



The State Bar *of California*

OPEN SESSION AGENDA ITEM JANUARY 2019 REGULATION AND DISCIPLINE COMMITTEE ITEM III.C

DATE: January 25, 2019

TO: Members, Regulation and Discipline Committee

FROM: Melanie J. Lawrence, Interim Chief Trial Counsel

SUBJECT: Office of Chief Trial Counsel Proposed Amendments to Standards 2.2, 2.5, 2.13, 2.15, and 2.21 of the Standards for Attorney Sanctions for Professional Misconduct: Request to Circulate for Public Comment

EXECUTIVE SUMMARY

In addition to the separate agenda item requesting approval of several other amendments to the Standards for Attorney Sanctions for Professional Misconduct, the Office of Chief Trial Counsel (OCTC) seeks that Standard 2.15 be circulated for public comment and that Standards 2.2, 2.5, 2.13, and 2.21 be circulated for public comment again.

At the September 2018 meeting, in [Item III.A.](#), the Regulation and Discipline Committee resolved to send out for a 60-day public comment period the proposed amendments to the Standards for Attorney Sanctions for Professional Misconduct. The close of public comment was November 16, 2018. With the exception of Standard 2.15, the above Standards were included in OCTC's initial request for public comment; however, during the initial public comment period, OCTC engaged in a series of meetings with representatives of the State Bar Court and the Association of Discipline Defense Counsel (ADDC). Over the approximately seven meetings between October and January, some of these proposals changed based on input from our discipline-system partners.

As a result, this item requests that the Regulation and Discipline Committee circulate, for a 45-day public comment period, proposed changes to Standards 2.2, 2.5, 2.13, 2.15, and 2.21 of the Standards for Attorney Sanctions for Professional Misconduct.

BACKGROUND

In 1985, the State Bar, through a collaborative effort between the State Bar Court and OCTC, developed proposed disciplinary standards which were adopted by the Board in November of 1985. On October 12, 2013, the Board approved a reorganization and revision of the rules and authorized the creation of a task force to study the Standards and recommend any changes to the Standards that were considered to be “major policy and philosophical shifts.” The changes recommended by the Task Force were adopted by the Board in May 2015 and became effective in July 2015.

Despite the relatively recent overhaul of the Standards for Attorney Sanctions for Professional Misconduct, the proposed change to Standards 2.2, 2.5, 2.13, and the addition of Standard 2.21 are, in the view of OCTC, required because of the adoption of new Rules of Professional Conduct. The change to Standard 2.15 is required because of a change to Business and Professions Code section 6102. The bill that changed that code section had not been passed at the time OCTC submitted the other proposed changes to the standards. We do not believe that the proposed changes rise to the level of a major policy change or philosophical shift.

DISCUSSION

This item proposes changes to eliminate the use of the term “member” and adopt the term “lawyer” or “licensee” in Standards 2.5 and 2.13.

In addition, this item proposes other amendments to the Standards for Attorney Sanctions for Professional Misconduct.

1. Standard 2.2

The primary change to this standard is to incorporate the new requirement that attorneys place advanced fees in the client trust account. While case law for failure to deposit client funds or fiduciary funds into a client trust account has gone as low as a public reproof (See *Dudugjian v. State Bar* (1991) 52 Cal.3d 1092), depositing client funds, including advance fees, into an account other than a client trust account is essentially commingling (i.e., mixing client or entrusted funds with other funds) or worse, a misappropriation.

As a result, OCTC proposes changing Standard 2.2, which pertains to commingling, to apply to the failure to deposit funds received for a client, including advance fees, in a client trust account.

During our meetings with the ADDC and State Bar Court, the ADDC expressed concern that the presumed sanction for commingling, actual suspension of three months, was more severe than the presumed sanction for misappropriation, actual suspension without a three month minimum suspension. However, this perceived incongruity exists in the standards as they are currently drafted and is not the product of OCTC’s proposed changes. We declined to address this issue because we believed that altering the Standard to eliminate the minimum period of

actual suspension, or adding a longer minimum period of actual suspension to Standard 2.1, may represent a major policy shift that was beyond the scope of this item.

Discipline system partners also voiced a concern that placing failure to deposit advance fees into the client trust account in Standard 2.2 would result in a minimum 90-day suspension even where the deposit went into the wrong account as a result of mere negligence. However, the State Bar would not discipline an attorney for a merely negligent deposit into the wrong account. For example, if the attorney pulled the wrong deposit slip and deposited the funds into the firm operating account instead of the client trust account, but found the mistake and corrected it upon promptly reconciling his or her account statements, as required, the erroneous deposit would be deemed to be mere negligence. The attorney would not be prosecuted for that violation because attorneys are not generally subject to discipline for mere negligence. *In the Matter of Yagman* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 788, 803. If, however, the attorney fails to reconcile his or her accounts and does not discover the error, such conduct would be reckless or grossly negligent. Further, even when disciplined for depositing client funds into an account other than a client trust account, the standard creates only the presumed sanction, or the starting point of the analysis, and does not prevent the imposition of lesser discipline.

Following our discussion with the court and the ADDC, we altered our proposal to clarify that Standard 2.2(a) would not apply where there is evidence of misappropriation. If evidence of misappropriation exists, Standard 2.1 would be used.

Another proposed change merely substitutes the new rule number (1.15) for the old rule number (4-100). The new rule (rule 1.15 [Safekeeping Funds and Property of Clients and Other Persons]) also has additional requirements (e.g., the accounting must be in writing, etc.). Violations of these requirements appear to be adequately covered under Standard 2.2(b), so OCTC proposes to include them there. After consulting with the State Bar Court and the ADDC, we also sought to clarify which violations of the new rule would be subject to Standard 2.2(b).

As a result of these substantial changes from the prior version of our proposal, we are asking that this standard be re-circulated for public comment.

2. Standard 2.5

The terminology and methodology of the new conflicts rules suggests that we need new language in the Standards. This proposal would align Standard 2.5(a) with violations of rule 1.7(a) [represent a client directly adverse to a concurrent client in the same or separate matter]; rule 1.7(b) [represent a client when there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's representation or responsibilities to another client or a former client, a third person, or the lawyer's own interest] and 1.7(d). Rule 1.7(d) prohibits certain conflicts even if there are waivers, for example, when a lawyer does not believe the lawyer is able to provide competent and diligent representation to each client; the representation is prohibited by law; or the representation involves the assertion of a claim by one client against another in the same litigation or other proceeding

before a tribunal. (See also rule 1.10 [applying rule 1.7 to lawyers in firm with conflicted attorney].)

Proposed Standard 2.5(a) is also consistent with the Supreme Court's discussion of the most serious types of conflicts. (See *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1147 ["The most egregious conflict of interest is representation of clients whose interests are directly adverse in the same litigation."].)

Proposed paragraph (b) of Standard 2.5 covers rule 1.9(a), 1.9(b) and other conflicts that are materially adverse to former clients, especially those where confidential information may be used. (See also rules 1.10 [Imputation of Conflicts of Interest: General Rule] and 1.11 applying rule 1.9 to lawyers in firm with conflicted attorney or with government conflicts.) Paragraph (b) would apply to:

- New rule 1.9(a) - Representation of clients with interests that are materially adverse to the interests of former clients in the same or substantially related matters;
- New rule 1.9(b) - Knowing representation of a client in the same or substantially related matters in which a firm with which the lawyer was formerly associated previously represented a client.

During our discussions with the ADDC and the State Bar Court, both expressed concern that current clients should not be included in Standard 2.5(b) because rule 1.9 of the new Rules of Professional Conduct only applies to former clients. We do not disagree, but we were attempting to craft the rule to cover both violations of the new rule (1.9) and the former conflict rules. In order to address the concern of the ADDC, we created a subdivision (d) to cover violations of the former rules. We propose to order the paragraphs in this manner (i.e., paragraph (d) coming after the "catch-all" paragraph (c)) to avoid future confusion associated with reordering paragraphs. There is a potential for confusion because, in time, violations of the old rules will no longer be charged and paragraph (d) can be deleted. Placing that paragraph last avoids the need to reorder the paragraphs in the future.

Proposed new paragraph (c) of Standard 2.5 addresses all other conflicts and the breach of the common law duty of loyalty, e.g. aggregate settlements (rule 1.8.7), compensation from other than the client (rule 1.8.6), conflicts by former judges (1.8.12), conflicts involving prospective clients (1.18), and the common law duty of loyalty. (See *Santa Clara County Counsel Attys Assn. v. Woodside* (1994) 7 Cal.4th 525, 548.)

In our initial proposal, we included violations of rule 1.9(c) in Standard 2.5(c), however, following our discussion with the State Bar Court and the ADDC, we removed rule 1.9(c) because we agreed that it was more properly considered a breach of confidentiality under Standard 2.6.

The above changes are substantial and were made following the public comment period. As a result, we are asking that this standard be sent back out for public comment.

3. Standard 2.13

A proposed amendment to Standard 2.13 was previously circulated for public comment, but following our discussions with discipline-system partners, we have significantly altered the proposal. As a result, we believe this Standard should be circulated for public comment again.

Paragraph (a) parallels parts of Business and Professions Code sections 6106.9(a)(1), 6106.9(a)(2), and old rule 3-120 and involve outrageous and overreaching conduct. The conduct in paragraph (a) is particularly egregious and probably involves moral turpitude.

In our initial proposal, in an attempt to minimize modification of the standard, we simply added “requests” to “requires or demands sexual relations with a client incident to or as a condition of professional representation.” This was done to incorporate the implied coercion associated with a request that is “incident to or as a condition of professional representation;” however, during our discussions with the ADDC, we became convinced that the language was too vague. As a result, we have modified our proposal to directly track the relevant language of Business and Professions Code section 6106.9.

The new rule, rule 1.8.10 [Sexual Relations with Current Client], prohibits all sex with clients except for spouses and people already in a relationship prior to the representation. Violations of Business and Professions Code section 6106.9 that do not fall within paragraph (a) are not as egregious. As a result, paragraph (b) applies to violations of rule 1.8.10 and Business and Professions Code section 6106.9 not covered by paragraph (a).

As a result of the substantial changes to our proposal since it was last circulated for public comment, we are asking that it be circulated for additional public comment.

4. Standard 2.15

The proposed change was not part of our original proposal and is not required by a change to the Rules of Professional Conduct. This proposed change is due to a change to Business and Professions Code 6102 which had not been passed at the time the other Standards were sent out for public comment. Effective January 1, 2019 subdivision (c) of Business and Professions Code section 6102 has been amended to read:

After the judgment of conviction of an offense specified in subdivision (a) has become final or, irrespective of any subsequent order under Section 1203.4 of the Penal Code or similar statutory provision, an order granting probation has been made suspending the imposition of sentence, the Supreme Court shall summarily disbar the attorney if the offense is a felony under the laws of California, the United States, or any state or territory thereof, and [either: \(1\) an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involved moral turpitude, or \(2\) the facts and circumstances of the offense involved moral](#) turpitude.

The proposed changes to the standard reflect that summary disbarment is the actual sanction, instead of the presumed sanction, for such convictions. Further, we have proposed changes to the Standard so that it tracks the statute because the same sanction now applies to crimes where the facts and circumstances of the crime involve moral turpitude.

This Standard was not sent out for public comment in September 2018.

5. NEW Standard 2.21

This proposed new Standard is to address violations of new rule 8.4(d). As this rule is similar to Business and Professions Code section 6106, moral turpitude, the proposed new Standard is similar. Nonetheless, the purpose of having a separate Standard was to allow the case law to develop separately and to minimize confusion.

During our discussions with the ADDC and the State Bar Court, the ADDC expressed concern about the definition of “prejudicial to the administration of justice.” Initially, we sought to allay their concerns by dividing the standard up into different subdivisions for intentional or reckless conduct versus aberrational and negligent conduct. However, after further discussion, we came to the conclusion that this approach is untenable because such distinctions do not exist in the underlying rule. Further, new rule 8.4(d) utilizes the phrase “prejudicial to the administration of justice” and we do not believe the Standards for Attorney Discipline for Professional Misconduct is the appropriate place to define phrases used in the rules. Instead, the Court should define the terms used in the rules.

It is important to note that throughout the country, Rule 8.4(d) generally requires substantial harm or substantial potential harm and is intended to address moral turpitude-type conduct. As a result, we believe that this Standard, like 2.11, which applies to moral turpitude, warrants actual suspension to disbarment as the presumed discipline. However, the purpose of drafting a separate standard for Rule 8.4(d) is so that this Standard can be adjusted independently of Standard 2.11 as the case law develops.

This proposed Standard has not changed from our [initial Standards agenda item](#) at the September 2018 Regulation and Discipline Committee meeting, and therefore has been out for public comment previously. However, because of the discussions with the ADDC, our initial attempt to modify the proposal, and our later rejection of that approach, we believe that in the interests of transparency and fairness, the proposal should be sent out for public comment again.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

Title IV, Part B, Standard 2.2
Title IV, Part B, Standard 2.5
Title IV, Part B, Standard 2.13
Title IV, Part B, Standard 2.15
Title IV, Part B, Standard 2.21

BOARD BOOK AMENDMENTS

None

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.

RECOMMENDATIONS

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

RESOLVED, that staff is authorized to make available, for public comment for a period of 45-days, proposed amendments to:
the Standards for Attorney Sanctions for Professional Misconduct, as set forth in Attachment A; and it is

FURTHER RESOLVED, that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed amended Standards for Attorney Sanctions for Professional Misconduct.

ATTACHMENT(S) LIST

- A.** Proposed Amended Standards 2.2, 2.5, 2.13, 2.15, and 2.21 (Clean Version)
- B.** Proposed Amended Standards 2.2, 2.5, 2.13, 2.15, and 2.21 (Redline Version)

**ATTACHMENT A – Proposed Amended Standards 2.2, 2.5, 2.13, 2.15, and 2.21
(Clean Version)**

2.2 COMMINGLING AND OTHER TRUST ACCOUNT VIOLATIONS

- (a) Actual suspension of three months is the presumed sanction for 1) commingling, 2) failure to deposit funds received for a client or other person to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, in a client trust account when that conduct does not involve misappropriation, or 3) failure to promptly pay out entrusted funds.
- (b) Suspension or reproof is the presumed sanction for any other violation of rule 1.15, including, but not limited to violations of 1.15(d).

Eff. January 1, 1986. Revised: January 1, 2001; January 1, 2014; July 1, 2015.

2.5 REPRESENTATION OF ADVERSE INTERESTS AND CONFLICTS OF INTEREST

- (a) Actual suspension is the presumed sanction when a lawyer violates rule 1.7, subparagraphs (a), (b), and (d), or other law prohibiting an attorney from simultaneously representing conflicting interests and causes significant harm to any of the clients.
- (b) Actual suspension is the presumed sanction when a lawyer either violates rule 1.9(a) or 1.9(b) and causes significant harm to the former client.
- (c) Suspension or reproof is the presumed sanction for all other conflicts of interest violations or breaches of the duty of loyalty not covered by other subparagraphs of this Standard, depending on the magnitude of the violation and the harm to the client or clients. This includes, but is not limited to rules 1.7(c), 1.8.2, 1.8.6, 1.10, 1.11, 1.12, 1.18(c) and (d). Actual suspension is the presumed sanction if there is harm.
- (d) Actual suspension is the presumed sanction for a violation of the former rules addressing conflicts, including, but not limited to 3-310, 3-320, and 3-600, where the lawyer causes significant harm to the client or former client.

Eff. July 1, 2015.

2.13 SEXUAL RELATIONS WITH CLIENTS

- (a) Disbarment is the presumed sanction when a lawyer expressly or impliedly conditions the performance of legal services for a current or prospective client upon the client's willingness to engage in sexual relations with the attorney or employs coercion, intimidation, or undue influence in entering into sexual relations with a client.
- (b) Suspension or reproof is the presumed sanction for any other violation of rule 1.8.10 or section 6106.9.

Eff. January 1, 1986. Revised: January 1, 2001; January 1, 2014; Renumbered & Revised July 1, 2015.

2.15 CRIMINAL CONVICTIONS INVOLVING MORAL TURPITUDE

- (a) Summary disbarment is the sanction for final conviction of a felony and either: (1) an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involved moral turpitude, or (2) the facts and circumstances of the offense involved moral turpitude.
- (b) Disbarment or actual suspension is the presumed sanction for final conviction of a misdemeanor involving moral turpitude.

Eff. January 1, 2014. Renumbered & Revised July 1, 2015.

2.21 CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

Disbarment or actual suspension is the presumed sanction for conduct that is prejudicial to the administration of justice in violation of rule 8.4(d). The degree of sanction depends on the magnitude of the misconduct, the extent to which the misconduct harmed the victim or the administration of justice, and the extent to which the misconduct related to the lawyer's practice of law.

**ATTACHMENT B – Proposed Amended Standards 2.2, 2.5, 2.13, 2.15, and 2.21
(Redline Version)**

2.2 COMMINGLING AND OTHER TRUST ACCOUNT VIOLATIONS

- (a) Actual suspension of three months is the presumed sanction for 1) commingling, 2) failure to deposit funds received for a client or other person to whom the lawyer owes a contractual, statutory, or other legal duty, including advances for fees, costs and expenses, in a client trust account when that conduct does not involve misappropriation, or 3) failure to promptly pay out entrusted funds.
- (b) Suspension or reproof is the presumed sanction for any other violation of ~~Rule 4-100~~ rule 1.15, including, but not limited to violations of 1.15(d).

Eff. January 1, 1986. Revised: January 1, 2001; January 1, 2014; July 1, 2015.

2.5 REPRESENTATION OF ADVERSE INTERESTS AND CONFLICTS OF INTEREST

- (a) Actual suspension is the presumed sanction when a ~~member-lawyer accepts or continues simultaneous representation of clients with actual adverse interests, where the member: (1) fails to obtain informed written consent of each client, and (2)~~ violates rule 1.7, subparagraphs (a), (b), and (d), or other law prohibiting an attorney from simultaneously representing conflicting interests and causes significant harm to any of the clients.
- (b) Actual suspension is the presumed sanction when a ~~member-lawyer either violates rule 1.9(a) or 1.9(b) and accepts employment that is actually adverse to a client or former client, where the member: (1) fails to obtain informed written consent, (2) breaches the duty to maintain confidential information material to the employment, and (3)~~ causes significant harm to the ~~client or~~ former client.
- (c) Suspension or reproof is the presumed sanction for all other conflicts of interest violations or breaches of the duty of loyalty not covered by other subparagraphs of this Standard, depending on the magnitude of the violation and the harm to the client or clients. This includes, but is not limited to rules 1.7(c), 1.8.2, 1.8.6, 1.10, 1.11, 1.12, 1.18(c) and (d). Actual suspension is the presumed sanction if there is harm.
- (d) Actual suspension is the presumed sanction for a violation of the former rules addressing conflicts, including, but not limited to 3-310, 3-320, and 3-600, where the lawyer causes significant harm to the client or former client.

Eff. July 1, 2015.

2.13 SEXUAL RELATIONS WITH CLIENTS

- (a) Disbarment is the presumed sanction when a ~~member-lawyer requires or demands sexual relations with a client incident to or as a condition of professional representation~~ expressly or impliedly conditions the performance of legal services for a current or prospective client upon the client's willingness to engage in sexual relations with the attorney or employs coercion, intimidation, or undue influence in entering into sexual relations with a client.
- (b) Suspension or reproof is the presumed sanction for any other violation of ~~Rule 3-120~~ rule 1.8.10 or section 6106.9.

Eff. January 1, 1986. Revised: January 1, 2001; January 1, 2014; Renumbered & Revised July 1, 2015.

2.15 CRIMINAL CONVICTIONS INVOLVING MORAL TURPITUDE

- (a) Summary disbarment is the ~~presumed~~ sanction for final conviction of a felony and either: (1) an element of the offense is the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involved moral turpitude, or (2) the facts and circumstances of the offense involved moral turpitude.~~in which an element of the offense involves the specific intent to deceive, defraud, steal, or make or suborn a false statement, or involves moral turpitude.~~
- ~~(b) Disbarment is the presumed sanction for final conviction of a felony in which the facts and circumstances surrounding the offense involve moral turpitude, unless the most compelling mitigating circumstance clearly predominate, in which case actual suspension of at least two years is appropriate.~~
- ~~(b)~~(c) Disbarment or actual suspension is the presumed sanction for final conviction of a misdemeanor involving moral turpitude.

Eff. January 1, 2014. Renumbered & Revised July 1, 2015.

[NEW] 2.21 CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

Disbarment or actual suspension is the presumed sanction for conduct that is prejudicial to the administration of justice in violation of rule 8.4(d). The degree of sanction depends on the magnitude of the misconduct, the extent to which the misconduct harmed the victim or the administration of justice, and the extent to which the misconduct related to the lawyer's practice of law.