

OPEN SESSION AGENDA ITEM

JULY 2018 RAD ITEM IIIE

DATE: July 19, 2018

TO: **Members, Regulation and Discipline Committee**

FROM: Antonia Darling, Chief Court Counsel
Suzanne Grandt, Assistant General Counsel

SUBJECT: Proposed State Bar Rule Setting Forth Guidelines for the Imposition and Collection of Monetary Sanctions

EXECUTIVE SUMMARY

The State Bar Regulation and Discipline Committee ("RAD") is asked to authorize a 30-day public comment period for a proposed State Bar Rule setting forth guidelines for the imposition and collection of sanctions to be ordered by the California Supreme Court when imposing suspension or disbarment of an attorney. This proposal is being submitted pursuant to Business and Professions ("B & P") Code § 6086.13, which requires that the State Bar adopt such a rule, to be approved by the California Supreme Court.

BACKGROUND

B & P Code § 6086.13, effective January 1, 1994,¹ requires that the State Bar, with the approval of the California Supreme Court, adopt rules setting forth guidelines for the imposition and collection of monetary sanctions to be imposed in connection with suspension or disbarment of attorneys. The full text of the statute is as follows:

- (a) Any order of the Supreme Court imposing suspension or disbarment of a member of the State Bar, or accepting a resignation with a disciplinary matter pending may include an order that the member pay a monetary sanction not to exceed five thousand dollars (\$5,000) for each violation, subject to a total limit of fifty thousand dollars (\$50,000).
- (b) Monetary sanctions collected under subdivision (a) shall be deposited into the Client Security Fund.
- (c) The State Bar shall, with the approval of the Supreme Court, adopt rules setting forth guidelines for the imposition and collection of monetary sanctions under this section.

¹ This statute was promulgated in 1992, and initially applied to State Bar Court orders only. In 1993, the statute was amended by Assembly Bill 2205 to specify that the disciplinary orders came from the California Supreme Court. The new amendment became effective on January 1, 1994.

- (d) The authority granted under this section is in addition to the provisions of [Section 6086.10](#) and any other authority to impose costs or monetary sanctions.
- (e) Monetary sanctions imposed under this section shall not be collected to the extent that the collection would impair the collection of criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney. In the event monetary sanctions are collected under this section and criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney are otherwise uncollectible, those penalties or judgments may be reimbursed from the Client Security Fund to the extent of the monetary sanctions collected under this section.

In early 1994, the State Bar Board of Governor's Committee on Discipline and Client Assistance (the "Committee") drafted "Proposed Guidelines for the Imposition of Monetary Sanctions in Attorney Disciplinary Proceedings" (the "1994 Guidelines"). See *State Bar of California*, California Regulatory Law Reporter, Spring/Summer 1994, at 222, 224–25. The 1994 Guidelines established two ranges of fines for disciplinary violations based on the seriousness of the misconduct. *Id.* Under the 1994 Guidelines, the specific sanction to be recommended within the applicable range would be determined by the State Bar Court upon application of specified criteria. *Id.*

The Committee published the 1994 Guidelines for public comment. During the comment period the State Bar received three comments. *State Bar of California*, California Regulatory Law Reporter, Fall 1994, at 208, 213. Two were from private practitioners who opposed the notion of the imposition of monetary sanctions and one was from the Office of Chief Trial Counsel ("OCTC") which recommended revisions. *Id.* The Committee was scheduled to discuss the comments at its December 9, 1994, Committee meeting but the discussion was postponed until the March 1995 meeting. *State Bar of California*, California Regulatory Law Reporter, Winter, 1995 at 172, 177. However, there was no discussion regarding the 1994 Guidelines at the March 1995 meeting. *Id.*

After 1995 there is no written record of any discussions or communications within the State Bar regarding the 1994 proposed Guidelines, nor any other proposed rule or guidelines on this issue. There is also no evidence that the State Bar Board of Governors/Board of Trustees, or any State Bar Committee ever authorized the State Bar to propose any guidelines or rules to the California Supreme Court pursuant to B & P Code § 6086.13(c).

In order to ensure full compliance with B & P Code § 6086.13(c), staff has drafted a proposed State Bar Rule 5.137, provided as Exhibit A.

DISCUSSION

Proposed rule 5.137 requires that the State Bar Court consider whether a respondent recommended to be suspended or disbarred, or who has resigned with charges pending, should be ordered to pay monetary sanctions as part of a disciplinary recommendation to the California Supreme Court. See Exhibit A, rule 5.137(C). The State Bar Court must utilize specified ranges for monetary sanctions or else include a justification for any such deviation. *Id.* The rule proposes ranges based on the length of the discipline. The minimum range is \$100-\$200 per violation for suspension of less than one month, and the highest range is \$1,000-\$5,000 per violation for disbarment. *Id.*, 5.137(G). For attorneys who resign with charges pending the range is \$0-\$2,500. *Id.*

Pursuant to B & P Code § 6086.13, the payments do not exceed \$5,000 for each violation. *Id.*, rule 5.137(A). The statute further states that the payments must "be subject to a total limit of fifty

thousand dollars (\$50,000).” As such, proposed rule 5.137 provides that the payments are “not to exceed \$5,000 for each violation, to a maximum of \$50,000 per order.” Exhibit A, rule 5.137(A).

The proposed rule includes factors for State Bar Court to consider in recommending sanction amounts within the requisite ranges. *Id.*, 5.137(G). These factors include, *inter alia*, the type of ethical violation (i.e., whether there was intentional misappropriation, monetary loss, or abusive/frivolous conduct that resulted in judicial sanctions), the seriousness of the misconduct, prior discipline, and the number of victims affected by the conduct. *Id.*

The proposed rule further provides that monetary sanctions may be contained in a separate form of order than the order imposing discipline. *Id.*, 5.137(C). This language was included such that the any challenge to the monetary sanction alone will not delay the disciplinary order.

B & P Code § 6086.13(e) provides that any monetary sanctions “shall not be collected to the extent that the collection would impair the collection of criminal penalties or civil judgments arising out of transactions connected with the discipline of the attorney.” As such, the proposed rule allows OCTC to enter into a stipulation with a respondent regarding the amount of monetary sanctions as part of settlement negotiations. Exhibit A, rule 5.137(D). This may include a stipulation as to a payment plan. *Id.*

The proposed rule also provides a process for a respondent to seek a waiver or reduction of any monetary sanctions owed and/or to establish a payment plan. To seek a waiver, reduction, or payment plan, the respondent must use the process set forth in Rule 5.130 for seeking relief from complying with disciplinary costs. *Id.*, rule 5.137(E).

FISCAL/PERSONNEL IMPACT

If adopted, the proposed rule may provide additional funding to the State Bar Client Security Fund. See B & P Code § 6054(a).

The proposed rule may necessitate additional resources in OCTC and State Bar Court in order to assess monetary sanctions recommendations, handle respondent’s challenges to sanctions, and evaluate respondent’s requests for sanctions’ waivers, reductions, or payment plans.

STRATEGIC PLAN GOALS & OBJECTIVES

Goal: 2. Ensure a timely, fair, and appropriately resourced admissions, discipline, and regulatory system for the more than 250,000 lawyers licensed in California.

Objective: F: Support adequate funding for the Client Security Fund.

RECOMMENDATION

It is recommended that the Regulation and Discipline Committee approve the following resolutions:

RESOLVED, that the Regulation and Discipline Committee authorizes staff to make available for a 30-day public comment period proposed State Bar Rule of Procedure 5.137, attached hereto as Attachment A.

ATTACHMENT(S) LIST

A. Text of proposed State Bar Rule of Procedure 5.137

**Rules of Procedure
of the State Bar of California**

Rule 5.137 Imposition of Monetary Sanctions

(A) The Supreme Court May Order Monetary Sanctions

In any disciplinary matter in which the respondent is suspended, disbarred or resigns with charges pending, the Supreme Court may order the payment of a monetary sanction not to exceed \$5,000 for each violation, to a maximum of \$50,000 per order. (Business & Professions Code § 6068.13.) Monetary sanctions ordered will be in addition to any restitution or court costs ordered. The monetary sanction order may be set forth in a separate order.

(B) Sanctions Shall Be Payable To The Client Security Fund

If the Supreme Court orders the payment of monetary sanctions, the funds shall be made payable directly to the Client Security Fund by the respondent.

(C) Determination of Monetary Sanction Amounts

In any disciplinary matter in which the State Bar Court recommends that an attorney be ordered to pay monetary sanctions, the amount shall be determined using the ranges found in subsection (F) and considering the factors set forth in subsection (G). Recommended sanctions that deviate from the ranges must include a justification for the exception. The State Bar Court may recommend that the Supreme Court allow respondent to pay monetary sanctions in installments, or that they be waived based upon financial hardship.

(D) Stipulations For Waiver Or Payment Plan For Monetary Sanctions

The Office of the Chief Trial Counsel may enter into a stipulation with respondent or make a recommendation regarding whether any monetary sanctions should be ordered or waived; if ordered, in what amount; whether a payment plan will be allowed and the specifics of such plan, using the guidelines set forth in subsection (F) and (G). Such stipulations will be subject to approval by the State Bar Court.

(E) Respondent's Financial Hardship

A Respondent may be granted relief, in whole or in part, from an order assessing monetary sanctions, or may be granted an extension of time to pay these sanctions in the discretion of the State Bar Court, upon grounds of hardship, special circumstances, other good cause or if collection of monetary sanctions will impair a respondent's ability to pay criminal penalties or civil judgments arising out of transactions connected with the respondent's discipline. Respondent may seek relief from monetary sanctions through a

motion filed with the State Bar Court, following the motion procedure set forth in Rule 5.130(B)-(E) of the State Bar Rules of Procedure. The burden of proof will be on the respondent to provide financial records and other proof in support of the motion.

(F) Monetary Sanction Ranges

Based upon the disciplinary sanction ordered in a case the recommended monetary sanction range per violation that respondent is found culpable of will be as follows:

1. Disbarment: \$1,000- \$5,000
2. Suspension: (Greater than 1 year) - \$500 - \$1,000
3. Suspension: (6 months to 1 year) - \$100 - \$500
4. Suspension: (less than 6 months) - \$100- \$250
5. Resignation with charges pending:\$0-\$2500

(G) Factors To Be Considered

The State Bar Court will consider the following factors in setting the amount of a recommended sanction within the appropriate range in subsection (F):

1. Whether there was an intentional misappropriation of money;
2. The amount of the direct or indirect monetary loss to any victim(s);
3. Whether the misconduct was against a vulnerable victim, including but not limited to the aged, incapacitated, infirm, disabled, incarcerated, an immigrant, or a minor;
4. The seriousness of the conduct underlying the discipline;
5. Any prior discipline of the attorney;
6. The number of victims affected by the conduct in this matter;
7. Whether the respondent has abandoned a client or the entire law practice;
8. Whether the respondent has been judicially sanctioned for engaging in abusive or frivolous conduct;
9. Whether the respondent has engaged in the unauthorized practice of law, or aided others in the unauthorized practice of law; and/or
10. Whether an underlying criminal conviction resulted in a significant jail sentence.