipline, e.g., disbarment] is appropriate.”
- Revising the language in current Standard 2.1 “Misappropriation” to reflect levels of discipline more consistent with case law.
- Breaking out several new Standards that are currently captured in the catch-all provisions. These new Standards include: (1) Standard 2.5 “Representation of Adverse Interests”; (2) Standard 2.6 “Breach of Confidentiality”; (3) Standard 2.8 “Fee-Splitting with Non-Lawyers”; and (4) Standard 2.9 “Frivolous Litigation.” These new Standards are based on violations of the Rules of Professional Conduct and the State Bar Act, and the presumed sanctions were derived from existing Supreme Court case law and State Bar Court precedent. In general, these new Standards have ranges that include actual suspension to reproof – which are wholly consistent with Business and Profession Code section 6077 that provides for suspension to reproof for a willful breach of any of the Rules of Professional Conduct. The Frivolous Litigation Standard includes disbarment as a sanction, but only when there is a pattern.
- Replacing current Standard 2.5 “Failure to Perform or Communicate” with new Standard 2.7 “Performance, Communication or Withdrawal Violations.” The Task

Force explored breaking out performance and communication violations into separate Standards, but realized that the case law bundles them together and there were no published cases dealing with failure to communicate as a stand-alone offense. Renaming the Standard – “Performance, Communication or Withdrawal Violations” – better captures types of misconduct that generally appear in tandem. The Task Force was also concerned that breaking these out into separate Standards could lead to stacking of discipline.

- Standard 2.7 (renumbered as 2.11) relating to “Moral Turpitude, Dishonesty, Fraud, Corruption, or Concealment” was expanded to include “intentional or grossly negligent misrepresentation.” In determining the degree of sanction, additional language was added to capture the “impact on the adjudicator” and “the administration of justice”.
- Correcting typographical errors, incorporating grammatical edits, renumbering, and making conforming changes throughout the Standards.

On November 6, 2014, RAD authorized that the recommendations be released for a 45-day comment period.

Several substantive comments were received, including comments from Steven Lewis (attorney member of the Task Force), David Carr (attorney), Phillip Reed (inactive member), Miles King (member of the public), and Jayne Kim (Chief Trial Counsel).

Since the Task Force sunsetted at the end of 2014, before the public comment period closed, the Board President, in consultation with the Chair of RAD, asked the former Chair of the Task Force (Karen Goodman) and the respective former Chairs of the Working Groups (Carol Langford, Ellen Peck, and Judith Sklar) (collectively “the Chairs”) to review the comments and provide input and advice. The Chairs reviewed the public comments and proposed the following additional recommendations:

- Standard 1.1 “Purpose and Scope of Standards” be amended to include reference to decisions of the Review Department of the State Bar Court, since the Standards are based on the longstanding decisions of the Supreme Court as well as the State Bar Court. Originally, the Chairs’ recommendation was to refer to the Review Department precedent as “decisions”, but a non-substantive change was subsequently made to reflect their accurate title – they are formally called “opinions.”
- Standard 1.6 “Mitigating Circumstances”, subsection (a), be amended to delete the word “aberrational” since the concept is already encompassed under the phrase “not likely to recur.”
- Standard 1.6 “Mitigating Circumstances”, subsection (b), be amended to add the term “objectively” in front of “reasonable” to underscore that reasonableness in this standard is to be viewed from an objective viewpoint.

- Standard 2.7 “Performance, Communication, Withdrawal, Violations” be amended so that any reference to “pattern” in the Standard be replaced with “habitual disregard of client interests.” The term “habitual disregard” necessarily includes the concept of repeated behavior extending over a period of time.
- Standard 2.7 “Performance, Communication, Withdrawal, Violations”, subsection (c), be amended to streamline the following phrase: “limited in scope or occur over an isolated period of time” to now read: “limited in scope or time.”

On March 12, 2015, RAD authorized that the Chairs’ recommendations be released for an additional 30-day comment period.

That comment period has now closed and only one comment was received. (See Attachment 1, e-mail from Bryan Robinson, dated April 18, 2015.) Mr. Robinson believes admonitions should be a form of discipline and that they should be expended to include education as a condition for “those cases that would fall between admonition and reproof.” He further believes that “for violations of the rules that do not result in actual suspension, the members should be permitted to go to the equivalent of traffic school which would give the member an opportunity to expunge the offense from their record.”

The levels of discipline that the State Bar can impose are set by statute, and do not include admonitions. (See Bus. & Prof. Code, § 6078 [“the State Bar has the power to recommend to the Supreme Court the disbarment or suspension from practice of members or discipline them by reproof, public or private, without such recommendation.”].) Admonitions, however, have always been, and remain, a basis for resolution of a disciplinary matter; however they are non-disciplinary dispositions and thus are not covered by the Standards. (See Standard 1.1.) Further, expungement of discipline must be done at the direction of the Supreme Court, and again, is not something covered by the Standards. (See Bus. & Prof. Code, § 6092.5(e) [“the disciplinary agency can only expunge records as directed by the California Supreme Court”].)

As no other comments have been received, this item seeks adoption of the Standards, as proposed, to be effective July 1, 2015.

FISCAL / PERSONNEL IMPACT

None expected.

RULE AMENDMENTS

Title IV of the Rules of Procedure of the State Bar will need to be updated.

BOARD BOOK IMPACT

None known.

BOARD COMMITTEE RECOMMENDATION

The Regulation and Discipline Committee recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees approve the proposed Standards in the form attached hereto, to be effective July 1, 2015.

ATTACHMENT(S) LIST

Attachment 1: Public Comment from Bryan Robinson, Esq.

Attachment 2: Standards for Attorney Sanctions for Professional Misconduct with proposed modifications (track-changes version)

Attachment 3: Standards for Attorney Sanctions for Professional Misconduct with proposed modifications (clean-copy)